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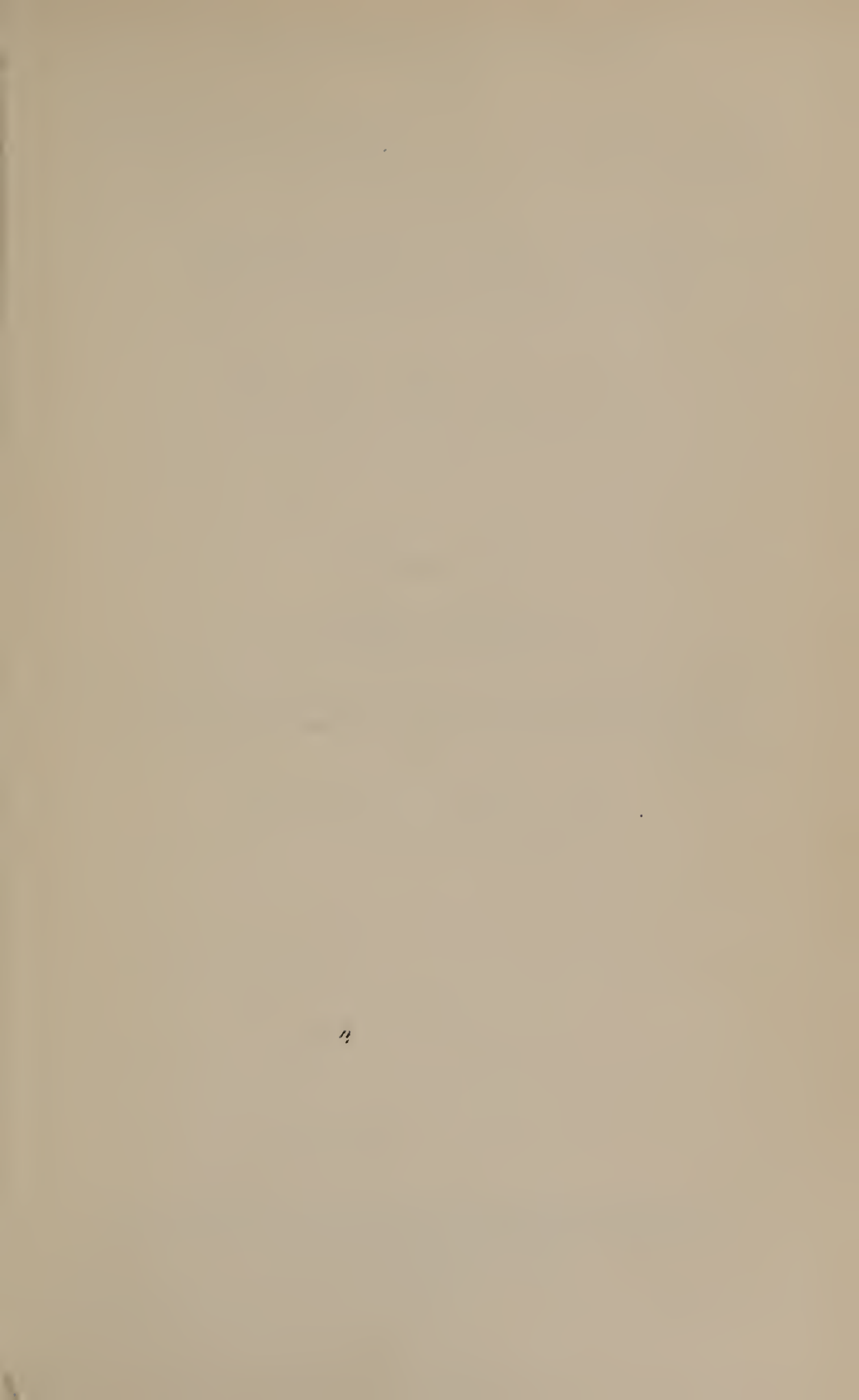
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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

222, 223, 224, 225, U. S.

BOOK 56,
LAWYERS' EDITION,
CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY
THE PUBLISHERS' EDITORIAL STAFF

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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. EDWARD DOUGLASS WHITE.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,¹

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,

HON. WILLIAM R. DAY,

HON. HORACE H. LURTON,

HON. CHARLES EVANS HUGHES,

HON. WILLIS VAN DEVANTER,

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MARSHAL,

JOHN MONTGOMERY WRIGHT, Esq.

¹ Died, October 14, 1911.

² Commission ordered recorded, March 18, 1912.

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

From January 9, 1911, to March 18, 1912.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 53 L. ed., Appendix III., p. 906.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMIS- SIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE CHARLES E. HUGHES, New York.	President TAFT.	SECOND. VERMONT, CONN., NEW YORK.	1910. (May 2.)	1910. (Oct. 10.)
ASSOCIATE JUSTICE HORACE H. LURTON, Tennessee.	President TAFT.	THIRD. NEW JERSEY, PA., DEL.	1909. (Dec. 20.)	1910. (Jan. 3.)
CHIEF JUSTICE EDWARD D. WHITE, Louisiana.	President TAFT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
ASSOCIATE JUSTICE JOSEPH R. LAMAR, Georgia.	President TAFT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1910. (Dec. 17.)	1911. (Jan. 3.)
ASSOCIATE JUSTICE JOHN M. HARLAN,† Kentucky.	President HAYES.	SIXTH. KY., TENN., OHIO, MICH.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE WILLIS VAN DEVANTER, Wyoming.	President TAFT.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., OKLAHOMA, NEW MEX.*	1910. (Dec. 16.)	1911. (Jan. 3.)
ASSOCIATE JUSTICE JOSEPH MCKENNA, California.	President MCKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA* HAWAII*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

†Died, October 14, 1911.

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

March 18, 1912.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT
OF SERVICE, RESPECTIVELY.For Order of Court Making Allotment, see *infra*, Appendix XI., p. 1308.

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ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE CHARLES E. HUGHES, New York.	President TAFT.	SECOND. VERMONT, CONN., NEW YORK.	1910. (May 2.)	1910. (Oct. 10.)
ASSOCIATE JUSTICE MAHLON PITNEY, New Jersey.	President TAFT.	THIRD. NEW JERSEY, PA., DEL.	1912. (Mar. 13.)	1912. (Mar. 18.)
CHIEF JUSTICE EDWARD D. WHITE, Louisiana.	President TAFT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
ASSOCIATE JUSTICE JOSEPH R. LAMAR, Georgia.	President TAFT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1910. (Dec. 17.)	1911. (Jan. 3.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SIXTH. KY., TENN., OHIO, MICH.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE HORACE H. LURTON, Tennessee.	President TAFT.	SEVENTH. IND., ILL., WIS.	1909. (Dec. 20.)	1910. (Jan. 3.)
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ASSOCIATE JUSTICE JOSEPH McKENNA, California.	President McKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA, HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1911.

1]*GEORGE R. BLINN, Receiver of the Property of Mabel Allen, Otherwise Known as Mabel E. Allen, an Absentee, Plff. in Err.,

v.

GEORGE ELLA NELSON, Robert J. Fisher, Emma E. Thomas, et al.

(See S. C. Reporter's ed. 1-7.)

Constitutional law — due process of law — notice — distribution of absentee's estate.

1. Sufficient notice and other safeguards to satisfy the constitutional guaranty of due process of law are afforded by the provisions

NOTE.—Validity of statutes providing for administration of estate of absentee.

Since the decision in *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121, the power of the state to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by a special and appropriate proceeding distinct from the general law for the settlement of the estates of decedents, can no longer be doubted.

The question remains, however, whether the particular statute affords the requisite notice and other safeguards to satisfy constitutional guaranties.

The absence of a provision for adequate notice is fatal. *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 675; *Clapp v. Houg*, 12 N. D. 600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; *Selden v. Kennedy* (*Grandy v. Kennedy*) 104 Va. 826, 4 L.R.A. (N.S.) 944, 113 Am. St. Rep. 1076, 52 S. E. 635, 7 Ann. Cas. 879.

The lack of such a provision cannot be cured by regarding the proceedings as in the nature of one *in rem*. *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 675.

56 L. ed.

of Mass. Rev. Laws, chap. 144, for the distribution of the estate of an absentee, where there is reasonably careful provision for notice by publication before the appointment of a receiver, and the whole proceeding begins with a seizure by the sheriff of the property mentioned in the original petition. [For other cases, see Constitutional Law, 452, 457, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — limitation of actions — estate of absentee.

2. The time for distributing the estate of an absentee, and for barring actions relative to the property, prescribed by Mass. Rev. Laws, chap. 144, is not so arbitrary and

Notice by publication is, however, sufficient. *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121; *BLINN v. NELSON*; *Adams v. Adams*, 211 Mass. 198, 97 N. E. 982.

Fixing the period of a person's absence from his last domicile within the state, which will be sufficient, under Pa. Laws, 1885, p. 155, to authorize the administration of his property by the special proceeding provided by that statute, at seven or more years, is not so unreasonable as to render the statute repugnant to the due process of law clause of the 14th Amendment to the Constitution of the United States. *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121.

This decision was followed in *New York L. Ins. Co. v. Chittenden*, 134 Iowa, 613, 11 L.R.A. (N.S.) 233, 120 Am. St. Rep. 444, 112 N. W. 96, 13 Ann. Cas. 408.

Fourteen years of absence and inattention to property is a sufficient time to warrant a finding of abandonment, so as not arbitrarily to extinguish the property rights of an absent beneficiary in a trust under a statute providing for the distribution of his estate after such absence to his heirs as new trustees, and barring all actions by the absentee to recover the fund after six years

unreasonable as to be wanting in due process of law, because the rights of the absentee are absolutely barred after one year from the appointment of a receiver, in the event that such appointment was not made within thirteen years from the date of the disappearance of the absentee, otherwise, after fourteen years from such disappearance. [For other cases, see Constitutional Law, 686-688, in Digest Sup. Ct. 1908.]

[No. 5.]

Argued April 10, 1911. Decided October 23, 1911.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a decree which affirmed a decree of the Probate Court for the County of Suffolk, in that state, for the distribution of the estate of an absentee. Affirmed.

See same case below, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147.

The facts are stated in the opinion.

Mr. George R. Blinn submitted the cause *pro se*:

The consideration of what constitutes a reasonable or unreasonable length of time for a statute of limitations to operate depends upon the circumstances of the class of cases which it affects. The time which is reasonable for one class of cases may be unreasonable for another class of cases, and all classes of cases may be affected in times of a public emergency.

from the filing of a bond by such heirs, conditioned for repayment upon his reappearance. *Adams v. Adams*, 211 Mass. 198, 97 N. E. 982.

The safeguards for the protection of the property of an absentee in case of his return, afforded by Pa. Laws 1885, p. 155, providing a special proceeding for the administration of the estates of absentees, satisfy the requirement of the due process of law clause of the 14th Amendment to the Constitution of the United States, where that statute authorizes the revocation of the administration at any time on proof that the absentee is in fact alive, and in such event permits him to recover the shares of his estate received by the distributees, and provides that until the latter shall give security for refunding their shares with interest in case the supposed decedent shall be alive, no distribution shall be made, and that in case of inability to give such security the money shall be invested under the control of the court, and the interest only paid to the distributees. *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121.

The decision in *Carr v. Brown*, 20 R. I. 215, 38 L.R.A. 294, 78 Am. St. Rep. 855, 38 Atl. 9, that a statute authorizing adminis-

American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

All statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his rights in court. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Wilson v. Iseminger, 185 U. S. 55, 46 L. ed. 804, 22 Sup. Ct. Rep. 573; *Sturges v. Crowninshield*, 4 Wheat. 122, 207, 4 L. ed. 529, 551; *Re Brown*, 135 U. S. 701, 707, 34 L. ed. 316, 318, 10 Sup. Ct. Rep. 972.

Mr. Amos L. Taylor argued the cause, and, with **Mr. Hollis R. Bailey**, filed a brief for defendants in error:

Every safeguard has been thrown about the property, and it is under the wise direction and control of the court, with all the safeguards that exist in the case of any receivership proceedings.

Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121, affirming 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16; *Nelson v. Blinn*, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889; *Atty. Gen. v. Provident Inst. for Savings*, 201 Mass. 23, 86 N. E. 912.

It is within the power of a state to enact reasonable statutes of limitations and establish a time after which no action can

be brought upon the estate of a person who has left home and not been heard from for seven years is unconstitutional, although it provides for the publication for three months of a notice of intention to apply for letters of administration or prove the last will and testament of such person, was made before *Cunnius v. Reading School Dist.*, supra, and the Rhode Island court would probably now view the question differently.

After the decision in *Savings Bank v. Weeks*, 103 Md. 601, 6 L.R.A.(N.S.) 690, 64 Atl. 295, that the legislature could not confer upon the courts jurisdiction to make a conclusive determination without inquiry as to the fact that a person who has been absent for more than seven years is dead, and proceed to distribute his property, the Maryland legislature changed the law and enacted a measure in the same words as the Pennsylvania statute upheld in *Cunnius v. Reading School Dist.* supra. This new act was upheld in *Savings Bank v. Weeks*, 110 Md. 78, 22 L.R.A.(N.S.) 221, 72 Atl. 475.

Such a statute may be made retroactive without affecting its validity. *Adams v. Adams*, 211 Mass. 198, 97 N. E. 982; *Savings Bank v. Weeks*, supra.

be brought. This power is legislative, and not judicial.

American Land Co. v. Zeiss, 219 U. S. 47, 70, 55 L. ed. 82, 98, 31 Sup. Ct. Rep. 200; *Kentucky Union Co. v. Kentucky*, 219 U. S. 156, 55 L. ed. 155, 31 Sup. Ct. Rep. 171; *Missouri v. Illinois*, 200 U. S. 496, 520, 50 L. ed. 572, 578, 26 Sup. Ct. Rep. 268; *Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692; *Soper v. Lawrence Bros. Co.* 201 U. S. 359, 50 L. ed. 788, 26 Sup. Ct. Rep. 473, affirming 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 150, 22 L. ed. 331, 337; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *M'Elmoyle v. Cohen*, 13 Pet. 312, 327, 10 L. ed. 177, 184; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38, affirming 145 N. Y. 451, 40 N. E. 400; *Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts)* 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 7 L. ed. 679; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190; *Nelson v. Blinn*, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147; *Atty. Gen. v. Provident Inst. for Savings*, 201 Mass. 23, 86 N. E. 912.

The fact that there may be a distribution after one year after the appointment of a receiver is not unreasonable, especially when taken in connection with the absence of the party for over fourteen years; nor is it unreasonable to provide that the time shall be reckoned from the date of the disappearance, rather than from the date of the right of the absentee to possession of any property in question. That has always been the rule in case of presumption of death after seven years' absence, and important rights are determined by it.

Loring v. Steineman, 1 Met. 204; *George v. Clark*, 186 Mass. 426, 71 N. E. 809; *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088; *Marden v. Boston*, 155 Mass. 359, 29 N. E. 588; *Re Stockbridge*, 145 Mass. 517, 14 N. E. 928; *Bowditch v. Jordan*, 131 Mass. 321; *Kelly v. Drew*, 12 Allen, 107, 90 Am. Dec. 138; *King v. Fowler*, 11 Pick. 302, 22 Am. Dec. 370.

All proceedings under the statute in question amount to due process of law.

Hurtado v. California, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 31, 25 L. ed. 989, 992; *Ameri-*
56 L. ed.

can Land Co. v. Zeiss, 219 U. S. 47, 66, 55 L. ed. 82, 97, 31 Sup. Ct. Rep. 200; *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121; *Nelson v. Blinn*, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition by the next of kin of an absentee for the distribution of her property in the hands of the receiver; the appointment of the receiver, the taking of the property into his hands, and the present petition all being under Massachusetts Revised Laws, chap. 144, and amendments to the same. The general scheme of the law is that, in case of a person disappearing from Massachusetts to parts unknown, leaving no known agent in the state, but having an interest in property there, anyone who would be entitled to administration may apply to the probate court for the appointment of a receiver. After due notice, a warrant to the sheriff to take possession of the property, and his return, a receiver may be appointed of the property scheduled in the sheriff's return, and the court is to find and record the date of the disappearance. By § 10, if the absentee does not appear and claim the property *within fourteen years after[6 the recorded date, his title is barred; and by § 11, if, after the fourteen years, the property has not been accounted for or paid over, it is to be distributed to those who would have taken it on the day fourteen years after the said date. By § 12, if the receiver is not appointed within thirteen years after said date, the time for distribution and for barring actions relative to the property shall be one year after the date of the appointment, instead of the fourteen years provided in §§ 11, 12.

On July 20, 1905, the plaintiff in error was appointed receiver of the property, of Mabel E. Allen, and the date of the disappearance of the latter was found and recorded as "within or prior to the year 1892." The present petition was filed on March 18, 1907. The property in question was an interest of the absentee under the residuary clause of the will of Jonathan Merry, allowed and proved on December 8, 1828. Long after the estate was settled, an administrator *de bonis non* was appointed in 1885, and in or about 1899 collected on account of French spoliation claims a sum in which Mabel Allen's share

was \$1,633 and \$22. This, with accumulations from interest, is the fund in controversy. The probate court made a decree of distribution, which was affirmed by the supreme judicial court of the commonwealth. 197 Mass. 279, 15 L.R.A. (N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147. The receiver, having duly set up that the above-mentioned §§ 10, 11, and 12 were contrary to the 14th Amendment, brought the case to this court.

The plaintiff in error does not deny that the provisions for the appointment of a receiver are valid. *Cunnius v. Reading School Dist.* 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121. But he argues that the attempt to bar the absentee's title and to distribute his property is void for want of sufficient notice and other safeguards, and because the time within which distribution may be made is arbitrary and unreasonable. There is reasonably careful provision for notice by publication before the appointment, and 7]the whole proceeding begins *with a seizure by the sheriff of the property mentioned in the original petition. *American Land Co. v. Zeiss*, 219 U. S. 47, 67, 55 L. ed. 82, 31 Sup. Ct. Rep. 200; *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 75, 51 L.R.A. 433, 55 N. E. 812. So the question, put in the way most favorable for the plaintiff in error, is whether a statute of limitations that possibly may allow little more than one year is too short when the property is held in the quasi adverse hand of the receiver for that time (what the court would do and how it would interpret the statute if other property fell in after the receiver was appointed is not material in this case). We cannot doubt as to the answer. If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years, and presumably is dead, it acts within its constitutional discretion. Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done. See *American Land Co. v. Zeiss*, supra. Shorter time than one year has been upheld. *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 156, 55 L. ed. 137, 155, 31 Sup. Ct. Rep. 171; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365. See *Soper v. Lawrence Bros. Co.* 201 U. S. 359, 369, 50 L. ed. 788, 791, 26 Sup. Ct. Rep. 473.

Decree affirmed.

*UNITED STATES, Plff. in Err., [8
v.

BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY.

(See S. C. Reporter's ed. 8-15.)

Animals — importation from quarantined district — liability of connecting carrier.

A carrier does not transport, nor deliver or receive live stock for transportation, from a quarantined portion of a state, into another state, in violation of the prohibition of the act of March 3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp. 1909, p. 1185), § 2, where, being a connecting carrier, it receives the live stock from the preceding carrier, at a point in a state other than the quarantined state, for delivery to a point in the same state. [For other cases, see *Animals*, 6-8, in Digest Sup. Ct. 1908.]

[No. 464.]

Argued October 19, 1911. Decided October 30, 1911.

IN ERROR to the District Court of the United States for the Southern District of Ohio to review a judgment quashing an indictment against a carrier for transporting or delivering, or receiving live stock for transportation, from a quarantined portion of one state, into another state. Affirmed.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for plaintiff in error.

Mr. **George Hoadly** argued the cause, and, with Messrs. A. W. Goldsmith, Edward Colston, and Judson Harmon, filed a brief for defendant in error.

*Mr. Justice **McKenna** delivered the [11 opinion of the court:

The defendant in error, called herein defendant, was indicted for violations of the act of March 3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp. 1909, p. 1185), entitled, "An Act to Enable the Secretary of Agriculture to Establish and Maintain Quarantine Districts, to Permit and Regulate the Movement of Cattle and Other Live Stock Therefrom, and for Other Purposes."

Defendant entered a plea of not guilty,

NOTE.—On the validity and construction of statutory regulations as to infected animals—see note to *Grimes v. Eddy*, 26 L.R.A. 638.

As to constitutionality of state legislation regulating the importation of infected animals—see note to *Reid v. Colorado*, 47 L. ed. U. S. 108.

but subsequently the court quashed the indictment, following the ruling in certain other cases, and this writ of error was sued out to determine the validity of the ruling.

The efficient words of the statute are in § 2 (presently to be given), and prohibit receiving stock for transportation or to transport it from a quarantined state into any other state or territory. A summary of the indictment is as follows:

The Secretary of Agriculture, in pursuance of the act of Congress, having determined the fact that a contagious and communicable disease, known as scabies, existed among the sheep in the state of Kentucky, as required by said act, promulgated an order and regulation establishing a quarantine in Kentucky, and gave public notice thereof, as required by the statute. And the indictment charges that he gave notice of the quarantine and of the rules and regulations established by him by sending printed copies of the same to defendant, and that the receipt of notice was acknowledged by the general manager.

There were three separate shipments (each of which is made a count in the indictment), of sheep from Kentucky, upon different dates, and the cars containing the sheep were delivered to the Cincinnati, New Orleans, & Texas Pacific Railway Company, and transported by it over its line of railroad to a point within the city of Cincinnati, *state of Ohio, and were delivered at such point to defendant, and by it conveyed over its line of railroad to the Union Stock Yards in Cincinnati, "being a place," as the indictment avers, "*en route* to the destination" of the shipments.

The cars in which the shipments were made did not have upon their sides, or at all, placards bearing the words "Dipped scabby sheep," or the words, "Exposed sheep for slaughter," as provided in the orders and regulations of the Secretary of Agriculture, nor did the waybills, conductors' manifests, memoranda, and bills of lading have written or stamped upon their face those words, as was also required by such orders and regulations.

Section 1 of the act of Congress authorizes the Secretary of Agriculture to quarantine any state or territory, or any portion of any state or territory, when he shall determine the fact that there exists therein live stock affected with any contagious, infectious, or communicable disease, and of such quarantine he is directed to publish notice.

Section 2 forbids railroad companies and others engaged in transportation to "receive for transportation or transport . . . from the quarantined portion of any state or territory or the District of Columbia, in-

to any other state or territory or the District of Columbia, any cattle or other live stock." The statute also forbids the delivery for transportation, or the driving on foot or transporting by private conveyance, of such stock "from a quarantined state or territory or the District of Columbia," or from any portion of either, "into any other state or territory or the District of Columbia." And these words are repeated in other sections as descriptive of the transportation to which the statute applies.

An offender against the statute is declared (§ 6) to be guilty of a misdemeanor, and punishable by a fine or imprisonment, or by both.

The question in the case is, What did Congress intend *by the words we have[13 italicized? Did the defendant receive the sheep for transportation from Kentucky, the quarantined state, for delivery in a state, by receiving them in Ohio for delivery in Ohio?

The government urges an answer in the affirmative, and contends that not only an initial carrier, but a connecting carrier, though it receive the stock in a state other than the quarantined state (in the case at bar, Ohio), transports, within the meaning of the statute, stock "from" one state "into" another. The argument is that necessarily such connecting carrier is instrumental in the transportation of the stock from the place of shipment to its ultimate destination, and therefore within the reason and purpose of the law.

The contention is untenable. To receive a thing in Ohio is not receiving it in Kentucky, nor is transporting it in Ohio transporting it from Kentucky into Ohio. To sustain the indictment, therefore, we must disregard the plain and only direct signification of the words of the statute. Such extreme liberty with the words of a penal statute may not be taken. We are not unmindful that our function is to seek the intention of the lawmaker, and that illustrations may be found where the literal meaning of words has been extended beyond their absolute sense. But the general rule is that penal statutes must be strictly construed. It is a familiar rule and need not be illustrated. The words of the statute, certainly when they have a sensible meaning and a definite and unmistakable signification, as the words of the statute under review have, mark its extent. We do not mean to say that ambiguity in words may not be resolved by the clear purpose of the statute.

If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity for a character of the statute determines for a strict

or liberal construction. A criminal statute 14] is strictly "construed. Courts are not inclined to make "constructive crimes." We therefore might have to decide against the indictment, even if there were more ambiguity in the statute under review than we find in it. It manifests care and a studied purpose to define the extent of the quarantine and of what shall constitute violations of it. Within its limits there shall be no delivery of stock for transportation beyond them "into any other state or territory" by public for private conveyance or by driving. There is no obscurity whatever. A sensible, definite meaning is expressed. There must be a delivery for or a receiving for transportation "from the quarantined portion of any state or territory . . . into any other state or territory. . . ." That reception and that transportation are the elements of the crime and must exist to constitute it. None of these elements are charged against the defendant. It did not receive the sheep for transportation in Kentucky, or transport them "from" Kentucky "into" Ohio. It received them in Ohio and transported them in Ohio; and the statute, thus construed, adapts the remedy to the mischief. In other words, if the breaking of quarantine is prevented, the purpose of the statute is fulfilled without subjecting to criminal accusation and penalties distant carriers, who, it may be, are ignorant of the existence of the quarantine; and ignorant they may be, for the statute (§ 1) requires the Secretary of Agriculture to give notice of the establishment of quarantine only to the "transportation companies doing business in or through" the quarantined state. It would be strange indeed if the statute intends to confound unwilful with wilful acts by uniting in criminality and penalties the companies to which no notice of quarantine is required to be given with those to which notice is required.

We do not, of course, mean to say that the movement of sheep in Ohio did not tend to spread the contagion, but it is certain there could have been no movement of 15]*them in Ohio if they had not been transported "from" Kentucky "into" Ohio.

In *United States v. El Paso & N. E. R. Co.* 178 Fed. 846, and in *United States v. Chicago, B. & Q. R. Co.* 181 Fed. 882, the same construction was given to the statute that we have given it. Also by the circuit court of appeals of the eighth circuit in *St. Louis. St. Louis Merchants' Bridge Terminal R. Co. v. United States*, 188 Fed. 191. In *United States v. Southern R. Co.* (C. C. D. S. C.) 187 Fed. 209, a contrary ruling was made, and a connecting carrier which received stock outside of the limits

of the quarantined state was held to be liable.

Judgment affirmed.

UNITED STATES, Plff. in Err.,

v.

CONRAD A. PLYLER.

(See S. C. Reporter's ed. 15-17.)

Forgery — of civil service vouchers — financial or property loss.

An actual financial or property loss need not be charged or proved in order to make out a case under U. S. Rev. Stat. § 5418, U. S. Comp. Stat. 1901, p. 3666, of forging vouchers required upon examination by the Civil Service Commission of the United States, certifying to the character, physical capacity, etc., of the applicant, and presenting the same to the commission.

[Matters as to forgery, see *Forgery*, in *Digest Sup. Ct.* 1908.]

[No. 440.]

Argued October 19, 1911. Decided October 30, 1911.

IN ERROR to the District Court of the United States for the Western District of North Carolina to review a judgment sustaining a demurrer to an indictment for forging certain vouchers required by the Civil Service Commission, and for presenting the same to the commission. Reversed.

Solicitor General Lehmann argued the case and filed a brief for plaintiff in error.

No counsel for defendant in error.

Memorandum opinion by direction of the court. By Mr. Justice Holmes:

This is an indictment for forging vouchers required upon examination by the Civil Service Commission of the United States, certifying to the character, physical capacity, etc., of the applicant, the defendant, and for presenting the same to the commission. The district court held that the acts were not frauds against the United States, within the contemplation of Rev. Stat. § 5418, U. S. Comp. Stat. 1901, p. 3666, and discharged *the defendant.[17 The government excepted and brought the case to this court. It now must be regarded as established that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute." The section covers this case. *Haas v. Henkel*, 216 U. S. 462, 480, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 A. & E. Ann. Cas. 1112; *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1; *United States v. Bunting*, 82 Fed. 883.

Judgment reversed.

COMMONWEALTH OF VIRGINIA
v.

STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 17-20.)

**Supreme Court — original jurisdiction
— suit between states — motion for
final decree.**

The disposition of the authorities of the state of West Virginia to await the next regular session of the legislature, convening more than one year hence, before considering the matters left open by the Federal Supreme Court when determining the amount which such state should pay as its equitable share of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, does not furnish sufficient reason for granting a motion on behalf of the state of Virginia, that the court proceed to settle and determine all the questions left open by its decision.

[Original jurisdiction of Supreme Court, see Supreme Court of the United States, in Digest Sup. Ct. 1908.]

[No. 3, Original.]

Motion submitted October 10, 1911. Decided October 30, 1911.

MOTION on behalf of the Commonwealth of Virginia that the court proceed to determine all questions left open by its decision when determining the amount which the state of West Virginia should pay as its equitable share of the public debt of the state of Virginia, which was assumed by West Virginia at the time of its creation as a state. Overruled without prejudice.

The facts are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of Virginia, for the motion.

Mr. William G. Conley, Attorney General of West Virginia, opposed.

Mr. Justice Holmes delivered the opinion of the court:

This is a motion on behalf of the commonwealth of Virginia that the court proceed to determine all questions left open by the decision of March 6, 1911. 220 U. S. 1, 55 L. ed. 353, 31 Sup. Ct. Rep. 330. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the governor of West Virginia had called an extra session of the legislature upon another mat-

ter. The Constitution forbade the legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session that followed it, there was time for the governor to issue a further proclamation on the subject of the debt. The governor, in his message to the legislature, referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now "to take the initiative," and whether a commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three fifths of the body under the Constitution, a majority should express to him the opinion that the legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion, or receive such an expression as induced him to use it, and the legislature does not meet in regular session until January, 1913. The commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The attorney general of West Virginia answered that the members of the legislature convened in May, 1911, were elected before this cause had been argued, and under conditions that left them uncertain as to the wishes of their constituents; that the governor was of opinion that he could not constitutionally amend his proclamation so as to embody consideration of the debt, and that there is no one in West Virginia except the legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the resolution creating it, that it should not negotiate except upon the basis that Virginia is bound only for the two thirds of the debt that she had provided for, and concluded that this court ought not to act before the West Virginia legislature, at its next regular session, can consider the case in the spirit anticipated by the opinion of the court.

With regard to the doubt implied by the governor of West Virginia whether it now is incumbent upon that state to take the initiative, and that suggested by its attorney general, whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the court is a conference in the cause. The body that directed the institution of the suit has taken the prop-

er step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the court to enter a decree irrespective of its assent, or will try to reach a result that the court will accept. The conference is not for an independent compromise out of court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia resolution preceding the statute authorizing this suit, refers, we presume, to a settlement out of court, and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a state cannot be expected to move with the celerity of a private business man; it is 20]enough if *it proceeds, in the language of the English chancery, with all deliberate speed. Assuming, as we do, that the attorney general is correct in saying that only the legislature of the defendant state can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the legislature, that fact is not sufficient to prove that when the voice of the state is heard, it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 20-27.)

Master and servant — safety-appliance act — application to car used in intrastate traffic.

1. Cars used in moving intrastate traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of the safety-appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3,174), as

NOTE.—On the power of Congress to regulate commerce—see notes to *State ex rel. Crowin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

amended by the act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1,143), declaring, *inter alia*, that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

[For other cases, see *Master and Servant*, 36-40, in Digest Sup. Ct. 1908.]

Commerce — power of Congress — safety appliances.

2. Congress had the power, under the commerce clause of the Federal Constitution, to require, as it did in the safety-appliance act of March 2, 1893, as amended by the act of March 2, 1903, that all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce, shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic.

[For other cases, see *Commerce*, 26-36, in Digest Sup. Ct. 1908.]

[No. 28.]

Argued and submitted March 9 and 10, 1911. Decided October 30, 1911.

IN ERROR to the District Court of the United States for the Northern District of Alabama to review a judgment in favor of the government in an action to recover penalties from a railway company for violations of the safety-appliance act. Affirmed.

See same case below, 164 Fed. 347.

The facts are stated in the opinion.

Mr. Alfred P. Thom submitted the cause for plaintiff in error.

Assistant Attorney General Fowler argued the cause, and, with Mr. Henry E. Colton, Special Assistant to the Attorney General, filed a brief for defendant in error:

Congress has power even to construct roads to be used in interstate commerce, and to grant charters authorizing the construction of highways for that purpose.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Luxton v. North River Bridge Co.* 153 U. S. 525, 529, 38 L. ed. 808, 810, 14 Sup. Ct. Rep. 891.

This court has never hesitated to declare the power of the United States to remove obstructions of every character from every avenue of commerce that may directly or indirectly interfere with interstate traffic.

Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pennsylvania v. Wheeling & B. Bridge Co.* 13

How. 518, 14 L. ed. 249; *Re Debs*, 158 U. S. 565, 39 L. ed. 1093, 15 Sup. Ct. Rep. 900.

The United States may even prevent interference with a stream not navigable, but which is tributary to a navigable stream, in order to preserve the navigability of the stream to which it is tributary.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 699, 43 L. ed. 1136, 1140, 19 Sup. Ct. Rep. 770.

In order to facilitate and hasten the transportation of interstate commerce, the several states are not permitted to enact any law or adopt any regulation which will materially interfere with or impede interstate transportation.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 153, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

Congress may enact laws regulating the qualifications of those actually engaged in the carrying of interstate commerce, although such persons may at times, in the pursuit of their vocation, be solely engaged in handling intrastate commerce.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; *Smith v. Alabama*, 124 U. S. 465, 479, 480, 31 L. ed. 508, 512, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

State statutes relating to commerce have been held to be valid where they do not adversely affect, but aid, interstate commerce, or where they have no relationship thereto; but when such statutes have substantially affected interstate or foreign commerce adversely, they have been universally held to be invalid.

Mobile County v. Kimball, 102 U. S. 691, 698, 26 L. ed. 238, 240; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Congress may pass laws remotely affecting interstate commerce.

United States v. Coombs, 12 Pet. 72, 77, 78, 9 L. ed. 1004, 1006, 1007; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *Gibbons v. Ogden*, 9 Wheat. 1, 194, 195, 6 L. ed. 23, 69, 70; *Interstate Commerce Commission v. Illi-* 56 L. ed.

nois C. R. Co. 215 U. S. 452, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 495, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141.

This act has been sustained by the lower Federal courts.

Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 9; *United States v. International & G. N. R. Co.* 98 C. C. A. 392, 174 Fed. 638.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a civil action to recover penalties for the violation in specified instances of the safety-appliance acts of Congress. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143. The government prevailed in the district court, and the defendant sued out this direct writ of error.

Briefly stated, the case is this: The defendant, while operating a railroad which was "a part of a through highway" over which traffic was continually being moved from one state to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic, and the other three in moving intrastate traffic; but it *does not appear that the use of the[24 three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling of the three cars, and insisted, first, that such a hauling in intrastate commerce although upon a railroad over which traffic was continually being moved from one state to another, was not within the prohibition of the safety appliance acts of Congress; and, second, that, if it was, those acts should be pronounced invalid, as being in excess of the power of Congress under the commerce clause of the Constitution. But the objection was overruled (164 Fed. 347), and error is assigned upon that ruling.

The original act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), imposed upon every common carrier "engaged in interstate commerce by railroad" the duty of equipping all trains, locomotives, and cars used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employees engaged in its movement; and the 2d section of that act made it unlawful for "any such common carrier" to haul or permit to be hauled or used on

its line of railroad any car "used in moving interstate traffic," not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. The act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143), amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." Both acts contained some minor exceptions, but they have no bearing here.

The real controversy is over the true significance of the words "on any railroad engaged" in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car, or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no contention to the contrary were it not for the presence in the amendatory provision of the third clause,—and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." In this there is a suggestion that what precedes does not cover the entire field; but at most it is only a suggestion, and gives no warrant for disregarding the plain words, "on any railroad engaged" in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving interstate traffic and others moving intrastate traffic, would, by their concurrent operation, bring the entire train within the statute. But it is not necessary to reject them to accomplish this result, for the first clause, with those words in it, does even more; that is to say, it embraces every train on a railroad which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most, only redundant; and we perceive no reason for believing that Congress intended that less than full effect should be given to the more comprehensive one, but, on the contrary, good

reason for believing otherwise. As between the two opposing views, one rejecting the words "on any railroad engaged" in the first clause, and the other treating the third clause as redundant, the latter is to be preferred, first, because it is *in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption (Cong. Rec. 57th Cong., 1st Sess., vol. 35, pt. 7, p. 7300; Id. 2d Sess., vol. 36, pt. 3, p. 2268), thus making it certain that without them the act would not express the will of Congress.

For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is *so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation,

no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative.

Affirmed.

28] *JAMES W. FINLEY, Plff. in Err.,

v.

PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 28-31.)

Constitutional law — equal protection of the laws — classification of prisoners committing assaults.

Singling out convicts serving life sentences in a state prison as proper subjects for the imposition of the death penalty, as is done by Cal. Pen. Code, § 246, in case they shall, with malice aforethought, com-

mit an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, does not deny such life prisoners the equal protection of the laws. [For other cases, see Constitutional Law, 397-401, in Digest Sup. Ct. 1908.]

[No. 15.]

Argued and submitted October 26, 1911.
Decided November 6, 1911.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Sacramento County, in that state, imposing the death penalty upon a life convict committing a murderous assault. Affirmed.

See same case below, 153 Cal. 59, 94 Pac. 248.

Mr. H. G. W. Dinkelspiel submitted the cause for plaintiff in error. Mr. G. C. Ringolsky was on his brief:

While the law with reference to classification within the constitutional meaning is well settled, the application thereof gives rise to question.

Yick Wo v. Hopkins, 118 U. S. 356. 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Board of Education v. Alliance Assur. Co. 159 Fed. 994.

It is necessary to ascertain the reason and purpose of the statute, to determine its validity.

a. The rapid and beneficent advance of penal reform necessitates the conclusion that no trivial reason prompted or should be held to have prompted the statute.

Boies, Science of Penology, 119.

b. The legislature did not base the statute upon the ground that life termers are more dangerous than other prisoners.

People v. Finley, 153 Cal. 59, 94 Pac. 248, *contra*.

1. The term of imprisonment is determined by influences other than personal character.

Drahms, The Criminal, 364; Re Mallon, 16 Idaho, 737, 22 L.R.A.(N.S.) 1123, 102 Pac. 374.

2. Life termers are not desperate because of the loss of all hope of freedom, since the parol law of California supplies ample relief.

3. Permanent loss of civil rights, as com-

Validity of statute classifying prisoners committing crimes for purpose of fixing punishment.

A statute providing that "any convict sentenced to imprisonment for life, who commits murder in the first degree, while such sentence remains in force against him, must,

NOTE.—As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. P. Co. 14 L.R.A. 579.

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pared with a temporary loss thereof, does not make the life term more dangerous than his fellow convict.

c. A law predicated on length of term is unconstitutional.

Re Mallon, 16 Idaho, 737, 22 L.R.A. (N.S.) 1123, 102 Pac. 374; State v. Lewin, 53 Kan. 679, 37 Pac. 168.

d. The only possible reason for the enactment of the statute is a seeming lack of adequate punishment for life termers.

The classification necessary to support a statute must be based upon real differences in the situation, condition, and tendencies of things.

Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Board of Education v. Alliance Assur. Co. 159 Fed. 994; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 506; State v. Mitchell, 97 Me. 73, 94 Am. St. Rep. 481, 53 Atl. 887; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 783; State v. Thomas, 138 Mo. 95, 39 S. W. 481; Murray v. Ramsey County, 81 Minn. 359, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; People ex rel. McPike v. Van De Carr, 91 App.

Div. 20, 86 N. Y. Supp. 644; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 308, 121 Am. St. Rep. 313, 83 N. E. 215; State v. Wright, 53 Or. 344, 21 L.R.A. (N.S.) 349, 100 Pac. 296; State ex rel. Richards v. Hammer, 42 N. J. L. 435; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Allardt v. People, 197 Ill. 501, 64 N. E. 533; Phipps v. Wisconsin C. R. Co. 133 Wis. 153, 113 N. W. 456; Johnson v. Milwaukee, 88 Wis. 383, 60 N. W. 270; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

a. The statute does not meet constitutional tests. There is no inherent difference between the life term and the middle-aged long term.

Report State Board Prison Directors, 1909-10, 69, and 185, 70, and 184.

b. Owing to the condition of the California law, certain prisoners are, with reference to immunity from punishment, in the same position as life termers.

Ex parte Morton, 132 Cal. 346, 64 Pac. 469.

c. The statute should be viewed from a broad position. It is unequal, special, discriminatory, and unconstitutional.

Messrs. C. C. Calhoun and James N. Sharp also submitted the cause for plaintiff in error. Mr. Samuel T. Bush was on their brief.

on conviction, suffer death," was sustained in Williams v. State, 130 Ala. 31, 30 So. 336, as against the objection that it was class legislation. The court said: "The punishment imposed by the statute is the only one that could be effectually inflicted. Any less degree of punishment would amount to no punishment at all. This is sufficient to maintain and justify the classifications made by the statute. It is clear that the statute applies alike to all convicts, while under sentence to imprisonment for life, who commit murder in the first degree, whether the imprisonment is the result of a conviction for murder in the first degree or any other offense punished by imprisonment for life."

In two cases legislation classifying the punishment for an escape with reference to the original term has been declared unconstitutional.

The first of these cases is State v. Lewin, 53 Kan. 679, 37 Pac. 168, where the court had under consideration the constitutionality of a statute which, instead of measuring the punishment for an escape by the offense actually committed, required the court to obliterate the time served under the original sentence, and to reimpose the sentence given for the prior crime. The court said that

under this enactment two men attempting or effecting an escape from the penitentiary on the same day in concert, under precisely the same circumstances and with exactly equal guilt, might receive wholly different punishment; and declared that the statute was open to the objection that it was not an impartial administration of justice, and did not afford the equal protection of the laws.

For the same reason, viz., that the character or nature of the offense committed is not the basis upon which the extent of the punishment is fixed, the court, in Re Mallon, 16 Idaho, 737, 22 L.R.A. (N.S.) 1123, 102 Pac. 374, held invalid as class legislation a statute which fixes the punishment for an escape by a state prisoner at a term "equal in length to the term he was serving at the time of such escape, said second term of imprisonment to commence from the time he would otherwise have been discharged from such prison."

On the general subject of enhancing the penalty for crimes when committed by habitual criminals or prior offenders, see notes to Re Miller, 34 L.R.A. 398; Com. v. McDermott, 24 L.R.A. (N.S.) 431; and McDonald v. Massachusetts, 45 L. ed. U. S. 542.

Mr. E. B. Power argued the cause, and, with Mr. U. S. Webb, Attorney General of California, filed a brief for defendant in error:

It is for the state court to determine whether or not its statutes are valid under the state Constitution, and whether a person has received equal protection of the laws of the state in a regular administration of the criminal law.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; *O'Neil v. Vermont*, 144 U. S. 336, 36 L. ed. 457, 12 Sup. Ct. Rep. 693.

The Constitution of the United States merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; *Moore v. Missouri*, 159 U. S. 677, 40 L. ed. 303, 16 Sup. Ct. Rep. 179; *Pace v. Alabama*, 106 U. S. 585, 27 L. ed. 207, 1 Sup. Ct. Rep. 637; *People v. Coleman*, 145 Cal. 613, 79 Pac. 283.

Memorandum opinion, by direction of the court. By Mr. Justice McKenna:

Section 246 of the Penal Code of the state of California provides as follows: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

[31] *Plaintiff in error was indicted under this section, tried, found guilty, and the death penalty imposed. To the judgment of the supreme court of the state, affirming the sentence against him, he prosecutes this writ of error, and urges as ground thereof that § 246 is repugnant to the 14th Amendment of the Constitution of the United States in that it denies to him the equal protection of the laws, because it provides an exceptional punishment for life prisoners.

The supreme court sustained the law on the ground that there was a proper basis for classification between convicts serving life sentences in the state prison, as defendant was when he committed the crime for which he was indicted and found guilty, and convicts serving lesser terms.

It is elementary that the contention is to be tested by considering whether there is a basis for the classification made by the statute. Applying that test, we see no error in the ruling. As said by Mr. Justice Henshaw, delivering the opinion of the court, "The classification of the statute

in question is not arbitrary, but is based upon valid reasons and distinctions." And pointing out the distinction between life prisoners and other convicts, he said that "the 'life termers,' as has been said, while within the prison walls, constitute a class by themselves,—a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual." [153 Cal. 62, 94 Pac. 248.] Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the lawmaking power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of § 246.

Judgment affirmed.

*T. O. HELM et al., Appts., [32
v.

J. H. ZARECOR et al.

(See S. C. Reporter's ed. 32-38.)

Federal courts — jurisdiction — collusion — omitted parties.

1. If the parties before a Federal circuit court are properly aligned as plaintiffs and defendants, the suit may not be dismissed, under the act of March 3, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 511), § 5, for collusion because necessary parties are omitted, either as plaintiff or defendant, whose presence would defeat the jurisdiction of the court. [For other cases, see Courts, 688-690, 761-769, in Digest Sup. Ct. 1908.]

Pleading — sufficiency of plea to jurisdiction — collusive joinder.

2. A plea to the jurisdiction of a Federal circuit court, based upon the ground that the complainants had collusively made parties complainants and defendants for the purpose of showing the requisite diversity of citizenship, is insufficient in law if it

NOTE.—As to conflict of jurisdiction between Federal and state courts—see notes to *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 356, and *J. I. Case Plow Works v. Finks*, 26 C. C. A. 50.

As to diverse citizenship as ground for Federal jurisdiction—see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 108; *Myers v. Murray, N. & Co.* 11 L.R.A. 216; *Emory v. Greenough*, 1 L. ed. U. S. 640; *Strawbridge v. Curtiss*, 2 L. ed. U. S. 435; *McDonald v. Smalley*, 7 L. ed. U. S. 287; and *Roberts v. Lewis*, 36 L. ed. U. S. 579.

does not specify what parties are alleged collusively to have been made.

[For other cases, see Courts, 680-690; Pleading, 634-648, in Digest Sup. Ct. 1908.]

Courts — conflicting jurisdiction — suits with different objects.

3. The pendency in a state court of a suit in the nature of quo warranto, seeking a determination as to the persons who were the true and lawful members of the Board of Publication of the Cumberland Church after the alleged union with the Presbyterian Church, is not a bar to a suit in the Federal courts to enforce the alleged rights of the members of the united Church to control the said Board, and to have the benefit of the Board's property in its denominational work, regardless of the personnel of the Board.

[For other cases, see Courts, 1564, 1565, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — diverse citizenship — alignment of parties.

4. Neither the attitude of the alleged members of the Board of Publication of the Cumberland Church, incorporated merely as a convenient agency for the publishing work of such church, who believed the alleged union with the Presbyterian Church to have been consummated, nor the fact that it does not appear that such members have surrendered possession, requires that, when testing the jurisdiction of a Federal circuit court, invoked on the ground of diversity of citizenship, such corporation be aligned on the side of complainants in a suit to enforce the alleged rights of the members of the united Church to use and control the corporate agency and to have the benefit of the corporate property in its denominational work, as against defendants who repudiate the alleged union, and insist that the religious association which they represent is still the original Cumberland Church, continuing with all its separate powers unimpaired.

[For other cases, see Courts, 721-769, in Digest Sup. Ct. 1908.]

[No. 395.]

Submitted October 9, 1911. Decided November 6, 1911.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee to review a decree dismissing, for want of jurisdiction, a suit to enforce the alleged rights of members of the Presbyterian Church to use and control the Board of Publication of the Cumberland Church, and to have the benefit of the Board's property in its denominational work. Reversed.

The facts are stated in the opinion.

Messrs. John M. Gaut and Alexander Pope Humphrey submitted the cause for appellants:

Where the complainants sue in a representative capacity as belonging to a class,

members of that class who are not named as parties on the record are not parties to the suit.

Stewart v. Dunham, 115 U. S. 64, 29 L. ed. 330, 5 Sup. Ct. Rep. 1163; Smith v. Swormstedt, 16 How. 288, 14 L. ed. 943; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, Nos. 1 & 3, 90 Fed. 606; McIntosh v. Pittsburg, 112 Fed. 707; Watson v. National Life & T. Co. 88 C. C. A. 380, 162 Fed. 11; San Francisco Gas & Electric Co. v. San Francisco, 164 Fed. 886; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; United States v. Old Settlers, 148 U. S. 480, 37 L. ed. 529, 13 Sup. Ct. Rep. 650.

There was no legal propriety in aligning the corporate defendant with the individual complainants.

Delaware & H. Co. v. Albany & S. R. Co. 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540; Venner v. Great Northern R. Co. 209 U. S. 25, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355.

Mr. W. C. Caldwell submitted the cause for appellees. Messrs. Frank Slemons and W. B. Lamb were on the brief:

Failure on the part of complainants to pray for relief against the corporation is significant, and of itself shows that the corporation should be treated as a complainant in the case.

Steele v. Culver, 211 U. S. 29, 53 L. ed. 74, 29 Sup. Ct. Rep. 9.

Where the jurisdiction of the United States court is dependent alone upon diversity of citizenship, the parties should be arranged with reference to the real controversy presented by the pleadings, and not according to the arbitrary arrangement of the pleader.

First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 573; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Steele v. Culver, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Venner v. Great Northern R. Co. 209 U. S. 25, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Stewart v. Mitchell, 172 Fed. 907; Stevens v. Smartt, 172 Fed. 466.

It is allowable, when necessary, under the practice in courts of equity, for a few of a large class of persons with a common interest to plead, and for a few of a like opposing class to be impleaded. But the rule is one of necessity, and the privilege of the pleader must be exercised fairly, and not collusively.

Story, Eq. Pl. §§ 107, et seq.; Dan. Ch. Pl. & Pr. 238 et seq.

Mr. Justice Hughes delivered the opinion of the court:

The sole question presented by this appeal is with respect to the jurisdiction of the circuit court.

The bill, as amended, was brought by certain ministers, ruling elders, and laymen of the Presbyterian Church in the United States of America, citizens of states other 33]than *Tennessee, suing for themselves and for all the members of said Church, against individuals, citizens of Tennessee, described as representing not only their own interests, but also those of all the members of the Cumberland Presbyterian Church, and "The Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation.

The controversy disclosed by the bill arose from the proceedings, taken in 1906, to effect the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, both voluntary religious associations, and relates to the property and management of the defendant corporation. The Board of Publication had been incorporated in 1860, under the direction of the General Assembly of the Cumberland Presbyterian Church, for the purpose of conducting its publishing work, and had acquired valuable property consisting of a publishing house and its equipment in Nashville, Tennessee. The original members of the corporation were the committee of publication of the Church, and their successors under the charter were appointed by the General Assembly, to which was committed its regulation and control.

The bill alleged that the two Churches had been legally united, and that, as a result, the property in question was held by the corporation in trust "for the entire reunited denomination;" and, further, that "the Board and its officers and managers were advised and believed, and still believe," that the union was valid, that "thereby the Board of Publication became a corporation and institution of the reunited Church," and that the managers of the corporation "could do nothing else than recognize the General Assembly of the united Church by reporting to it and otherwise recognizing its authority." It was also alleged that a minority of the members of the Cumberland Presbyterian Church, and 34]of its ministers, who *were opposed to the consolidation, repudiated it and effected a separate organization under the former name, and that thereupon a body assuming to be the General Assembly of the Cumberland Presbyterian Church declared the offices of all the members of the Board of Publication vacant, and proceeded to elect 56 L. ed.

persons of their own organization to fill the supposed vacancies. These persons had made demand for the possession of the corporate property, claiming to be the rightful members of the corporation, and that its property was held in trust for the religious association by whose General Assembly they had been elected. It was stated that this claim cast a cloud upon the equitable title to the property. After reviewing at length the history of the Cumberland Presbyterian Church, the action of the representatives of the two Churches which culminated in the alleged consolidation, and the subsequent antagonistic proceedings, the bill prayed for decree that the property in question is held in trust by the corporation for the benefit of the Presbyterian Church in the United States of America, or the members thereof, and that the members of the Board elected by the reunited Church are the true and lawful members of said Board; that the defendants be enjoined from interfering with the control and management of the corporation by those members, or with the corporate property, and that, if mistaken with respect to the relief prayed for as to the persons who constitute the Board and have the right of management, the court should decree that "whoever may be the members of the Board, and whoever may be entitled to such management, they shall manage the corporation and administer the trust for the use and benefit of said reunited Church."

The defendants filed two pleas to the jurisdiction. In the first plea it was alleged that the complainants had collusively made and omitted both complainants and defendants for the purpose of showing the requisite diversity *of citizenship. The[35 second plea set up the pendency of a suit in the chancery court of Davidson county, Tennessee, in the nature of a quo warranto proceeding, brought on the relation of J. H. Zarecor and other individual defendants herein, to oust those named as defendants in that suit from membership in the Board of Publication, and from the control and management of its property, and to install the relators in their stead. These pleas the court below overruled. As to the ground of the first plea, that certain persons had been omitted as parties, the court held that § 5 of the judiciary act of March 3, 1875, chap. 137 (18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 511), relates solely to the collusive making of the actual parties plaintiff, or the collusive joinder of the actual parties defendant, and that if the parties before the court are properly aligned as plaintiffs and defendants, it is not a ground of dismissal, in so far as the

jurisdictional question is concerned, that necessary parties are omitted, either as plaintiffs or defendants, whose presence would defeat the jurisdiction of the court. While the omission of indispensable parties, if any, said the court, would be a ground for dismissal on the merits if they were not joined, or, if joined, and on proper alignment their citizenship was such as to defeat the Federal jurisdiction, a plea to the jurisdiction would then lie, their omission in the meantime could not defeat the jurisdiction of the court in a controversy between the parties who were before the court. And so far as the first plea was based upon the ground that the complainants had collusively made parties plaintiffs and defendants for the purpose of showing a diversity of citizenship, the plea was held to be insufficient in law, in that it did not specify what parties are alleged to have been collusively made. The second plea was overruled because it did not reach the whole case made by the bill, as the bill did not merely ask a determination as to the persons who were the true and lawful members of the corporation, which was the only [36]*matter involved in the quo warranto proceeding in the state court, but sought a decree declaring the trust upon which the property of the corporation is held, and the uses and purposes for which it is to be administered, whoever might be found to be the true and lawful members of the corporation. We need add nothing to what was said by the court below upon these points.

But the court of its own motion dismissed the bill for want of jurisdiction, for the reason that the defendant corporation, the Board of Publication, was not antagonistic to the complainants, and should be aligned upon the same side of the controversy with the complainants; and that therefore, upon such alignment, some of the defendants and one of the complainants being citizens of the same state, the circuit court had no jurisdiction. In this we think the court erred.

It was, undoubtedly, the duty of the court in determining whether there was the requisite diversity of citizenship, to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill. *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; *Steele v. Culver*, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9. What, then, is the controversy?

The suit cannot properly be said to be

brought to enforce a right inhering in the Board of Publication, or by the complainants as members of that corporation. And the question whether the Board may be assigned a place on the other side of the controversy is not to be answered by applying the rule which governs suits by shareholders on behalf of a corporation, or by beneficiaries in the right of a trustee. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 461, 26 L. ed. 827, 832; *Doctor v. Harrington*, 196 U. S. 579, 587, 49 L. ed. 606, 609, 25 Sup. Ct. Rep. 355; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 299, 25 L. ed. 932, 936. The complainants sue for themselves and on behalf of all members of the Presbyterian Church in the United States of America, *and the ob- [37]ject of their suit is to enforce the right of the members of that Church as it was constituted after the alleged union. The Board of Publication was incorporated merely as a convenient agency for the publishing work of the Cumberland Presbyterian Church. The charter clearly discloses its character. The representative assembly of the Church was to fill the vacancies in its membership and control its conduct. It was an incorporated committee of publication, which lost none of its essential qualities as an agent of denominational service when it became an artificial person, clothed with power to hold property in a corporate capacity. The language of the charter is that "said Board shall be subject to the regulation and control of the General Assembly of said Church under its past and future actions on the subject; the number of the Board may be increased or diminished and all vacancies filled as the said authority has or may direct; the General Assembly of the Church shall also have power to locate the Board and change the same at pleasure; and also at any time to alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others." The contention of the complaints is that, after the union, the Cumberland Presbyterian Church continued in the united Church, and that the General Assembly of the latter succeeded to the authority formerly possessed by the General Assembly of the separate denomination. The defendants are sued as the representatives of the religious association which insists that it is still the original Cumberland Presbyterian Church, continuing with all its separate powers unimpaired.

It is thus evident that the controversy transcends the rivalries of those claiming membership in the Board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associa-

tions, said to be represented by the respective parties, to use and control the corporate agency, and *to have the benefit in their denominational work of the corporate property. Viewed in this aspect, the relation of the corporation to the controversy is not to be determined by the attitude of alleged members of the Board, who believed the union to have been consummated, nor by the fact that it does not appear that they have surrendered possession. These do not suffice to identify the interest of the corporation with that of the complainants. And the individual defendants actually joined it with themselves in filing the pleas to the jurisdiction, and in this way, it may be assumed, they sought to emphasize the contention that the Board was under the exclusive direction of the separate association to which they adhered, and should be employed solely for its benefit.

To align the corporation itself with the complainants is virtually to decide the merits in their favor. The Board is simply a title holder (*Watson v. Jones*, 13 Wall. 679, 720, 20 L. ed. 666, 672),—an instrumentality, the mastery of which is in dispute. But, as it is the holder of the legal title, the complainants seek a decree defining, in the light of the proceedings alleged in the bill, the equitable obligations arising from the nature and purpose of the corporate organization.

We are therefore of opinion that the corporation was properly made a party defendant, and that the court erred in dismissing the bill for want of jurisdiction.

Decree reversed.

39]*TROY BANK OF TROY, INDIANA,
and John Beidenkopf, Appts.,
v.

G. A. WHITEHEAD & COMPANY (Incorporated).

(See S. C. Reporter's ed. 39-41.)

Federal courts — amount in dispute — aggregation to make amount.

A suit by the assignees, respectively, of two promissory notes given for the unpaid portion of the purchase price of real property, to enforce the vendor's lien, which, under the local law, passed to the assignees as a common security for the payment of both notes, without any priority of right in either assignee, involves the amount es-

NOTE.—On the jurisdiction of Federal courts as affected by the amount in dispute—see notes to *Rich v. Bray*, 2 L.R.A. 225; *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; and *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.

56 L. ed.

sential to sustain the jurisdiction of a Federal circuit court, under the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, if the interests of such assignees collectively equal the jurisdictional amount. [For other cases, see *Courts*, 908-911, in *Digest Sup. Ct.* 1908.]

[No. 566.]

Submitted October 9, 1911. Decided November 6, 1911.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree dismissing, for lack of the jurisdictional amount, a suit to enforce a vendor's lien. Reversed.

See same case below, 184 Fed. 932.

The facts are stated in the opinion.

Mr. George W. Jolly submitted the cause for appellants. Mr. B. F. Huffman was on the brief:

The equitable lien is a separate and distinct right, and may be enforced in equity when the legal remedy may be lost.

Belknap v. Gleason, 27 Am. Dec. 721 and note, 11 Conn. 160; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38.

The courts of the United States enforce grantors' and vendors' liens if in harmony with the jurisprudence of the state in which the action is brought.

Fisher v. Shropshire, 147 U. S. 133, 139, 37 L. ed. 109, 113, 13 Sup. Ct. Rep. 201; *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 516, 38 L. ed. 802, 805, 14 Sup. Ct. Rep. 842.

It is now and has been the law of Kentucky from the foundation of the state, that a vendor of land has an equitable lien on the land for the unpaid purchase money, and that the vendee becomes a trustee for his vendor therefor.

Voorhies v. Instone, 3 Bibb, 354.

In Kentucky the vendor's lien has never been considered as personal to the vendor, and has always been held to be assignable; and the assignee of the debt may enforce the lien in his own name.

Ripperdon v. Cozine, 8 B. Mon. 466; *Burrus v. Roulhac*, 2 Bush, 39; *Duncan v. Louisville*, 13 Bush, 378, 26 Am. Rep. 201; *Bradley v. Curtis*, 79 Ky. 327.

The jurisdiction of the circuit court is sustainable upon several grounds: first, because the complainants seek to enforce a lien in excess of the jurisdictional value or amount, in which they have a common, undivided interest, their right being derived from a common source, created by the same contract; they claim under the same title, created at the same time, by the same in-

strument; and, secondly, they are the sole beneficiaries under a trust created in their favor for a sum above the jurisdictional limit, growing out of the same transaction, and created by the same instrument.

Shields v. Thomas, 18 How. 253, 15 L. ed. 368; *Rodd v. Heartt*, 17 Wall. 354, 21 L. ed. 627; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 51, 52, 36 L. ed. 66, 68, 69, 12 Sup. Ct. Rep. 364; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782; *The Mamie (Parcher v. Cuddy)* 105 U. S. 773, 26 L. ed. 937; *Freeman v. Dawson*, 110 U. S. 264, 28 L. ed. 141, 4 Sup. Ct. Rep. 94; *Estes v. Gunter*, 121 U. S. 183, 30 L. ed. 884, 7 Sup. Ct. Rep. 854; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Texas R. Co. v. Gentry*, 163 U. S. 361, 41 L. ed. 191, 16 Sup. Ct. Rep. 1104; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; *Morgan v. Adams*, 211 U. S. 627, 53 L. ed. 362, 29 Sup. Ct. Rep. 213.

Mr. Ben D. Ringo submitted the cause for appellee:

The case at bar is properly to be assigned to that class of cases wherein the claims of complainants are separate and distinct in their nature, and they cannot be joined to give jurisdiction, although the state statute under which the right of action arises might allow a joinder of the causes.

Rich v. Bray, 2 L.R.A. 225, 37 Fed. 273; *Seaver v. Bigelow*, 5 Wall. 208, 18 L. ed. 595; *Hawley v. Fairbanks (Hawley v. United States)* 108 U. S. 543, 27 L. ed. 820, 2 Sup. Ct. Rep. 846; *Schwed v. Smith*, 106 U. S. 188, 27 L. ed. 156, 1 Sup. Ct. Rep. 221; *Gibson v. Schufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Farmers' Loan & T. Co. v. Waterman*, 106 U. S. 265, 27 L. ed. 115, 1 Sup. Ct. Rep. 131; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Hassall v. Wilcox*, 115 U. S. 598, 29 L. ed. 504, 6 Sup. Ct. Rep. 189; *Eaton v. Hoge*, 72 C. C. A. 74, 141 Fed. 64, 5 A. & E. Ann. Cas. 489; *Holt v. Bergevin*, 60 Fed. 1; *Stemmler v. McNeill*, 102 Fed. 660; *Putney v. Whitmire*, 66 Fed. 385; *Hagge v. Kansas City S. R. Co.* 104 Fed. 391; *Busey v. Smith*, 67 Fed. 13; *Auer v. Lombard*, 19 C. C. A. 72, 33 U. S. App. 438, 72 Fed. 209.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit in equity wherein the jurisdiction of the circuit court was invoked on the ground of diverse citizenship, and the sole question now presented for de-

the matter in dispute exceeded \$2,000, exclusive of interest and costs, as required by the act of August 13, 1888, chap. 866, § 1, 25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508. The facts are these:

Upon a sale of land situated in the western district of Kentucky, the vendor lawfully reserved a vendor's lien for the unpaid portion of the purchase price, for which he took two promissory notes of \$1,200 each, payable in one and two years. Shortly thereafter the notes were assigned to the present appellants, one to each; and by the law of Kentucky the vendor's lien passed to the assignees, as a common security for the payment of both notes, without any priority of right in either assignee. After the maturity of the notes, both remaining wholly unpaid, the assignees jointly brought this suit to enforce the vendor's lien. They and their assignor were citizens of Indiana, and the defendant, who acquired the land with notice of the lien, was a citizen of Kentucky.

By a demurrer to the bill the defendant challenged the jurisdiction of the circuit court, upon the ground that the matter in dispute was not of the requisite jurisdictional value; and the court, being of opinion that such value was not to be measured by the extent to which the plaintiffs collectively were seeking to enforce the lien as a common security, but by the extent to which each was interested in its enforcement, sustained the demurrer and dismissed the bill for want of jurisdiction. 184 Fed. 932. The plaintiffs then appealed directly to this court, and the circuit court appropriately certified the question of jurisdiction. Act of March 3, 1891, chap. 517, § 5, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488.

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Rodd v. Heartt*, 17 Wall. 354, 21 L. ed. 627; *Davies v. Corbin*, 112 U. S. 36, 40, 28 L. ed. 627, 629, 5 Sup. Ct. Rep. 4; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *Walter v. Northeastern R. Co.* 147 U. S. 370, 373, 37 L. ed. 206, 208, 13 Sup. Ct. Rep. 348; *Davis v. Schwartz*, 155 U. S. 631, 647, 39 L. ed. 289, 296, 15 Sup. Ct. Rep. 237; *Illinois C. R. Co. v. Adams*,

180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claims under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes.

It follows that the Circuit Court erred in holding that it was without jurisdiction; and its decree is accordingly reversed, with directions to overrule the demurrer to the bill, and to take such further proceedings in the case as may be appropriate.

42]*INTERSTATE COMMERCE COMMISSION, Appt.,

v.

HARRY J. DIFFENBAUGH, Edmund D. Bigelow, and Charles W. Lonsdale, as Officers and Members of the Board of Trade of Kansas City, et al. (No. 285.)

INTERSTATE COMMERCE COMMISSION, Appt.,

v.

F. H. PEAVEY & COMPANY, Omaha Elevator Company, and Midland Elevator Company. (No. 286.)

UNION PACIFIC RAILROAD COMPANY, Appt.,

v.

F. H. PEAVEY & COMPANY, Omaha Elevator Company, and Midland Elevator Company. (No. 287.)

(See S. C. Reporter's ed. 42-50.)

Interstate Commerce Commission — powers — restricting allowances to shipper.

1. The Interstate Commerce Commission cannot make the allowance by a carrier to the owner of an elevator of the cost of the elevation in transit of grain in which he has an interest, conditional upon his failure to use the opportunity afforded during the process of elevation to treat, weigh, inspect, or mix the grain, since such allowance cannot be deemed an undue preference or discrimination forbidden by the act to regulate commerce, in view of the provisions of the amendatory act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), recognizing that services in transportation, ren-

dered by an owner of the property transported, are to be paid for by the carrier. [For other cases, see Interstate Commerce Commission; Carriers, III. e, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — restricting allowances to shipper.

2. Confining the allowance by a carrier to the owner of an elevator for elevating grain in transit in which he has an interest, to such grain as shall be reshipped within ten days, is within the power of the Interstate Commerce Commission.

[For other cases, see Interstate Commerce Commission; Carriers, III. e, in Digest Sup. Ct. 1908.]

[Nos. 285, 286, and 287.]

Argued October 13 and 18, 1911. Decided November 13, 1911.

A PPEALS from the Circuit Court of the United States for the Western District of Missouri to review a decree enjoining the enforcement of orders by the Interstate Commerce Commission, forbidding the allowance by a carrier to the owner of an elevator for elevating grain in transit in which he has an interest, unless such grain is reshipped within ten days, and unless the elevator owner refrains from using the opportunity presented to treat the grain during the process of elevation. Modified, and, as modified, affirmed.

See same case below, 176 Fed. 409.

The facts are stated in the opinion.

Solicitor General Lehmann argued the cause for the Interstate Commerce Commission.

Mr. P. J. Farrell also argued the cause and filed a brief for the Interstate Commerce Commission:

The contention of the appellees is equivalent to saying that certain provisions of the law may be seized upon and used, regardless of other provisions of the same law, to justify inequalities in the treatment accorded by carriers to shippers, while this court, in speaking of the interstate commerce law as a whole, has repeatedly said that it was enacted for the purpose of preventing such inequalities.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 277, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Union P. R. Co. v. Goodridge, 149 U. S. 680, 690, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405,

16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896; *Wight v. United States*, 167 U. S. 512, 518, 42 L. ed. 258, 260, 17 Sup. Ct. Rep. 822; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 477, 54 L. ed. 280, 290, 30 Sup. Ct. Rep. 155; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392.

No circumstance or condition which does not pertain directly to the carriage of the traffic,—not even competition between different carriers,—can be shown for the purpose of proving that the different shipments are not transported by the carriers under substantially similar circumstances and conditions, because § 2 of the act to regulate commerce, as construed by this court, applies only to the matter of the carriage, and does not include competition between rival routes.

Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 260, 17 Sup. Ct. Rep. 822; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 166, 167, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392.

Mr. Maxwell Evarts argued the cause, and, with Messrs. F. C. Dillard and Henry W. Clark, filed a brief for the United Pacific Railroad Company.

Messrs. Frank Hagerman and John Barton Payne argued the cause, and, with Mr. M. B. Koon, filed a brief for appellees:

Without legislation the power existed for the railroad company to pay for the service rendered by the elevator operator.

Richmond v. Dubuque & S. C. R. Co. 26 Iowa, 200; *People v. Budd*, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 534, 544, 36 L. ed. 247, 252, 255, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Millions are invested in these various

properties and arrangements, and Congress was aware of the fact when it amended the law. Granted that it has the constitutional power to do so, would that body intend or propose to destroy such valuable property rights without some kind of express language to that effect?

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 823.

A discrimination is forbidden by the interstate commerce act. That which is expressly allowed thereby cannot be an undue or illegal discrimination. Such only are forbidden.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 264, 276, 277, 36 L. ed. 699, 700, 703, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37.

The essence of all the decisions is that the positions of the respective persons between whom difference in treatment is made by the carriers must be compared with each other; there must be found to exist substantial identity of situation (or, as to these cases, of service and benefit to the carrier), accompanied by irregularity and partiality of treatment by the carrier, which results in undue advantage to one, or undue disadvantage to another, in order to constitute unjust discrimination.

Traffic Bureau, Merchants' Exch. v. Chicago, B. & Q. R. Co. 14 Inters. Com. Rep. 326; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 283, 36 L. ed. 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Many of the differences herein relied upon as making "substantially different circumstances and conditions" have been discussed by the courts and held sufficient to bring the discrimination outside the statute.

Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169, 61 C. C. A. 405, 125 Fed. 445; *Choctaw, O. & G. R. Co. v. State*, 73 Ark. 373, 84 S. W. 502; *Little Rock & Ft. S. R. Co. v. Hug-gins*, 64 Ark. 432, 43 S. W. 145.

The elevator payments were condemned on the ground that they are not "open to all." Can it be seriously argued, then, because the nonelevator operator has not seen fit to invest a dollar in the facility which the carrier demands, these payments are not open to him?

Evershed v. London & N. W. R. Co. L. R. 3 Q. B. Div. 134; Nicholson v. Great Western R. Co. 1 Nev. & Macn. 121.

Competition which is real and substantial, and exercises a potential influence at a certain point, brings into play the dissimilarity of circumstances and conditions provided by the statute; and the consequent right to deal differently with localities is not destroyed by the mere fact that incidentally a preference or discrimination results.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Clyde S. S. Co. 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003.

Elevator services are necessary to the carriers.

People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 533, 36 L. ed. 247, 251, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Messrs. Frank Hagerman and John Barton Payne also filed a separate brief for appellees:

A common carrier engaged in commerce among the several states is bound to perform the full transportation service, and may engage another, whether shipper or not, to perform for it what it otherwise would be obliged to perform, and make compensation therefor, limited only by the rule that only a reasonable compensation may be paid for the services; and the Interstate Commerce Commission has no power to prohibit payment for such services.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Re Allowances to Elevators, 10 Inters. Com. Rep. 309, 12 Inters. Com. Rep. 86; Re Party Rate Tickets, 12 Inters. Com. Rep. 110; Atchison v. Missouri P. R. 56 L. ed.

Co. 12 Inters. Com. Rep. 114; Consolidated Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 206; American Nat. Live Stock Asso. v. Texas & P. R. Co. 12 Inters. Com. Rep. 36; Merchants' Cotton Press & Storage Co. v. Illinois C. R. Co. 17 Inters. Com. Rep. 99; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Re Unlawful Rates, 8 Inters. Com. Rep. 135; Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 10 Inters. Com. Rep. 213; Laurel Cotton Mills v. Gulf & S. I. R. Co. 84 Miss. 339, 66 L.R.A. 453, 37 So. 134; Cowan v. Bond, 2 Inters. Com. Rep. 542, 39 Fed. 54; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 50; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Denaby Main Colliery Co. v. Mansfield, S. & L. R. Co. L. R. 11 App. Cas. 97; 6 Nev. & Macn. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340; Pidcock v. Manchester, S. & L. R. Co. 9 Nev. & Macn. 45; Tennant v. C. R. Co. 10 Nev. & Macn. 194; Hutchinson, Carr. § 538.

Messrs. Robert Dunlap and Gardiner Lathrop filed a brief for the Atchison, Topeka, & Santa Fé Railway Company:

It is obligatory upon the shipper to remove his goods when the carriage has terminated, or whenever he terminates the same by taking possession of his goods, and he is obliged to be diligent in removing his goods and relieving the cars of the carriers, especially as to carload shipments.

2 Rorer, Railroads, pp. 1286, 1290; Alabama & T. River R. Co. v. Kidd, 35 Ala. 218.

Railway companies are not required to make personal delivery of freight at the warehouse or place of business of consignees.

2 Hutchinson, Carr. 3d ed. § 701.

With reference to bulk freight in carload lots, such as grain, it is well settled that delivery thereof is usually made by placing the car at such a convenient place upon the tracks of the railway company as will permit the shipper to unload the same. The duty of loading and unloading such freight is upon the shipper, as it is merely the duty, in the first instance, to place the same in the custody of the carrier for transportation, and at the terminus to come and take such freight away.

Schumacher v. Chicago & N. W. R. Co. 207 Ill. 212, 69 N. E. 825; Gregg v. Illinois C. R. Co. 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 543; Vaughn v. New York, N. H. & H. R. Co. 27 R. I. 235, 61 Atl. 695; 2 Hutchinson, Carr. 3d ed. § 711; 4 Elliott,

Railroads, 2d ed. § 1521, pp. 247, 248; 2 Rorer, Railroads, pp. 1233, 1282.

When the car of grain is set at the elevator or at such point on the tracks of the railway company that it may be conveniently unloaded, the transportation is ended, a delivery has been effected, and it is the duty of the shipper to unload or take away such freight. The statute is not to be construed as repealing the common law.

State v. Shapiro, 29 R. I. 133, 69 Atl. 340; Langlois v. Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.

Mr. Justice Holmes delivered the opinion of the court:

These are appeals from injunctions issued upon bills brought by the appellees against the enforcement of two orders made by the Interstate Commerce Commission. 176 Fed. 409. The stages by which the Commission came to its present conclusion, against its earlier view, will be found reported in 10 Inters. Com. Rep. 309, 12 Inters. Com. Rep. 85, 14 Inters. Com. Rep. 315. See 14 Inters. Com. Rep. 317, 510, 551. In the circuit court these cases were tried upon the same evidence and they raise the same question; but as the Peavey suit presents that question in its initial and simplest form, we will state the facts of that case first.

The Union Pacific Railroad, after passing through a grain country, has its eastern termini at Omaha and Kansas City, on the Missouri river. Much the greater part, nine tenths, more or less, of the grain gathered and carried by the road, passes beyond the termini, especially to points farther east. During the season the Union Pacific needs all its cars to collect the grain, and therefore wants to get them back as quickly as possible from the end of its line. Furthermore, the shipments eastward are made more profitably in heavier loads than can be collected from the local stations. For these reasons the Union Pacific sought to prevent its own cars being carried beyond the termini, over connecting lines, and to have the grain shifted to other cars. To make the change it is commercially necessary to pass the grain through an elevator, where also it is weighed,—another necessary step in the transportation. See 14 Inters. Com. Rep. 317, 318. An additional consideration is that Omaha and Kansas City are great grain markets, where 44]there are sales largely in excess *of local needs, and this also requires the grain to pass through elevators at these points. If the Union Pacific could not use these instruments of transfer, it could not compete with other roads that have through lines from the grain fields across the Mis-

souri river to the East. See 14 Inters. Com. Rep. 317, 327.

Acting on these motives, the railroad company, in 1899, made a contract in good faith with Peavey, under which he built an elevator at Council Bluffs, on the other side of the river from Omaha. He was to receive not exceeding 1½ cents per hundred pounds for the first ten years, and 1 cent for the next ten, for grain transferred through his elevator. Later another elevator was brought into the arrangement, now with Peavey & Company, a corporation. Peavey & Company, is a large dealer in grain, and receives the same allowance for its own grain that it receives for that of others. It is important to remark that in no case is any additional charge made to the shipper for the elevator service. In 1904 the Interstate Commerce Commission investigated the matter and upheld the contract, including the allowance for Peavey & Company's own grain. 10 Inters. Com. Rep. 309.

The Commission also made a report to Congress, and after further investigation, notwithstanding the fact that the incidental advantages to grain owners from such allowances had been made apparent, Congress passed the act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149. By this it was provided in § 1, amending the earlier statute, that "the term 'transportation' shall include . . . all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to *provide[45 and furnish such transportation upon reasonable request therefor, and to establish through routes," etc. By § 2 the carrier was required to state separately in its schedules all terminal charges and all privileges of facilities granted or allowed, and by § 4, "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered, or for the use of the instrumentality so furnished." Thus, Congress clearly recognized that services such as those rendered by Peavey

& Company, were services in transportation, and were to be paid for notwithstanding the possibility that some advantage might be gained as a result. Meantime other elevators had sprung up, and in 1906 the Union Pacific extended the allowance made to Peavey & Company, to all elevators in Omaha, Council Bluffs, and Kansas City.

But the Interstate Commerce Commission had begun to change its view upon further reflection. In 1907, upon rehearing, it cut down the allowance to Peavey & Company, to $\frac{3}{4}$ of a cent, estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate. 12 Inters. Com. Rep. 85. The order made required the railroad company to desist from paying more than $\frac{3}{4}$ of a cent per hundred pounds, for service rendered in the transfer or elevation of grain at Council Bluffs or Kansas City, to anyone interested in the buying, selling, or shipment of grain at those places, especially naming the appellees. This is one of the orders complained of. The chief object of complaint, however, is an order made in the following year, on June 29, 1908. In that the Commission took the last **46**] step, and ordered the Union Pacific to desist from paying any allowance to Peavey & Company, on grain in which they have any interest that is not reshipped from their elevators within ten days, or that has been mixed, treated, weighed, or inspected in any of their elevators at the above-named points. 14 Inters. Com. Rep. 315.

The ground on which the payment to owners of grain finally was held to be a rebate had been considered from the beginning, and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them, they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which, although not included under the term "elevation," or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and unjust discrimination. Of course, the opportunities for fraud are adverted to, but the ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. As was pointed out by the court below, the final order is confined to grain that has been treated, weighed, inspected, or mixed.

We agree with the court below that this **56** L. ed.

decision is erroneous in its conception of the grounds on which, under the statute, an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Ref. Co. v. Western New York & P. R. Co.* 208 U. S. 208, 221, 52 L. ed. 456, 462, 28 Sup. Ct. Rep. 268. The law does not attempt to equalize fortune, opportunities, or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is *taken for granted in § 15; the only re-**47** striction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 553). As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that $\frac{3}{4}$ of a cent barely would pay the cost of the service rendered, without any reasonable profit to Peavey & Company, for the work. See *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

In the *Diffenbaugh Case* the order of the Commission bore the same date, June 29, 1908, as that against Peavey & Company, and the Union Pacific. It was directed against the Chicago, Burlington, & Quincy Railroad Company and other competitors of the Union Pacific, and forbade their paying any sum as compensation for service rendered in the elevation of grain at Kansas City, Missouri, and other Missouri river points upon their lines. Competition, which was an element in the motives of the Union Pacific, led these other roads to make a similar arrangement. Probably, being through lines, they would not object to the Commission's order if that to the Union Pacific could be sustained. The opinion of Mr. Commissioner Prouty in this case takes somewhat different ground from that on which the orders in the Peavey Case are based. 14 Inters. Com. Rep. 317. See 15 Inters. Com. Rep. 90, 93. See also *H. Gund & Co. v. Chicago, B. & Q. R. Co.* 18 Inters. Com. Rep. 364. Especially it throws doubt upon the allowance being properly a transfer allowance at this pres-

ent day. As the contract with Peavey & Company, purports to be only for grain transferred, it is not necessary to consider 48]*whether elevation could be allowed for as practically necessary under modern conditions, even if the grain did not go on. For the purpose of this case, so much of the order as meets the above-mentioned doubt by confining payments to grain reshipped within ten days seems proper enough, and not open to review on the matter of fact. But when the grain has been treated, the prohibition of an allowance is universal, and therefore the question that we have answered is raised by the record; the question, that is, of the power of the Commission to prohibit such allowances to grain owners in general terms. In this order it was stated expressly that the purpose of the Commission was to prohibit and stop the payment of the elevator allowances everywhere. 14 Inters. Com. Rep. 510, 551.

The Union Pacific made the allowances in question to elevators at its termini; it had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the Diffenbaugh Case were compelled by competition to make the same allowance at Missouri river points, but they also make it nowhere else. The Traffic Bureau, Merchants' Exchange of St. Louis, complained to the Commission that the result was a discrimination against St. Louis of $\frac{1}{4}$ of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore this question of preference between cities does not need to be discussed. But, as remarked below, the Union Pacific could not be complained of on this ground (176 Fed. 424), and it would be impossible to deny the same right to competing roads, merely because, as the result of the conditions, one city would gain and another lose. (Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209).

Although the order cutting down the allowance to *Peavey & Company to the estimated cost may have been influenced by erroneous views touching the powers of the Commission and the elements proper for consideration (see Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678), we are of opinion that no sufficient reason appears for disturbing that. The Commission has decided what compensation is reasonable, and we infer that Peavey & Company would be content under the circumstances to render the service for $\frac{1}{4}$ of a cent per hundred pounds rather than give it up.

The jurisdiction in the Diffenbaugh Case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. 416, 417. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission.

The result is that the decree of the Circuit Court must be affirmed in its main point, but that the Commission's order of 1907, diminishing the allowance to $\frac{1}{4}$ of a cent, and so much of the Peavey order of 1908 as confines allowances to grain reshipped within ten days, should be allowed to stand.

Decree of Circuit Court modified and affirmed.

Mr. Justice McKenna, dissenting:

I am unable to concur in the opinion of the court.

The Commission did not hold that elevation may not properly be furnished by a railroad, or be allowed for to a shipper, but held that "such elevation must be charged for at what it is reasonably worth," and without discrimination. And I understand elevation to mean "the transfer of the grain from the car of the inbound carrier, through an elevator, to the car of the outhound carrier," within a *giv-[50 en period. "In such elevation," Mr. Commissioner Harlan said, and his language I adopt, "there is nothing either preferential or discriminatory, whether done in an elevator operated by the carrier, or in an elevator operated for it by the owner;" but "any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed, or otherwise treated in the process of elevation, is unlawful. As a facility for the convenience of the carrier, free elevation is unobjectionable; but when the owner is permitted to and does use the elevation as a transit privilege for himself, by means of which to secure commercial advantages on his own grain, the result is an unlawful preference and discrimination."

The conclusion is not a misconstruction of the statute. Transportation simply is the business of the railroad company. Weighing, inspecting, cleaning, and mixing, that is, raising the quality of the grain to suit the demand of the market, is the business of the grain dealer or others, and the two businesses are not to be confounded, and it was not, I think, the purpose of the statute to confound them. The statute makes the term "transportation" include "all instrumentalities and facilities of shipment or carriage;" and it is only when the

owner of property renders services "connected with such transportation, or furnishes any instrumentality used therein," that he may be compensated by the railroad. What goes beyond that transcends the statute, and becomes, as the Commission held, a discrimination.

I am authorized to say that Mr. Justice Hughes concurs in this dissent.

51] *ISOBEL H. LENMAN, Appt.,

v.

THOMAS R. JONES.

(See S. C. Reporter's ed. 51-54.)

Specific performance — defense — ignorance of purchaser's identity.

1. Specific performance of a contract for the sale of real property will not be refused, in the absence of fraud, because the vendor was not informed as to the identity of the person for whom the purchase was made, where she knew that the person named in the contract as the vendee was not the real purchaser, and suffered no loss thereby.

[For other cases, see Specific Performance, IV., in Digest Sup. Ct. 1908.]

Specific performance — defense — mistake.

2. The belief of the vendor when signing a contract for the sale of real property, that it merely gave an option, is no defense to a suit for specific performance.

[For other cases, see Specific Performance, IV. c, in Digest Sup. Ct. 1908.]

Evidence — variance — assignment or purchase.

3. An allegation in a suit for the specific performance of a contract for the sale of real property, that the vendee sold all her rights under the contract to complainant, is supported by a contract by which the vendee agreed to sell the land to complainant, and by a deed to him, purporting to be from both vendor and vendee, but signed only by the latter, reciting the transactions on which it is founded.

[For other cases, see Evidence, XIII. b, in Digest Sup. Ct. 1908.]

Appeal — objection not raised below — parties.

4. An objection that the vendee in a contract for the sale of real property is not made a party to a suit for specific performance by a person to whom she afterwards contracted to sell the land is not available to defeat the suit,—especially when first raised on appeal, since such vendee had no

NOTE.—Specific performance as affected by vendor's ignorance of race or character of purchaser—see note to *Cole v. Hunter Tract Improv. Co.* 32 L.R.A.(N.S.) 125.

As to what is sufficient memorandum under statute of frauds—see note to *Barry v. Coombe*, 7 L. ed. U. S. 295.

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real interest in the suit, and the vendor was put in no danger by the decree.

[For other cases, see Appeal and Error, VIII. j. 10, in Digest Sup. Ct. 1908.]

Contracts — statute of frauds — sufficiency of writing.

5. Formal absurdities in a written contract for the sale of land do not make the contract insufficient under the statute of frauds, where it leaves no doubt as to who was the purchaser, who the seller, what the land, or what the terms.

[For other cases, see Contracts, I. e, 5, in Digest Sup. Ct. 1908.]

[No. 19.]

Argued October 27, 1911. Decided November 13, 1911.

A PPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District for the specific performance of a contract for the sale of real property. Affirmed.

See same case below, 33 App. D. C. 7.

The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause and filed a brief for appellant:

A court of equity will not as a matter of course decree specific performance of a contract in writing for the sale of real estate. If not satisfied that the plaintiff is morally as well as legally entitled to relief, it will remit him to a court of law.

Willard v. Tayloe, 8 Wall. 565, 19 L. ed. 503; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224-236, 36 L. ed. 414-419, 12 Sup. Ct. Rep. 632.

Equity will often refuse to decree specific performance of a contract at the suit of one party where it would also refuse to rescind it at the suit of another.

Clark v. Reeder, 158 U. S. 505-531, 39 L. ed. 1070-1079, 15 Sup. Ct. Rep. 849; *Story*, Eq. Jur. § 769.

A misrepresentation as to the party who is buying or selling is fatal, without regard to the respective characters of the real and the pretended party.

New York Brokerage Co. v. Wharton, 143 Iowa, 66, 119 N. W. 969; *Ellsworth v. Randall*, 78 Iowa, 141, 16 Am. St. Rep. 425, 42 N. W. 629; *Rodliff v. Dallinger*, 141 Mass. 1, 55 Am. Rep. 439, 4 N. E. 805; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101.

Even where a plaintiff in a suit in equity has acted in good faith, he cannot claim in one capacity in his bill, and recover in another capacity on the evidence.

Crocket v. Lee, 7 Wheat. 522, 527, 5 L. ed. 513, 514; *Sheehy v. Mandeville*, 7 Cranch, 208, 216, 3 L. ed. 317, 320; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *Eyre v. Potter*, 15 How. 42, 56, 14 L. ed. 592,

598; *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*) 10 Wall. 299, 303, 19 L. ed. 894, 895; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. ed. 566; *Wilson v. Haley Live Stock Co.* 153 U. S. 39, 47, 38 L. ed. 627, 631, 14 Sup. Ct. Rep. 768; *Southern R. Co. v. King*, 217 U. S. 524, 536, 54 L. ed. 868, 872, 30 Sup. Ct. Rep. 594.

The objection of want of parties may be made here for the first time, and may be made by the court if the parties do not make it.

Coiron v. Millaudon, 19 How. 113, 15 L. ed. 575; *Hoe v. Wilson*, 9 Wall. 501, 19 L. ed. 762; *Slacum v. Pomery*, 6 Cranch, 221, 3 L. ed. 205; *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*) 10 Wall. 299, 303, 19 L. ed. 894, 895; *Cragin v. Lovell*, 109 U. S. 194, 200, 27 L. ed. 903, 905, 3 Sup. Ct. Rep. 132; *Barth v. Clise*, 12 Wall. 400, 403, 20 L. ed. 393, 394.

In such a case as this the immediate vendee or vendees must be made party to a bill for specific performance by the last vendee against the original vendor.

McCarthy v. Couch, 37 Minn. 124, 33 N. W. 777; *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220; *Lord v. Underdunk*, 1 Sandf. Ch. 48; *Ward v. Ledbetter*, 21 N. C. (1 Dev. & B. Eq.) 496; *Hoover v. Donally*, 3 Hen. & M. 316; *Vanmeeter v. Williams*, 1 J. J. Marsh. 561.

In order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law.

Barry v. Coombe, 1 Pet. 640, 650, 7 L. ed. 295, 300.

Parol evidence is inadmissible when the transaction is one covered by the statute of frauds.

Mead v. White (*Mead v. Winslow*) 53 Wash. 638, 23 L.R.A.(N.S.) 1197, 132 Am. St. Rep. 1092, 102 Pac. 753; *Osborn v. Phelps*, 19 Conn. 70, 48 Am. Dec. 133; *Lipscomb v. Watrous*, 3 App. D. C. 6.

It is true that, as a general rule, where two courts below have decided questions of fact in the same way, this court will adopt their conclusion. But that rule has many exceptions.

Beyer v. LeFevre, 186 U. S. 119, 46 L. ed. 1082, 22 Sup. Ct. Rep. 765; *Darlington v. Turner*, 202 U. S. 220, 50 L. ed. 1003, 26 Sup. Ct. Rep. 630.

Messrs. J. J. Darlington and Hugh H. Obeare argued the cause and filed a brief for appellee:

It is only where the claim of the complainant under a legal, valid contract is met by some valid, opposing equity that the court's discretion is called into existence.

Pom. Eq. Jur. 3d ed. § 1404; *King v.*

Hamilton, 4 Pet. 328, 7 L. ed. 875; *Godwin v. Collins*, 4 Houst. (Del.) 28; *Popplein v. Foley*, 61 Md. 381; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 600, 41 L. ed. 265, 278, 16 Sup. Ct. Rep. 1173.

Specific performance is granted under the principles of equitable conversion.

Pom. Eq. Jur. §§ 368, 372, 1161, 1406.

The courts of equity act in favor of all persons claiming by assignment under the parties, independent of that privity of contract generally indispensable at law.

Pom. Eq. Jur. § 368; *Willard v. Tayloe*, 8 Wall. 557, 571, 19 L. ed. 501, 505; 26 Am. & Eng. Enc. Law, 125, 126; *Meyer v. Mitchell*, 75 Ala. 480; *Worthington v. Lee*, 61 Md. 535; *Bissell v. Heyward*, 96 U. S. 580-586, 24 L. ed. 678-680; *Ewins v. Gordon*, 49 N. H. 463; *Hunt v. Hayt*, 10 Colo. 282, 15 Pac. 410; *Houé v. Dexter*, 9 Mich. 246; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Fuller v. Bradley*, 160 Ill. 55, 43 N. E. 732; *Melton v. Smith*, 65 Mo. 320; *Pomeroy v. Fullerton*, 113 Mo. 458, 21 S. W. 19; *Randolph v. Wheeler*, 182 Mo. 155, 81 S. W. 419; *Harriman v. Tynedale*, 184 Mass. 539, 69 N. E. 353; *Story*, Eq. Jur. §§ 783, 1040, 1056, 1057a; *Currier v. Howard*, 14 Gray, 513; *Griffith v. Stewart*, 31 App. D. C. 29, affirmed in 217 U. S. 323, 54 L. ed. 782, 30 Sup. Ct. Rep. 528, 19 A. & E. Ann. Cas. 639.

It would be practically destructive of this branch of equity jurisdiction in all cases if the law were that one of the parties could defeat it simply by claiming that he thought the agreement, though a perfect and a complete instrument, binding upon both parties, was merely an option.

No variance is deemed to be material unless it be of a character to mislead the opposing party in maintaining his action of defense on the merits.

Grayson v. Lynch, 163 U. S. 476, 41 L. ed. 233, 16 Sup. Ct. Rep. 1064; *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527; *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 238, 44 L. ed. 451, 20 Sup. Ct. Rep. 380; *Campbell v. Bowles*, 30 Gratt. 656; *Burt v. C. Gotzian & Co.* 43 C. C. A. 59, 102 Fed. 944.

A conveyance by the original vendee to A is, in legal effect, and for every purpose, an assignment of the contract between himself and his own vendor.

Buchannon v. Upshaw, 1 How. 56, 11 L. ed. 46; *Stratton v. California Land & Timber Co.* 86 Cal. 353, 24 Pac. 1065; *Meyer v. Mitchell*, 75 Ala. 480; *Worthington v. Lee*, 61 Md. 535; *Currier v. Howard*, 14 Gray, 513; *Hunt v. Hayt*, 10 Colo. 282, 15 Pac. 410; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Randolph v. Wheeler*, 182

Mo. 155, 81 S. W. 419; *Harriman v. Tynedale*, 184 Mass. 539, 69 N. E. 353.

An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised and passed on by the court below.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 575, 40 L. ed. 540, 16 Sup. Ct. Rep. 389; *Chicago, I. & L. R. Co. v. McGuire*, 196 U. S. 131, 132, 49 L. ed. 415, 417, 25 Sup. Ct. Rep. 200.

The vendee is not a necessary party to a suit by the assignee against the vendor for specific performance.

Miller v. Whittier, 32 Me. 203; *Betton v. Williams*, 4 Fla. 11.

And the converse, that, in an action by the vendee against the assignee or grantee of the vendor, the vendor himself is not a necessary party, has been held in *Noonan v. Orton*, 4 Wis. 336; *Topeka Water Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, 52]affirming a decree of the supreme *court for the specific performance of a contract for the sale of land. 33 App. D. C. 7. The appellant was the owner of the land by inheritance, subject to the dower of her mother, who has died pending this cause. After some previous offers, Early & Lampton, real estate brokers in Washington, understanding that the defendant would take \$200,000, prepared a document which the defendant, after some consultation with others, signed. So far as material it is as follows:

Office of Early & Lampton,
Real Estate and Loan Brokers,
615 14th Street, N. W.

Washington, D. C., May 2d, 1905.

Received of Fannie E. Wilhoite a deposit of one hundred (\$100) dollars, to be applied to part payment of purchase of sublots 4, 5, 6, and 7, square 222, known as the Lenman Building, sold her for two hundred thousand dollars net on following terms [with details as to payment, title, time, etc.].

Early & Lampton,
Agents for Fannie E. Wilhoite.

Confirmed, ratified, and approved:

Isobel H. Lenman (Owner).

Fannie E. Wilhoite.

Fannie E. Wilhoite (Purchaser).

Per E. & L.

figurehead used by the brokers, and to have played merely a formal part.

The next day Mrs. Wilhoite signed an instrument in similar form, acknowledging the receipt of \$500 from the appellee, part payment for the same land, sold to him for \$213,250, cash, the purchaser to make full settlement within five days from date. The terms varied from those in the first paper, by which \$150,000, payable in three years, was to be secured by deed of trust. But there is no trouble on that score, as the appellee simply is trying to hold the appellant to her own terms. Mrs. Wilhoite subsequently executed a deed to the appellee, although it never was acknowledged or recorded. Demand and tender have been made, but the appellant has refused and refuses to perform, and the appellee brought this bill.

*We will deal with the grounds for [53 the refusal in the order in which they were presented. In the first place it was said that the conduct of the appellee and those under whom he claims precludes him from equitable relief. This needs no discussion. Even if it were true, as suggested, but not found or proved, that when the bargain with the defendant was made, the appellee, Jones, was behind the brokers, and a trust company of which he was president was behind him, and that the defendant was not informed of the facts, she could not complain. It is apparent from her own testimony that she knew that Mrs. Wilhoite was only a figurehead, and the most that can be contended is that she thought that another person, not the appellee, most probably was the real man. It does not matter that she did. She suffered no loss, and, moreover, Mr. Jones and his company were under no obligation to disclose their interest, in the absence of fraud, which there is not the slightest ground to suggest. It also is urged that the defendant, when she signed the instrument, thought that it merely gave an option. This is an immaterial afterthought. If she did not know what she was doing, she had only herself to thank, but no even one-sided mistake is proved.

Some slight support for the preceding objection is sought also in the second ground upon which it is argued that the court erred. The bill alleges that Mrs. Wilhoite sold to the plaintiff, the appellee, all her rights under her contract with the appellant, and it now is urged that Jones was not an assignee, but a subpurchaser, and cannot recover on the allegations of the bill as they stand. There is a suggestion, as little warranted as those that we have mentioned, that the form of the bill also manifests bad faith. But the argument is mainly on the technical point that the

Mrs. Wilhoite seems to have been a
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proofs fail to sustain the allegations. We do not see the failure. When Mrs. Wilhoite contracted to sell the land, she contracted to transfer all the rights she got 54]* by her contract with the owners of the land. As she, in popular legal language, became the equitable owner by her contract, she made the appellee the equitable owner by her contract with him,—that is, she gave him the right to insist in her place that the legal owner should give up the legal estate upon fulfilment of the conditions agreed. The deed from Mrs. Wilhoite, although purporting to be made by Miss Lenman and her, reciting the transactions on which it is founded, would be sufficient to satisfy the allegations of the bill in the strictest sense. True, it purports to convey the land, but thereby it conveys all of Mrs. Wilhoite's rights in and to the land. It was executed by Mrs. Wilhoite in aid of the enforcement of Miss Lenman's agreement, and therefore is not to be read as conditional upon the signature of Miss Lenman. See *Buchannon v. Upshaw*, 1 How. 56, 11 L. ed. 46.

The foregoing considerations afford an answer to the third objection, that Mrs. Wilhoite is not made a party to the suit, in view of the fact that it was not taken in the pleadings, or, so far as appears, before the argument in the court of appeals. Mrs. Wilhoite has no real interest, and it is clear that the appellant is put in no danger by the decree. The point is urged as an afterthought, and no end of justice would be served by allowing it to prevail.

Finally it is said that the instrument sued upon does not satisfy the statute of frauds. D. C. Code, § 1117 [31 Stat. at L. 1367, chap. 854]. This is a desperate contention, like the rest. There are certain formal absurdities in the document, but it leaves no doubt in the mind of either lawyer or layman as to who was purchaser, who seller, what the land, or what the terms. Upon the whole case, without further discussion, we are of opinion that the plaintiff is entitled to prevail.

Decree affirmed.

55] *KALEM COMPANY, Appt.,

v.

HARPER BROTHERS. Marc Klaw, Abraham Erlanger, and Henry L. Wallace.

(See S. C. Reporter's ed. 55-63.)

Copyright — dramatization — moving pictures.

1. The public exhibition of moving pictures of the incidents of a copyrighted book constitutes an infringement of the exclu-

sive right given to the author by U. S. Rev. Stat. § 4952, as amended by the act of March 3, 1891 (26 Stat. at L. 1106, chap. 565, U. S. Comp. Stat. 1901, p. 3406), to dramatize his work.

Copyright — contributory infringement — moving picture films.

2. The makers of moving picture films of the incidents of a copyrighted book, who sell the same with a view to their use for dramatic reproduction, infringe the exclusive right given to the author by U. S. Rev. Stat. § 4952, as amended by the act of March 3, 1891, to dramatize his work.

Copyright — power of Congress — moving pictures.

3. Construing the exclusive right given to authors by U. S. Rev. Stat. § 4952, as amended by the act of March 3, 1891, to dramatize their works, as extending to the public exhibition of moving pictures of the incidents of a copyrighted work, does not render the statute invalid, as exceeding the power given to Congress by U. S. Const. art. 1, § 8, to secure to authors for a limited time the exclusive right to their writings.

[No. 26.]

Argued October 31 and November 1, 1911.

Decided November 13, 1911.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, enjoining the infringement of the copyright in a book by the public exhibition of moving pictures of its incidents. Affirmed.

See same case below, 94 C. C. A. 429, 169 Fed. 61.

The facts are stated in the opinion.

Messrs. John W. Griggs and Drury W. Cooper argued the cause and filed a brief for appellant:

Copyright does not monopolize the intellectual conception, but only the form of expression adopted by the author.

Holmes v. Hurst, 174 U. S. 82, 86, 43 L. ed. 904, 906, 19 Sup. Ct. Rep. 606; *White-Smith Music Pub. Co. v. Apollo Co.* 209 U. S. 1, 16, 17, 52 L. ed. 655, 661, 662, 28 Sup. Ct. Rep. 319, 14 A. & E. Ann. Cas. 628; *Stowe v. Thomas*, 2 Wall. Jr. 547, Fed. Cas. No. 13,514; *Baker v. Selden*, 101 U. S. 99, 25 L. ed. 841; *Johnson v. Donaldson*, 18 Blatchf. 287, 3 Fed. 22; *Perris v. Hexamer*, 99 U. S. 674, 676, 25 L. ed. 308, 309; *Bohbs-Merrill Co. v. Straus*, 210 U. S. 339, 347, 52 L. ed. 1086, 1092, 28 Sup. Ct. Rep. 722; *Millar v. Taylor*, 4 Burr. 2331; *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784; *Bennett v. Carr*, 37 C. C. A. 453, 96 Fed. 213.

A moving-picture film, whether made by

a modern rapid-fire camera or by the ancient and laborious process of taking, or drawing, and collating pictures of objects in successive positions, is a picture.

Edison v. Lubin, 58 C. C. A. 604, 122 Fed. 240; American Mutoscope & Biograph Co. v. Edison Mfg. Co. 137 Fed. 262; United States v. Berst, 175 Fed. 121.

The courts have had occasion to investigate the history of this art, and have found that old and new ways of producing the pictures did not show different results in the respect stated.

Edison v. American Mutoscope Co. 52 C. C. A. 546, 114 Fed. 926.

A corollary of the general rule that excludes our pictures from the charge of infringement is, that a person may utilize the ideas portrayed in a copyrighted publication, provided he bestows upon his own writings such skill and labor as to produce an original result.

Folsom v. Marsh, 2 Story, 115, Fed. Cas. No. 4,901; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335, 14 A. & E. Ann. Cas. 501; Morris v. Wright, L. R. 5 Ch. 279, 22 L. T. N. S. 78, 18 Week. Rep. 327; West Pub. Co. v. Lawyers' Co-op. Pub. Co. 25 L.R.A. 441, 64 Fed. 360, 35 L.R.A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756; Edward Thompson Co. v. American Law-book Co. 130 Fed. 639, 85 C. C. A. 677, 157 Fed. 1003.

Our contention that the copyright on the book is not infringed by the making and publication of pictures of the characters, actions, and scenes described, seems to find full support in the decisions upon the relation borne by phonograph records and perforated records for automatic musical instruments to copyrighted musical compositions.

Kennedy v. McTammany, 33 Fed. 584; White-Smith Music Pub. Co. v. Apollo Co. 77 C. C. A. 368, 147 Fed. 226, 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319, 14 A. & E. Ann. Cas. 628; Boosey v. Wright [1900] 1 Ch. 122, 69 L. J. Ch. N. S. 66, 48 Week. Rep. 228, 81 L. T. N. S. 571, 16 Times L. R. 82; Stern v. Rosey, 17 App. D. C. 562.

These pictures constitute in the highest, most artistic sense, "the personal reaction of an individual upon nature" (Bleistein v. Donaldson Lithographing Co. 188 U. S. 250, 47 L. ed. 462, 23 Sup. Ct. Rep. 298).

They do not fulfil the definition of a copy—"that which will provide a substitute for the whole or a substantial part of the original book" (Macgillivray, Copyright, p. 97).

That it was not intended by the Congress that a photograph could be an infringement
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upon a copyrighted book or drama is clear from the care exercised in framing the statute to distinguish the former from both of the latter. Now, since the plain line of demarcation has been thus preserved by the lawmakers, it is open to the courts to divert or overstep it by holding the picture, however used, to be a book, or a drama, simply because both are forms of writing, or because the picture is exhibited in a place of dramatic entertainment? The question carries its own answer.

Littleton v. Oliver Ditson Co. 62 Fed. 597, 15 C. C. A. 61, 33 U. S. App. 114, 67 Fed. 905; Wood v. Abbott, 5 Blatchf. 325, Fed. Cas. No. 17,938; Stowe v. Thomas, 2 Wall. Jr. 547, Fed. Cas. No. 13,514; Hills & Co. v. Austrich, 120 Fed. 862.

The exhibition of the pictures arranged upon a film which is, during all the time of its use, a part of a machine, is not an infringement of the book copyright.

White-Smith Music Pub. Co. v. Apollo Co. 77 C. C. A. 368, 147 Fed. 227, 209 U. S. 1, 52 L. ed. 655, 659, 28 Sup. Ct. Rep. 319, 14 A. & E. Ann. Cas. 628; Stern v. Rosey, 17 App. D. C. 562.

Such exhibition of the pictures is not a public "performance" or representation in violation of the dramatic copyright act.

Drone, Copyright, pp. 587-589; Russell v. Smith, 12 Q. B. 236, 17 L. J. Q. B. N. S. 225, 12 Jur. 723; Brackett, Theatrical Law, p. 54; Lee v. Simpson, 3 C. B. 871, 4 Dowl. & L. 666, 16 L. J. C. P. N. S. 105, 11 Jur. 127; Day v. Simpson, 18 C. B. N. S. 680, 34 L. J. Mag. Cas. N. S. 149, 11 Jur. N. S. 487, 12 L. T. N. S. 386, 13 Week. Rep. 748.

Similarities in the plots and scenic similarities are only material upon the question of the way the copy is taken; and, in the absence of copying the dialogue, those elements do not constitute infringement.

Scholz v. Amasis, Law Times, May 19, 1909; Tate v. Fullbrook [1908] 1 K. B. 821, 77 L. J. K. B. N. S. 577, 98 L. T. N. S. 106, 24 Times L. R. 347, 52 Sol. Jo. 279; Chatterton v. Cave. L. R. 3 App. Cas. 483, 47 L. J. C. P. N. S. 545, 38 L. T. N. S. 397, 26 Week. Rep. 498; Hanfstaengl v. Baines [1895] A. C. 20.

The defendant's film of pictures is not a "dramatic composition," and its exhibition has none of the attributes of the drama, save that it is a spectacle that attracts patronage at an admission fee. But that is true of a circus, of an exhibition of legerdemain, of a dance in costume, accompanied by a series of poses, or of a purely mechanical arrangement simulating a river, into which a person falls from a bridge. All of these cases the courts have distinguished from dramatic performances.

Harris v. Com. 81 Va. 240, 59 Am. Rep. 666; *Jacko v. State*, 22 Ala. 73; *Fuller v. Bemis*, 50 Fed. 926; *Carte v. Duff*, 23 Blatchf. 347, 25 Fed. 183; *Serrana v. Jefferson*, 33 Fed. 347.

Were the question less clear than it is, upon the facts, we would rely with confidence upon the repeated decisions of this court, that the copyright statutes are to be construed strictly, and not stretched by resort to equitable considerations.

Banks v. Manchester, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36; *Bolles v. Outing Co.* 175 U. S. 262, 268, 44 L. ed. 156, 158, 20 Sup. Ct. Rep. 94; *Higgins v. Keuffel*, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; *Thompson v. Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 26, 32 L. ed. 837, 842, 9 Sup. Ct. Rep. 409.

In any event, defendant is not an infringer, direct or contributory.

Russell v. Briant, 8 C. B. 848, 19 L. J. C. P. N. S. 33, 14 Jur. 201; *Harper v. Shoppell*, 23 Blatchf. 431, 26 Fed. 519; *Canda v. Michigan Malleable Iron Co.* 61 C. C. A. 194, 124 Fed. 486.

If the statute be construed to prohibit the making or the exhibition in theaters of the pictures, it is unconstitutional.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 58, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. ed. 550, 551; *Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. ed. 470, 471, 11 Sup. Ct. Rep. 731; *Holmes v. Hurst*, 174 U. S. 82, 86, 43 L. ed. 904, 906, 19 Sup. Ct. Rep. 606; *Wheaton v. Peters*, 8 Pet. 676, 681, 8 L. ed. 1086, 1088; *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. ed. 23, 68; *American Tobacco Co. v. Werckmeister*, 207 U. S. 291, 52 L. ed. 214, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595.

If an act of Congress admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction, because the presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority unless that conclusion is forced upon the court by language altogether unambiguous.

United States v. Coombs, 12 Pet. 72, 75, 9 L. ed. 1004, 1005; *Grenada County v. Brogden*, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038.

Mr. David Gerber argued the cause and filed a brief for appellees Klaw and Erlanger:

Appellant is a contributing infringer.

Harper v. Shoppell, 28 Fed. 613.

A public representation of a substantial part of complainants' copyrighted book is a violation of their exclusive right to dramatize the novel, and of their sole liberty of publicly performing or representing it, or causing it to be performed or used by others.

Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552; *Daly v. Webster*, 4 C. C. A. 10, 1 U. S. App. 573, 56 Fed. 483; *Drone, Copyright*, pp. 588, 590-596, 627-629, 634; *Lee v. Simpson*, 3 C. B. 881, 4 Dowl. & L. 666, 16 L. J. C. P. N. S. 105, 11 Jur. 127; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, 510; 2 *Morgan, Literature*, ¶ 294, p. 287, ¶ 313, p. 334, p. 680, § 459; *Brackett, Theatrical Law*, §§ 50-55, 99, 100; *Wandell, Theater*, pp. 448, 503; *Macgillivray, Copyright*, pp. 276, 277; *American Mutoscope & Biograph Co. v. Edison Mfg. Co.* 137 Fed. 262; *Bracken v. Rosenthal*, 151 Fed. 136.

It is somewhat late in the day to contend that the statute is unconstitutional because a stage representation of a dramatic composition is not a copy of the "writing" of the author.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279.

Unless the copyright statute is broad enough to cover any adaptation which contains the plot or theme of the story, it is wholly ineffective.

Dam v. Kirk La Shelle Co. — L.R.A. (N.S.) —, 99 C. C. A. 392, 175 Fed. 902, 20 A. & E. Ann. Cas. 1173.

The statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work.

American Tobacco Co. v. Werckmeister, 207 U. S. 284-299, 52 L. ed. 208-217, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595.

Mr. John Larkin argued the cause and filed a brief for appellee Harper & Brothers:

Circumlocution and method did not save the defendant in *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, 510.

The following are the leading authorities supporting the complainants' claim to the protection of the court:

Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552; *Daly v. Webster*, 4 C. C. A. 10, 1 U. S. App. 573, 56 Fed. 483.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree restraining an alleged infringement of the copyright upon the late General Lew Wallace's book "Ben Hur." 94 C. C. A. 429, 169 Fed. 61. The case was heard on the pleadings and an agreed statement of facts, and the only issue is whether those facts constitute an infringement of the copyright upon the book. So far as they need to be stated here they are as follows: The appellant and defendant, the Kalem company, is engaged in the production of moving-picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest, from a coronation to a prize fight, is presented to the public with almost the illusion of reality,—latterly even color being more or less reproduced. The defendant employed a man to read Ben Hur and to write out such a description or scenario of certain portions that it could be followed in action; these portions giving enough of the story to be identified with ease. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell 61] for *use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title "Ben Hur." "Scenery and Supers by Pain's Fireworks Company, Costumes from Metropolitan Opera House. Chariot Race by 3d Battery, Brooklyn. Positively the Most Superb Moving Picture Spectacle Ever Produced in America, in Sixteen Magnificent Scenes," etc., with taking titles, culminating in "Ben Hur Victor." It sold the films and public exhibitions from them took place.

The subdivision of the question that has the most general importance is whether the public exhibition of these moving pictures infringed any rights under the copyright law. By Rev. Stat. § 4952, as amended by the act of March 3, 1891, chap. 565, 26 Stat. at L. 1106, U. S. Comp. Stat. 1901, p. 3406, authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of Ben Hur, this copyright was infringed. We are of opinion that Ben Hur was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emo-

tion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art. *Daly v. Palmer*, 6 Blatchf. 256, 264, Fed. Cas. No. 3,552. But if a pantomime of Ben Hur, would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass, and not by direct vision of the figures,—as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed, but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression—what we see—is caused by the real pantomime *of real men[62 through the medium of natural forces, although the machinery is different and more complex. How it would be if the illusion of motion were produced from paintings instead of from photographs of the real thing may be left open until the question shall arise.

It is said that pictures of scenes in a novel may be made and exhibited without infringing the copyright, and that they may be copyrighted themselves. Indeed, it was conceded by the circuit court of appeals that these films could be copyrighted, and, we may assume, could be exhibited as photographs. Whether this concession is correct or not, in view of the fact that they are photographs of an unlawful dramatization of the novel, we need not decide. We will assume that it is. But it does not follow that the use of them in motion does not infringe the author's rights. The most innocent objects, such as the mirror in the other case that we have supposed, may be used for unlawful purposes. And if, as we have tried to show, moving pictures may be used for dramatizing a novel, when the photographs are used in that way, they are used to infringe a right which the statute reserves.

But again, it is said that the defendant did not produce the representations, but merely sold the films to jobbers, and on that ground ought not to be held. In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. It has been held that mere indifferent supposition or knowledge on the part of the seller that the buyer of spirituous liquor in contemplating such unlawful use is not enough to connect him with the possible unlawful consequences (*Graves v. Johnson*, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383), but that if the sale

was made with a view to the illegal resale, the price could not be recovered (*Graves v. Johnson*, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818). But no such niceties are involved here. The defendant not only expected but invoked by 63]advertisement *the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement, it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law. *Rupp & W. Co. v. Elliott*, 65 C. C. A. 544, 131 Fed. 730, 732; *Harper v. Shoppell*, 28 Fed. 613. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 433, 38 L. ed. 500, 503, 14 Sup. Ct. Rep. 627.

It is argued that the law, construed as we have construed it, goes beyond the power conferred upon Congress by the Constitution, to secure to authors for a limited time the exclusive right to their writings. Art. 1, § 8, cl. 8. It is suggested that to extend the copyright to a case like this is to extend it to the ideas, as distinguished from the words in which those ideas are clothed. But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate, and well-known form of reproduction. If to that extent a grant of monopoly is thought a proper way to secure the right to the writings, this court cannot say that Congress was wrong.

Decree affirmed.

SOUTHERN PACIFIC COMPANY, Plff. in Err.,
v.

COMMONWEALTH OF KENTUCKY ON
RELATION OF GEORGE H. ALEXAN-
DER et al., Revenue Agent.

(See S. C. Reporter's ed. 63-77.)

Taxation — of vessels — situs.

1. The right to select the name of the place of enrolment, the place where the vessel was built, or the place where the owner resides, as the place to be marked upon the stern as the home port, given the owner by U. S. Rev. Stat. §§ 4141, 4178, U. S. Comp. Stat. 1901, pp. 2808, 2830, as amended by the act of June 23, 1874 (18 Stat. at L. 252, chap. 467), does not confer the arbi-

NOTE.—As to the situs of vessels for taxation purposes—see notes to *Johnson v. De Bary-Baya Merchants Line*, 37 L.R.A. 518, and *North American Dredging Co. v. Taylor*, 29 L.R.A. (N.S.) 105.

trary right upon the owner to select a place for the taxation of his vessel.

[For other cases, see *Taxes*, 335-337, in Digest Sup. Ct. 1908.]

Constitutional law — taxation of vessel — situs.

2. Making the domicile of the corporate owner of ocean-going steamships the situs for taxation, where such vessels have acquired no actual situs elsewhere, is not inconsistent with the due process of law guaranteed by the 14th Amendment to the Federal Constitution.

[For other cases, see *Constitutional Law*, 533-540, in Digest Sup. Ct. 1908.]

Taxation — of vessel — situs.

3. The inability of vessels, by reason of draught, or the depth of water, to go to the situs of the domicile of the owner, does not prevent their taxation at that domicile, where they have gained no actual situs elsewhere.

[For other cases, see *Taxes*, 335-337, in Digest Sup. Ct. 1908.]

Taxation — of ocean-going steamships — situs.

4. Ocean-going steamships owned by a Kentucky corporation, and plying between the ports of New York and New Orleans, New York and Galveston, and New Orleans and Havana, are taxable in Kentucky, the domicile of the owner, although the vessels are enrolled at the port of New York, and carry the words "New York" on their sterns, these facts not being sufficient to give the vessels an actual situs in New York.

[For other cases, see *Taxes*, 335-337, in Digest Sup. Ct. 1908.]

[No. 247.]

Argued October 11 and 12, 1911. Decided
November 13, 1911.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which reversed a judgment of the Jefferson Circuit Court, reversing a judgment of the Jefferson County Court, assessing for taxation ocean-going steamships owned by a Kentucky corporation. Affirmed.

See same case below, 134 Ky. 417, 120 S. W. 311, 20 A. & E. Ann. Cas. 965.

The facts are stated in the opinion.

Messrs. Alexander Pope Humphrey and Maxwell Evarts argued the cause and filed a brief for plaintiff in error:

There can be no doubt that steamships, like other personal property, are subject to state taxation, and that such taxation is not a burden on interstate commerce.

Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100.

As to real estate, it was never doubted

that the taxing laws of a state could have no extraterritorial force. It has now come to be settled law that the same is true as to personal property.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 342, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 195, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

The problem to be solved in each case is this: Is there a situs of the ships in the state which is attempting to tax them?

Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100; *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

The actual situs of property determines where a tax thereon should be imposed, upon the theory that protection is the ground and reason for taxation.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

There is no case decided by this court which holds that a ship in the coastwise trade can be taxed by an inland state within whose jurisdiction it is a physical impossibility for it ever to come. Further than that, in its later decisions this court has favored the rule of reason and common sense, *viz.*, that ships should not be taxed in the artificial situs of the domicile of the owner, but in their actual situs,—where they received the protection of the taxing power.

Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100; *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

Mr. Matt J. Holt argued the cause, and, with Mr. Joseph Selligman, filed a brief for defendant in error:

It is true as to tangible property that the Supreme Court of the United States

has said that it cannot be taxed by this state if permanently located in and in use in another state (*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493). But no court has ever said that this or any other state cannot tax the intangible property of its citizens.

It is true intangible property in use in another state, as money loaned and re-loaned, may be taxed by that state, although the owner may reside elsewhere (*Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732; *Com. v. Dun*, 126 Ky. 108, 10 L.R.A.(N.S.) 920, 102 S. W. 859); but there is no decision that the state cannot tax its own citizen on his intangible property, even though the loans are in other states, or the investment is secured by property in another state.

If the owner of personal property within a state resides in another state, which taxes him for that property as part of his general estate, attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also.

Coe v. Errol, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475.

Ocean-going steamships are taxable at the owner's domicile.

Ayer & L. Tie Co. v. Kentucky, 202 U. S. 421, 424, 50 L. ed. 1086, 1088, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205, reversing 117 Ky. 161, 77 S. W. 686; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100; *North American Dredging Co. v. Taylor*, 29 L.R.A.(N.S.) 105, note.

Mr. Justice Lurton delivered the opinion of the court:

The question arising upon this writ of error is, whether certain steamships owned by the Southern Pacific Company, a corporation of the state of Kentucky, are taxable in Kentucky as property having a taxable situs there.

The Southern Pacific Company is a corporation organized under a special act of the general assembly of Kentucky of March 17, 1884. Acts of 1883-84, p. 725. Very wide and diverse powers are thereby conferred, among them being the right to own, lease, maintain, and operate railroads, telegraphs, and steamships, though prohibited from owning, leasing, or operating "any

railroad within the state of Kentucky." By an act of March 21, 1888, the act of March 17, 1884, was amended by adding thereto the following: "Except subject to and in conformity with the provisions of the laws of the state of Kentucky applicable to railroads, and acquiring no special rights that may be possessed by any railroads in the state, except the general and ordinary rights of common carriers as possessed by railroads generally." The company is required to keep its principal office in the state, with power to open other offices at places outside of the state, as its business may make convenient.

By virtue of the authority conferred, the company has acquired and is operating a line of railway from New Orleans and Galveston to San Francisco and Portland, to say nothing of connecting lines in the same region, either owned, leased, or controlled through stock domination. It also owns and operates a line of twenty steamships between the ports of New York and New Orleans, New York and Galveston, and New Orleans and Havana, Cuba. Auxiliary to these ships it also owns barges, tugs, and ferryboats, which operate exclusively in the harbors of the ports mentioned. These tugs, barges, etc., were held to have acquired a permanent situs in such ports, under the ruling in *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, and in this the state of Kentucky acquiesced, leaving open only the question of the taxable situs of the ocean-going steamships.

All of these ships are enrolled at the port of New York, and carry on their sterns the words "New York," as required by the statute. Two of them sail between New Orleans and Havana, five between New York and New Orleans exclusively, and thirteen interchangeably between New York and New Orleans, and New York and Galveston, Texas. The enrolment at New York, and the marking of the name of that port upon the stern of these vessels, is only of importance upon the question of an actual situs at New York. The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port which is neither his domicile nor the domicile of actual situs. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; 68]**Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. 686, 3 A. & E. Ann. Cas. 1100; *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

Sections 4141 and 4178, Revised Statutes (U. S. Comp. Stat. 1901, pp. 2808, 98

2830), as amended by the act of June 23, 1874 (18 Stat. at L. 252, chap. 467), give to an owner the right to mark upon the stern of his vessel either the name of the place of enrolment, the place where the vessel was built, or the place where the owner resides.

As the place of enrolment is not of itself determinative of the place of taxation, it is obvious that the right to select a place to be marked upon the stern as a place of hail, or home port, does not confer the arbitrary right upon the owner of selecting a place for the taxation of his vessel. To give to the statute this construction, said this court in *Ayer & L. Tie Co. v. Kentucky*, cited above, "would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel, in defiance of the law of domicile, and in disregard of the principle of actual situs."

Since, therefore, an artificial situs for purposes of taxation is not acquired by enrolment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation, has its foundation in the protection which the owner receives from the government of his residence; and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government. Thus, in *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 430, 20 L. ed. 192, 194, this court, after referring to the taxing power of a state as extending to all persons and property within its territorial jurisdiction, said:

*"In the eye of the law, personal property, for most purposes, has no locality. . . . In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wherever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal

property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one state, situate in another, can be taxed in the former, is a question which, in this case, we are not called upon to decide."

The question thus reserved was decided adversely to the state of domicile in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

The persistence with which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessels had an actual situs elsewhere, is illustrated by the cases of *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, and the case of *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

In *Hays v. Pacific Mail S. S. Co.* it appeared that the ships of the company were the property of a New York corporation, and that they were registered at the port of New York, where the capital represented by them was assessed for taxation. They were regularly and continuously employed on the Pacific coast, and were refitted 70]*and repaired from time to time at Benicia, in the state of California. Concerning these ships, which the state of California sought to tax, upon the theory that they had an actual situs in that state, this court said:

"These ships are engaged in the transportation of passengers, merchandise, etc., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the general government, to which belongs the regula-

tion of commerce with foreign nations and between the states.

"Now, it is quite apparent that if the state of California possessed the authority to impose the tax in question, any other state in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can effect the question as to the situs of the property, in view of the right of taxation by the state.

"Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage *or business, [71 several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port."

In *St. Louis v. Wiggins Ferry Co.*, cited above, the steamboats in question were owned by an Illinois corporation, which had its principal office within that State. They were enrolled at the port of St. Louis, where the principal officers of the company resided, and where an office was maintained, in which the corporate meetings were held, and where the corporate seal was kept. That they were enrolled at St. Louis, the court said, "throws no light upon the subject of our inquiry. . . . The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrolment." The steamers were taxed in Illinois, and were held not subject to taxation in St. Louis. Upon this subject the court said:

"The owner was, in the eye of the law, a citizen of that state, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its

personal property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."

In *Morgan v. Parham*, the vessel was owned and registered in New York, but entered as a coaster at Mobile, "where her master resided, and where there was an office and agent under the control of a superior agent residing at New Orleans, who employed and paid the other officers and men of the ships. There was also a wharf at Mobile, controlled and occupied by the vessels of the line. The vessels were engaged in commerce between Mobile and New Orleans, and have been so continuously for several years. The court held that the state of Alabama had no jurisdiction over the vessels for the purpose of taxation, for the reason that they had not become incorporated into the personal property of that estate, but were there temporarily only, and that they were engaged in lawful commerce between the states, and their situs at the home port of New York, where they belonged, and where their owners were liable to be taxed for their value.

The case of *Old Dominion S. S. Co. v. Virginia* affords an instance of where the domicile of the owner as a taxing situs was held to have been lost and a new taxing situs acquired by reason of a permanent location within another jurisdiction. But in that case the judgment was rested upon the fact that the vessels had for years been continuously and exclusively engaged in the navigation of the Virginia waters, which state had thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory.

Coming, now, to the last utterance of this court, the case of *Ayer & L. Tie Co. v. Kentucky*, we find a complete authority for upholding the assessability of these steamers by the state of Kentucky. The boats there in question were engaged in interstate commerce between the ports of Kentucky, Illinois, Mississippi, Tennessee, and Arkansas. They were owned by an Illinois corporation which has its principal office at Chicago, where taxes had been paid under the laws of the state, both to the state and to the city. Brookfield, in the extreme south-⁷³ern part of the state, and upon the Ohio river, was a port of call, and an office was probably maintained there, it being a place where cargoes were often discharged. The general manager of the transportation department of the company resided in Kentucky, and the boats of the fleet were enrolled at Paducah in that state, and bore upon their sterns the name "Paducah," as

the home port or port of hail under the statute. Paducah was the place where the boats received their supplies and repairs, where seamen were hired and laid up when not in use, though it seems that Paducah was not a point where cargo was either received or discharged. Upon this state of facts it was held that the boats of the company had neither such artificial situs through enrolment or the marking upon their sterns, nor such actual situs by reason of the temporary stoppage at Paducah and other ports of the state, as to draw to it jurisdiction for purposes of taxation. The result of the previous decisions was there summed up, the court saying:—

"The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrolment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a state other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

It has been urged that the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 195, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493, lays down the principle that jurisdiction to impose taxes upon tangible property is, under the 14th Amendment, wholly dependent upon the actual situs of the property taxed, and that the fiction which gives movables the situs of the owner for purposes of taxation is inconsistent with that due process of law⁷⁴ guaranteed under that Amendment. The question for decision in that case, as stated in the forepart of the opinion, was, "whether a corporation organized under the law of Kentucky is subject to taxation upon its property *permanently located in other states*, and employed there in the prosecution of its business." The property in question was railroad cars, a kind of movables obviously capable of acquiring a permanent location other than that of the owner. The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicile of the owner would be a denial of due process of law, and beyond the power of the state. The principle was not a new one, and was declared to rest upon repeated judgments of this court, the cases of *Northern C. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; *Dela-ware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep.

463, being cited as precedents. That judgment did not deny to the state of the domicile of the owner power to tax tangibles which had not acquired an actual situs elsewhere.

The case presented no such question, and the opinion does not refer to the numerous cases holding that the taxable situs of ships engaged in foreign or interstate commerce was that of the owner unless an actual situs had been elsewhere acquired. That no such consequence was attached to the judgment or opinion is evidenced from the opinion in *Ayer & L. Tie Co. v. Kentucky*, announced at the same term and concurred in by Mr. Justice Brown, who wrote the opinion in the *Transit Company Case*, in which case it was distinctly affirmed that vessels were subject to taxation only at the domicile of the owner, unless they had acquired an actual situs in another jurisdiction.

To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty [75]ty *concerning the situs of such property not presented by other kinds of movable property.

It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular state, and quite another to attribute to a sea-going ship an actual situs at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation. This court, in *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, said upon this subject: "Whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port."

In *People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.* 58 N. Y. 242, 246, the New York court said, concerning the neces-

sity of determining the taxable situs of such ships by some more certain standard than by the ports they make and the time they remain, that, "being in port is only a necessary incident in their proper employment. They are not built to be in port, but upon the sea. To determine their situs, for purposes of taxation by their longer or shorter stay in a particular port, or by their more or less frequent resort to it, would introduce *perpetual uncertainty [76]ty; it would, practically, subject them to taxation in every port, or exempt them in all."

The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation.

The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law.

Take the case in hand. The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky, and there maintains its general office, and there holds its corporate meetings. To say that the protection which the corporation receives from the state of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law. What is the protection accorded these vessels at any of the ports to which they temporarily go for purpose of business? What protection do they receive from the state or city of New York other than that accorded to every other ship which visits that port, foreign or domestic, for repairs, supplies, or other business? Referring to a like claim of protection, this court, in *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 599, 15 L. ed. 254, 255, said: "And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of *any [77] control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the gen-

eral government, to which belongs the regulation of commerce with foreign nations and between the states."

It has also been urged that the situs of the domicile of the owner of a ship cannot be the situs for purposes of taxation when it appears that the ship cannot go to that situs, and it is here said that the ships of the Southern Pacific Company cannot visit any port in the state of Kentucky. The fact is not shown, nor is it conceded. The state has a port on the Mississippi, a great stream up which national ships of war have at times gone as high or higher than the southern boundary of the state of Kentucky. But the test proposed is not one for which there is any authority, and would but introduce another grave element of uncertainty, dependent upon the draught of the ships and the depth of the water. Such a test might exclude from taxation ships, such great ships as the Olympic or the Lusitania, while smaller craft might meet the proposed standard.

The facts which have been relied upon to show an actual situs of these ships in the port of New York have been already sufficiently stated. They fall short of the facts relied upon for a like purpose in *Hays v. Pacific Mail S. S. Co.*; *St. Louis v. Wiggins Ferry Co.* and *Morgan v. Parham*, already cited, where the judgments were that they were insufficient to create a taxable situs other than that of the owner. The facts shown by no means bring the case under the authority of *Old Dominion S. S. Co. v. Virginia*, where it was held that the ships had acquired an actual situs.

We find no reason for disturbing the judgment of the Court of Appeals of the Commonwealth of Kentucky, and it is therefore affirmed.

78] *J. B. CURTIN, Appt.,
v.
H. C. BENSON et al.

(See S. C. Reporter's ed. 78-87.)

Yosemite valley — use of lands in private ownership — executive regulations.

The Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park, of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the Secretary for the government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent.

Submitted April 11, 1910. Ordered for oral argument October 21, 1910. Argued October 25, 1911. Decided November 20, 1911.

A PPEAL from the Circuit Court of the United States for the Northern District of California to review a decree dismissing a suit to enjoin the superintendent of the Yosemite National Park from interfering with the right of an owner and lessee of lands within such park to pasture his cattle upon his land, and to use the toll roads leading thereto. Reversed and remanded for further proceedings.

See same case below, 158 Fed. 383.

The facts are stated in the opinion.

Mr. Marshall B. Woodworth submitted the cause for appellant on original submission. Mr. John B. Curtin, *in propria persona*, was on the brief:

The United States is but an ordinary proprietor of the lands owned by it within the confines of the Yosemite National Park.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525-527, 29 L. ed. 264, 265, 5 Sup. Ct. Rep. 995; *Palmer v. Barrett*, 162 U. S. 399, 40 L. ed. 1015, 16 Sup. Ct. Rep. 837; *Sharon v. Hill*, 11 Sawy. 130, 24 Fed. 726; *Re Ladd*, 74 Fed. 35; *State ex rel. Jones v. Mack*, 23 Nev. 363, 62 Am. St. Rep. 813, 47 Pac. 764; *United States v. Meagher*, 37 Fed. 878; *Crook v. Old Point Comfort Hotel Co.* 54 Fed. 608; *Re Kelly*, 71 Fed. 549; *United States v. Partello*, 48 Fed. 677; *Benson v. United States*, 146 U. S. 330, 36 L. ed. 994, 13 Sup. Ct. Rep. 60.

If the state of California had ceded its political jurisdiction over all lands within the confines of the Yosemite National Park to the United States, it would have no right to collect taxes thereon.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005.

The cession of political sovereignty and jurisdiction is an act of paramount and most solemn character, and, it is submitted, can only be exercised by a state through some affirmative statutory enactment.

People v. Godfrey, 17 Johns. 225, 9 Am. Dec. 203; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005.

There is no legal obligation resting on the private owners of lands within the Yosemite National Park to fence their lands.

Bileu v. Paisley, 18 Or. 47, 4 L.R.A. 840, 21 Pac. 934.

Upon what theory of law can the Department of the Interior, or its officer, the superintendent of the park, enforce a rule compelling persons traveling public highways within the confines of the park, to obtain written permission to use such public highways in driving their stock to and from their patented lands within the confines of the park?

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Jones v. Brim*, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282; *Blood v. McCarty*, 112 Cal. 564, 44 Pac. 1025; *People ex rel. El Dorado County v. Davidson*, 79 Cal. 166, 21 Pac. 538; *Kellet v. Ida Clayton & G. W. Wagon R. Co.* 99 Cal. 213, 33 Pac. 885.

With the exception of the powers surrendered by the Constitution of the United States, the people of the several states are absolutely and unconditionally sovereign within their respective territories.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 428, 14 L. ed. 997, 1002; *The Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 124, 20 L. ed. 122, 125; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. ed. 97, 102; *M'Culloch v. Maryland*, 4 Wheat. 316, 402-405, 4 L. ed. 579, 600, 601; *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245; *Rhode Island v. Massachusetts*, 12 Pet. 730, 9 L. ed. 1262; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; 2 Tucker, Const. p. 690.

The "police power"—by which is meant the internal administration of the states—was reserved to the states in the 2d Article of Confederation and in the 10th Amendment to the Constitution of the United States.

United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 115; *Prigg v. Pennsylvania*, 16 Pet. 539, 625, 10 L. ed. 1060, 1092; *United States v. E. C. Knight Co.* 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Knoxville Iron Co. v.* 56 L. ed.

Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; *Western Turf Asso. v. Greenberg*, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384.

The 13th, 14th, or 15th Amendments to the Constitution do not impair the supremacy of the police power reserved to the states.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hodges v. United States*, 203 U. S. 6, 51 L. ed. 65, 27 Sup. Ct. Rep. 6.

Until the state of California cedes political jurisdiction over the Yosemite National Park to the United States, every foot of territory therein and every person therein is subject to the laws of the state of California, and to none other. Until then the rights of the United States in and to the park lands are simply those of an "ordinary proprietor."

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995.

It never was the intention of the framers of the Constitution that the Federal government should engage in the business of establishing pleasure parks in the different states. Such enterprises fall within what Mr. Chief Justice Marshall called that "immense mass of legislation" which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control.

Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. ed. 1115, 1116.

The creation and maintenance of pleasure parks fall within the police power, and such power is reserved to the states; and, therefore, the Federal government cannot claim that there is any implied power of legislation to justify its rules here under consideration, because the power to establish and maintain parks was never granted to it by the states, and parks are not instruments of government, and we think it well settled that the Federal government cannot exercise within the limits of a state any power or authority which is not incident to some power delegated to the Federal government.

Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Van Brocklin v. Anderson* (*Van Brocklin v. Tennessee*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Shoemaker v. United States*, 147

U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

But even for the sake of argument, if it were conceded that the Federal government had authority to make regulations affecting the use of private property in the Yosemite National Park, such regulations must, of necessity, fall within the police power and be police regulations, and, unless it appear from the face of the rules that their enactment was for the protection of "the health, safety, or comfort of the public," they cannot be said to be valid or any police regulations, and the rules here under consideration would fall as not being police regulations.

Hume v. Laurel Hill Cemetery, 142 Fed. 552.

Mr. William C. Prentiss argued the cause and filed a brief for appellant on oral argument:

Assistant Attorney General Harr argued the cause and filed a brief for appellees:

The United States has all the rights that inhere in sovereignty, consistent with the Constitution, for its preservation and protection and the furtherance of its ends.

Jourdan v. Barrett, 4 How. 169, 184, 11 L. ed. 924, 930; *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. ed. 534, 536; *United States v. Cleveland & C. Cattle Co.* 33 Fed. 330; *Re Debs*, 158 U. S. 564, 582, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900; *Ex parte Siebold*, 100 U. S. 371, 395, 25 L. ed. 717, 725; *Re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Camfield v. United States*, 167 U. S. 518, 525, 526, 42 L. ed. 260, 262, 263, 17 Sup. Ct. Rep. 864; *Light v. United States*, 220 U. S. 523, 537, 55 L. ed. 570, 574, 31 Sup. Ct. Rep. 485; *M'Culloch v. Maryland*, 4 Wheat, 422, 4 L. ed. 605; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

Mr. Justice McKenna delivered the opinion of the court:

This suit was brought in the superior court of Tuolumne county, state of California, against the appellee Benson, and others, who were soldiers under Benson, to enjoin them from driving appellant's stock from his lands, or by any means interfering with them, and from preventing appellant driving his stock to his lands over certain toll roads. The case was removed to the United States circuit court for the northern district of California, where, after hearing, final judgment was rendered dismissing the bill of complaint.

The facts as agreed to, and established by

evidence supplementing the agreement, are as follows: Appellant is the owner of certain lands within the Yosemite National Park (the park was regularly and legally established, act October 1, 1890, 26 Stat. at L. 650, chap. 1263, U. S. Comp. Stat. Supp. 1909, p. 572; Joint Res. June 11, 1906, 34 Stat. at L. 831, U. S. Comp. Stat. Supp. 1909, p. 584), and lessee of other lands therein. Leading to the lands there are certain toll roads, which were established many years prior to the creation of the park.

Appellee Benson is a captain in the United States Army and superintendent of the park, and, as such, it was and is his duty to enforce the rules and regulations prescribed by the Secretary of the Interior for the government of the park, and for this purpose he has a body of troops under his command.

*The Secretary established and pro-[83 mulgated the following rules:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

"10. The herding or grazing of loose stock or cattle of any kind on the government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

Appellant claims the right, without complying with these rules, to drive his cattle over the toll roads and to graze them on his lands. On one occasion appellant placed cattle on his lands, and appellee Benson immediately removed them, and refused to allow them to be grazed thereon until appellant complied with the rules; and, prior to the commencement of the suit, refused to allow appellant to drive his cattle over the toll roads to his lands, or to use the lands until he complied with the rules.

The testimony gave some particularity to the facts as agreed to. It appeared that appellant has within the park a few hundred acres, and, it may be inferred, 23,000 acres in the vicinity. He asserted that he had not complied with the regulations, and did not intend to do so until required. And it was admitted that the largest part of the land was unfenced.

The following from the report of the superintendent of the park to the Secre-

tary of the Interior for the year 1901 was put in evidence: "After due consideration, based upon the best evidence I have been 84] able to obtain, I can *see no objection to property owners and those holding leased land within the park limits grazing cattle near their own premises, under the supervision of the park authorities."

Testimony was introduced on the part of appellees (their counsel expressing a doubt of its admissibility) "to show that the regulation is a reasonable one, and the reason for it, and what effect will be produced if the regulation is not carried out." To the offer counsel for appellant replied that he denied the power of the Secretary. "It is simply a question of his power," he said, and stated that if defeated on that point, he could show that the rules were not reasonable under the circumstances. The court, saying that it understood, heard the evidence, which was to the following effect: Appellee Benson had been superintendent of the park since April 10, 1905, and on duty there for several years prior to that time. Numerous people claimed land in the park as their ranges, and a number of them had the places surrounded by fences, "sometimes inclosing, instead of 160 acres which they had, as high as several thousand acres of land." They drove their cattle to the so-called ranges and immediately let them loose, and they strayed throughout the entire reservation. "Senator Curtin's cattle have been in that condition for a great many year." This he (Benson) knew of his personal knowledge, because he was present at the time and had a correspondence with Mr. Curtin as far back as 1895, 1896, and 1897. He further testified that he was detailed on special duty to ascertain private land claims in the park, the object being to ascertain who owned land "and somewhere about where it lay;" that he did some surveying and found that a great many people—"Mr. Curtin, for instance"—had fenced more land than they were entitled to, had paid no attention to their own lines, had tracts of land inclosed upon which their cattle did not stay for more than three or four 85]*days, "but proceeded out to the rest of the park; so a regulation was ordered that they point out their metes and bounds, for this reason; though we might know absolutely where they were," they would claim the cattle to be on their lands. If the metes and bounds were fixed by an "agreed understanding" it could be definitely known whether they were within or without the claim. He further testified that the whole place had been overrun with

cattle, and that the object of the regulations was "to keep people to the use of their own lands and keep the government land from being interfered with." He did not attempt to prevent Curtin from using his land, provided he complied with the regulations, but he did remove cattle from Curtin's land, on the ground that he had not complied with the regulations.

He testified further that he permitted Curtin to pasture his cattle on his land after he (Curtin) had it surveyed, but refused Curtin permission to fence according to the survey, the correctness of the survey being disputed.

It is objected by the government that appellant is not entitled to the relief he prays because he does not come into court with clean hands. It is urged as a ground of the charge that the testimony exhibits his purpose to be to use his lands as a basis, and the toll roads as a means, to make wholesale trespasses upon the park lands. If the fact were established it might be hard to resist its effect, but it is not established. The evidence cited in support of it, and of which we have given the substance, refers to a period anterior to the time when this controversy arose. Indeed, anterior to the time when the regulations were established by the Secretary of the Interior, which was April 22, 1905; and the object of the testimony was to account for the regulations, and not to show the special and immediate justification of Benson's orders. We cannot now extend the evidence beyond the special and limited purpose of its introduction. We do *not think the case, as[86 it was submitted to the circuit court, showed the ulterior purpose on the part of appellant to be a wilful trespass upon the lands of the park, but to be an honest assertion of rights.

On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a

regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use,—an attribute of its ownership,—one which goes to make up its essence and value. To take it away is practically to take his property away; and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.

A law requiring an owner in appellant's situation to fence his land might be within such power, though of that we are not required to express an opinion. A law making the trespass of his cattle on other lands a criminal offense might be within such power. Such laws might be considered as strictly regulations of the use of property,—of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land, and of making him responsible for a neglect of it.

We have assumed so far that Benson has 87]exercised a *power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not that Curtin mark and define his lands, but that he do so "by an agreed understanding" with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson power to force a concession to his "understanding," and to require Curtin to submit to a limitation of the area of his land or a limitation of its uses. It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it.

It may be doubted, too, if the rules prescribed by the Secretary of the Interior warranted Benson's order in regard to the toll roads. The rules did not deal with the toll roads at all. They do deal with "park lands," and authorize stock to be taken over them by the "written permission and under the supervision of the superintendent." But even if it be held to apply to the toll roads, it is manifestly but a regulation of the transit of the stock merely, and not a use of the roads as a condition of the performance of something else.

We, however, rest our decision on the ground of the want of power of the Secretary or the superintendent to limit the uses to which lands in the park, held in private ownership, may be put.

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

*MARY N. HUSSEY, Administrator of [88 the Estate of Hannah S. Crane, Deceased; Mary Ives Crocker and Kate May Dillon Winship, Devisees of Kate D. McLaughlin, Deceased; and Richard H. Glassford, Executor of James T. Boyd, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 88-95.)

Judgment — against public officer — conclusiveness.

1. A judgment of ejectment against an officer of the United States in possession of the property, rendered in an action in which the district attorney of the United States, by direction of the Attorney General and the Secretary of the Treasury, appeared on behalf of the United States and conducted the defense, does not estop the United States in a subsequent action from contesting the title to the property.

[For other cases, see Judgment, 832-840, in Digest Sup. Ct. 1908.]

Claims — jurisdiction of court of claims.

2. The jurisdiction of the court of claims, under the act of February 25, 1905 (33 Stat. at L. 815, chap. 800), of a claim for the value of real property in the possession of the United States, is not confined to a determination of the existence of title in the claimants' grantor when the United States took possession, but extends to the question whether such grantor ratified a prior deed from her husband's executor, under which the United States claims, where the statute confers jurisdiction to hear the claim, and, if the court finds from the evidence on file and to be "presented on either side" that the claimants "acquired a valid title to said real property, as claimed," to award them the market value at the time possession was taken, and in addition states that any defense may be pleaded by the United States as defendants.

[For other cases, see Claims, I. d, 2, in Digest Sup. Ct. 1908.]

Estoppel — by ratification — laches.

3. A widow, who, being the devisee under her husband's will, received the purchase price of an estate in real property which was conveyed by his executor in the mistaken belief that it was subject to testamentary devise, and rested ten years without asserting her claim to the property after a decision of the highest court of the state to the effect that a moiety of such property was in law her community property, must be deemed to have ratified the sale, so as to preclude her grantees from asserting title as against the United States, claiming under the executor's deed. [For other cases, see Estoppel, III. b, 6, 7, in Digest Sup. Ct. 1908.]

[No. 32.]

NOTE.—On estoppel by laches or acquiescence—see note to Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co. 38 L. ed. U. S. 478.

Argued November 2, 1911. Decided November 20, 1911.

APPEAL from the Court of Claims to review a judgment dismissing a petition for an award of the value of a widow's share of community property in the possession of the United States, claiming under a deed from the husband's executor. Affirmed.

See same case below, 44 Ct. Cl. 324.

The facts are stated in the opinion.

Mr. George A. King argued the cause and filed a brief for appellants:

If there is any subject upon which the judgments or the courts of the several states are conclusive, it is that of title to real property.

Warburton v. White, 176 U. S. 484, 495, 44 L. ed. 555, 559, 20 Sup. Ct. Rep. 404; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873.

It is hardly to be supposed that, with all the facts before it, Congress referred the case to the court of claims in order to enable that court to review the reasoning of the supreme court of California. The more reasonable construction of its action is that the case was referred to the court of claims for the purpose of ascertaining the reasonable value of the property,—a question which the former findings had left indefinite,—and of awarding it to the claimants, if they were found to have succeeded to the title of James L. King, which had been sustained by the supreme court of California.

Roberts v. United States, 92 U. S. 41, 49, 23 L. ed. 646, 648; Dahlgren v. United States, 16 Ct. Cl. 30; Ayers v. United States, 44 Ct. Cl. 124; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556.

There can be no estoppel against Mrs. Ward or her grantees, arising out of anything done in this case.

Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Crary v. Dye, 208 U. S. 515, 521, 52 L. ed. 595, 600, 28 Sup. Ct. Rep. 360; Dotson v. Merritt, 141 Ky. 155, 132 S. W. 181.

Mr. Frederick DeCourcy Faust argued the cause, and, with Assistant Attorney General John Q. Thompson, filed a brief for appellee:

The United States cannot be made a defendant to any suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property as its agent can bind or conclude the government.

Carr v. United States, 98 U. S. 433, 25 L. ed. 209; United States v. Lee, 106 U. S. 56 L. ed.

217, 27 L. ed. 180, 1 Sup. Ct. Rep. 240; Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 807.

Not only is appellants' principal complaint against the adverse action of the court below flatly opposed to the settled doctrine of this court as announced in Carr v. United States and United States v. Lee, supra, but it is also in direct conflict with the explicit language of the jurisdictional act under which this suit was brought.

The rule of property established by state decisions was not invalid.

Warburton v. White, 176 U. S. 495, 496, 44 L. ed. 559, 560, 20 Sup. Ct. Rep. 404; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873.

If the facts found in this case do not constitute a ratification of an act done by one without authority to act in the first instance, it is difficult to perceive how the doctrine of ratification can be sustained.

1 Am. & Eng. Enc. Law, p. 189; Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Lafitte v. Godchaux, 35 La. Ann. 1161; Alexander v. Jones, 64 Iowa, 207, 19 N. W. 913.

Mr. Justice McKenna delivered the opinion of the court:

The appellants brought this suit in the court of claims for the sum of \$40,000, [89 that amount being, it is alleged, the value of their one sixth of certain real estate in the city of San Francisco at the time possession was taken of the property by the United States.

Jurisdiction of the suit was given by the act of Congress approved February 25, 1905 (33 Stat. at L. 815, chap. 800), which is as follows:

"That jurisdiction be, and the same is hereby, conferred on the court of claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the city of San Francisco, in the state of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said real property, as claimed, said court shall award the said parties the market value of the undivided one sixth of said property at the time possession was taken of it by the United States . . . and any defense, set-off, or counter-claim may be pleaded by the United States as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases."

There had been a reference of the claim

by a committee of Congress under an act of Congress called the "Bowman act" [22 Stat. at L. 485, chap. 116, U. S. Comp. Stat. 1901, p. 748], in which the court made findings substantially as in the present case, and these findings were certified to Congress, which subsequently passed the act to which we have referred.

The facts, summarized, are: that Congress provided (in 1852 [10 Stat. at L. 11 chap. 54]) for the establishment of a branch mint in the state of California, and for that purpose authorized the Secretary of the Treasury to make a contract for the erection of a building and procuring the necessary machinery at a sum not exceeding \$300,000. The Secretary of the Treasury, in execution of the statute, entered into [90]* a contract for the erection and equipment of the mint, on April 15, 1853, with Joseph R. Curtis, for the sum of \$239,900. The title to the property was to be satisfactory to the Attorney General of the United States. A supplemental contract was subsequently made for the purchase of an adjoining lot. The contracts were performed by Curtis, and on May 2, 1854, he executed a deed conveying both lots to the United States, which deed and the title were approved by the Attorney General, and all of the sums due under the contracts were paid to Curtis.

On April 15, 1853, the time of the making of the first contract, the property was owned in fee simple by and was in the possession of Curtis, Perry, & Ward, a firm composed of Joseph R. Curtis, Philo H. Perry, and Samuel H. Ward. The latter died while on a voyage to the Sandwich Islands. This was not known, and Curtis made the contract for the benefit of the firm.

Ward left a will appointing his partners his executors. The will was probated, but Perry alone qualified as executor. The value of the whole lot named in the contract of April 15, 1853, was appraised at \$40,000, and after its appraisement Perry conveyed all of Ward's interest in it to Curtis for the sum of \$13,333.33, payment for which he received. The sale was made by Perry as executor under the authority given him by the will.

By the terms of Ward's will, nine tenths of his estate was devised to his wife, Emily H. S. Ward, and her proportion of the sum so received for Ward's interest was paid to her and accepted by her with full knowledge of the sale by Perry as executor, but in ignorance of the extent of her estate in the land in dispute, as shown by the decision of the supreme court of the state of California. *King v. Lagrange*, 50 Cal. 328. See also 61 Cal. 221.

She, with her colegatees under the will, brought suit on the 18th of March, 1854, in the district court of the United States for the northern district of California *against Curtis and Perry. The bill al-[91 leged the partnership between Ward, Curtis, and Perry, the ownership by such partners of the lot, the building thereon, and of the machinery, tools, and fixtures in the building then used for assaying purposes; that the contract and its execution by Curtis were for the benefit of the partnership. It also alleged the appraisement of the lot and tools and fixtures, respectively, at \$40,000 and \$15,150, and the sale of the same by Perry, as executor, to Curtis; that the sale was private, without authority therefor from the probate court, and was made for the joint benefit of Perry and Curtis "as copartners in interest in the contract for the sale of the premises known as the 'United States Assay Office,' and the conversion of the same into a branch mint," and was made to deprive the legatees under the will of their just and legal right to participate in the profits of the sale to the United States; that the sum paid by Curtis to Perry was greatly under the value of the property, in view of the profits arising from the sale to the United States, and that by virtue of the sale Curtis and Perry dealt with the partnership property for their individual gain and advantage, and that they conspired to defraud the complainants of their just share of the purchase money. The object of the bill, therefore, was to obtain for Mrs. Ward and her colegatees the full benefit, jointly with Curtis and Perry, of the contract with the United States.

Notice of the filing of the bill was given to the Secretary of the Treasury by sending him a copy of it; but, prior to its receipt, the United States had paid Curtis the sum of \$100,000, and balance due was paid at subsequent dates.

The bill was dismissed by complainants' counsel in June, 1854.

In 1855, Perry's acts as executor, which included the disposition of all of the real estate here involved, were approved and he was discharged as executor, Mrs. Ward *and the other legatees under the will [92 joining in the petition therefor.

In 1865, Mrs. Ward conveyed all of her interest in the land to one James L. King, and he, in 1867, brought an action in ejectment therefor against Robert B. Swain, the then superintendent of the mint, which action was subsequently continued against his successor, O. H. Lagrange, they being only in possession as such officers, claiming no title in themselves. The United States district attorney appeared, by direc-

tion of the Secretary of the Treasury and the Attorney General, on behalf of the United States, and conducted the defense.

The case went twice to the supreme court of the state, that court ultimately deciding that the property was the community property of Ward and Mrs. Ward, and that one half thereof vested in her, upon his death, as the survivor of the community, and was not subject to his testamentary disposition, and that it was not established that Ward had attempted to dispose of more than his one half of the community property, or that Mrs. Ward knowingly performed any act indicating, or which could be construed to be, a waiver of her rights under the will, and a ratification of the sale of her share of the community property.

The controversy in the case turns on the effect to be given to the decisions of the supreme court of California in connection with the jurisdictional act.

The court of claims did not question the decisions in so far as they declare that the property was community property, and that one half thereof vested in Mrs. Ward upon Ward's death, and was not subject to his testamentary disposal. The court, however, disagreed with the supreme court of California as to ratification of the sale by Mrs. Ward.

Such conclusion, appellants contend, is precluded on two grounds: (1) the judgment of the supreme court of California 93]*became a rule of property and conclusive of the validity of the title; (2) the jurisdictional act confines the inquiry of the court to the existence of the title, and that being in appellants, they were entitled to a judgment for the market value of the property at the time possession was taken of it by the United States.

(1) This ground is not tenable. *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209, is a parallel case. There, as here, a judgment in an action against officers of the United States in possession of property, in which action the district attorney of the United States, by direction of the Secretary of the Treasury, appeared and defended, was urged in a subsequent action to estop the United States from contesting the title to the property. It was held that the judgment did not constitute an estoppel. To the same effect is *United States v. Lee*, 106 U. S. 196, 217, 27 L. ed. 171, 180, 1 Sup. Ct. Rep. 240.

(2) The act of Congress gives jurisdiction to the court of claims to hear the claim, and if it find from the evidence on file and to be "presented on either side" that the claimants "acquired a valid title to said real property, as claimed," it "shall 56 L. ed.

award the said parties the market value of the undivided one sixth of said property at the time possession was taken of it by the United States." It will be observed, therefore, that jurisdiction was conferred not to ascertain if Mrs. Ward had title at the time the United States took possession, but whether the claimants acquired a valid title, and whether they did or did not necessarily depends upon the effect of Mrs. Ward's conduct. And, besides, the act is careful to say that "any defense . . . may be pleaded by the United States, as defendants."

The defense urged by the United States is the ratification by Mrs. Ward of Perry's conveyance to Curtis. And this defense was sustained by the court of claims, and properly so, we think.

The decision of *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, which *defined[94 her interest in the community property, was rendered in the summer of 1855. The exact date is not given, but it was at the July term of the court of that year. Knowledge of it must be attributed to her. There is certainly nothing in the record to show a want of knowledge of it, and the circumstances called for action on her part if she had intended to disavow the sale. About contemporaneously with the decision she received upon the settlement of Perry's accounts as executor of her husband's estate, to which she consented through her trustee, the sum of \$37,914.58, and the further sum of \$18,893.54, partly in cash and partly in securities. And the findings of fact also show, as we have seen, that at the time of the execution of the deed by Perry to Curtis she received as her nine tenths of her husband's interest in the real estate conveyed (the other one tenth going to a legatee under the will) the sum of \$13,333.33. Nevertheless she did absolutely nothing to assert a claim to the property for ten years, double the limitation of time within which actions for the recovery of real property in the state of California may be barred; and then all that she did was to convey the property, through her attorney in fact, to one James L. King for the consideration of \$100. King let two years more elapse before bringing suit. He recovered judgment, as has been stated, but made no effort to enforce it. He conveyed the property to Charles McLaughlin in 1879, \$5 being the consideration expressed. He had previously conveyed a one-third interest in the property to William W. Crane, Jr., and James T. Boyd for a nominal consideration.

We think that the time which Mrs. Ward allowed to elapse, under the circumstances shown by the record, precludes her gran-

tees from asserting title to the property against the United States. She had actual knowledge of all that transpired. It is true that at one time she charged Perry and Curtis with fraud to deprive her and her 95]legatees "under her husband's will of their "rights to participate in the profits of the sale to the United States" of the real property and some other property. In this suit she did not attack Perry's power to convey the property because of her title to it under her community rights. She and the other complainants alleged only a purpose to defraud them "of their just proportion of the purchase money arising from the sale of the property." Notice of the suit, it is true, was given to the Secretary of the Treasury, but the suit was subsequently dismissed—for what reason it does not appear. It may be that there was a complete and satisfactory adjustment between the parties. And this may reasonably be, if not conclusively, inferred from the proceedings resulting in the settlement of Perry's accounts and his discharge from his trust as executor. Indeed, in the receipt given Perry by the legatees under the will other than Mrs. Ward, the suit was referred to and authorized to be dismissed, and he, as executor and individually with Curtis, was released "from all claims, debts, dues, or demands due . . . by reason of the contract or under said will, or any other matter or thing." The date of this receipt was July, 1855. This and the other transactions were, we repeat, contemporaneous with the decision in *Beard v. Knox*, and Mrs. Ward, then knowing her interest in the property, was charged to consider whether she would assert it or retain what she had received from Perry as executor. And Perry and the United States were entitled to a timely disavowal, if disavowal she intended to make. He then might have been able to defend against it, and the United States, against the consequence of the disavowal, could have sought indemnity against Perry and Curtis. She must be deemed to have ratified the sale.

Judgment affirmed.

96]*WESLEY C. RICHARDSON et al.,
Appts.,
v.

JUDSON HARMON, Receiver of the Toledo
Terminal & Railway Company.

(See S. C. Reporter's ed. 96-107.)

Shipping — limitation of liability —
nonmaritime torts.

The limitation of a shipowner's liability
for maritime torts not the result of his own

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fault, provided by U. S. Rev. Stat. §§ 4283-4285, U. S. Comp. Stat. 1901, pp. 2943, 2944, was extended to nonmaritime torts by the provisions of the act of June 26, 1884 (23 Stat. at L. 57, chap. 121, U. S. Comp. Stat. 1901, p. 2945), § 18, limiting the individual liability of a shipowner for "any or all debts and liabilities," except wages and liabilities incurred prior to such enactment, to his share in the vessel, and the aggregate liabilities of all the owners of a vessel on account of the same to the value of the vessel and freight pending.
[For other cases, see *Shipping*, V. c. 3, in *Digest Sup. Ct.* 1908.]

[No. 10.]

Argued April 25 and 26, 1911. Decided
November 20, 1911.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree dismissing, for want of jurisdiction, proceedings to limit the liability of a shipowner for a nonmaritime tort. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Frank S. Masten and Harvey D. Goulder argued the cause and filed a brief for appellants:

The general maritime law gave limitation of liability to owners of vessel property to the end that merchants might be encouraged to invest in maritime commerce.

The *Rebecca*, 1 Ware, 187, Fed. Cas. No. 11,619; *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104-116, 20 L. ed. 585-589; *The Scotland* (*National Steam Nav. Co. v. Dyer*) 105 U. S. 24-28, 26 L. ed. 1001-1003; *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558-576, 22 L. ed. 654-662; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617.

Almost since a merchant marine has existed in civilized nations, the ship herself has been treated as a sentient thing, liable for her own wrong in whosoever hands she may be, liable for her own contractual obligations and, under the general maritime law, the liability ended with the loss or surrender of the ship and freight.

Tucker v. Alexandroff, 183 U. S. 438, 46 L. ed. 270, 22 Sup. Ct. Rep. 195.

This court has referred to the Congress-

NOTE.—On the limitation of shipowner's liability—see notes to *Lawton v. Comer*, 7 L.R.A. 55, and *The Longfellow*, 45 C. C. A. 387.

As to the lack of knowledge or privity on the part of shipowners as condition of limitation of liability—see notes to *Great Lakes Towing Co. v. Mills Transp. Co.* 22 L.R.A. (N.S.) 769.

sional records to ascertain the legislative intent where the meaning is in controversy.

Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409-427, 50 L. ed. 1082-1089, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205; The Delaware, 161 U. S. 459-472, 40 L. ed. 771-776, 16 Sup. Ct. Rep. 516.

A district court, sitting in admiralty, will exercise jurisdiction (ancillary) over claims on which a direct proceeding in the admiralty would be entirely outside of the question.

Schuchardt v. Babbidge, 19 How. 239-241, 15 L. ed. 625, 626; Bogart v. The John Jay, 17 How. 399, 15 L. ed. 95; The J. E. Runbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; Duryee v. Elkins, 1 Abb. Adm. 529, Fed. Cas. No. 4,197; The C. C. Trowbridge, 11 Biss. 154, 14 Fed. 874; Davis v. Child, 2 Ware, 78, Fed. Cas. No. 3,628; The H. E. Willard, 52 Fed. 388; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398-406, 52 L. ed. 264-270, 28 Sup. Ct. Rep. 133.

The judicial power of the Federal government as to maritime causes is very broad.

The Daniel Ball, 10 Wall. 557-563, 19 L. ed. 999-1001; The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20-36, 18 L. ed. 125-129; Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; People's Ferry Co. v. Beers, 20 How. 393-401, 15 L. ed. 961-964; The Blackheat (United States v. Evans) 195 U. S. 361-365, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1-31, 20 L. ed. 90-99; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 589, 27 L. ed. 1042, 3 Sup. Ct. Rep. 379, 617; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 392, 12 L. ed. 486.

The purpose of a proceeding for limitation is not to adjudicate fault or liability as in a direct proceeding. The very object of proceedings for limited liability is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving up, or submitting to pay the value of, all their interest in the ship and freight.

Providence & N. Y. S. S. Co. v. Hill, 109 U. S. 595, 27 L. ed. 1044, 3 Sup. Ct. Rep. 379, 617.

Mr. George L. Canfield argued the cause, and, with Mr. Frank H. Canfield, filed a brief for appellee:

The injury done by the "Crete" to the railway bridge was not a maritime tort, but a trespass to realty, of which there is no jurisdiction in the American admiralty. 56 L. ed.

The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; Cleveland Terminal & Valley R. Co. v. Cleveland, S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; Phoenix Constr. Co. v. The Poughkeepsie, 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687.

The consensus of judicial opinion is against the effect which appellants ascribe to the later law.

Great Lakes Towing Co. v. Mill Transp. Co. 22 L.R.A.(N.S.) 769, 83 C. C. A. 607, 155 Fed. 11, 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. Rep. 262; Force v. Providence Washington Ins. Co. 35 Fed. 778; Miller v. O'Brien, 35 Fed. 783; The Amos D. Carver, 35 Fed. 669; McPhail v. Williams, 41 Fed. 61; Douse v. Sargent, 48 Fed. 695; Whitcomb v. Emerson, 50 Fed. 128; The Republic, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 113; The Annie Faxon, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 318; Gilchrist v. Chicago Ins. Co. 44 C. C. A. 43, 104 Fed. 573; The Puritan, 94 Fed. 365; Rudolf v. Brown, 137 Fed. 106.

The defeat of the amendment which sought to insert the words "without his personal consent of privity" is significant. These words are only applicable to liabilities *ex delicto*, and seemed incongruous in a law designed for liabilities *ex contractu*.

Re Sinclair, 8 Am. L. Reg. 206, Fed. Cas. No. 12,895.

The law of limited liability of shipowners is confined to the subject-matter of admiralty and maritime jurisdiction, and does not extend to liabilities beyond.

Goodrich Transp. Co. v. Gagnon, 36 Fed. 123.

The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law.

Re Garnett, 141 U. S. 1, 12, 35 L. ed. 631, 633, 11 Sup. Ct. Rep. 840.

Mr. Justice Lurton delivered the opinion of the court:

The steam barge "Crete," while proceeding up the Maumee river from Lake Erie, collided with the abutment *of a rail-[100 way drawbridge, resulting in great damage to both barge and bridge. For the damage sustained by the bridge an action was brought against two of the owners of the barge in a common-law court of the state at Toledo, Ohio. Thereupon the owners of the barge, three in number, filed their petition and libel in the district court of the United States at Cleveland, Ohio, where two of them resided and where the "Crete" was lying, for a limitation of liability un-

der §§ 4283-4285, Revised Statutes (U. S. Comp. Stat. 1901, pp. 2943, 2944), and § 18 of the act of June 26, 1884 [23 Stat. at L. 57, chap. 121, U. S. Comp. Stat. 1901, p. 2945].

This petition duly averred that the said collision was without fault upon the part of the "Crete;" but, if there was any, it was without the privity or knowledge of the owners, or either of them. It stated that the damages claimed in the pending action at law were \$35,000, and that they apprehended other actions of like kind, and if liable as claimed, the aggregate would greatly exceed the value of the interests of the owners in the vessel and her freight. Therefore, the petition sought the benefit of the limited-liability act of Congress and the right to defend against any liability, as provided by general law and admiralty rule 56 of the Supreme Court.

Under this petition an appraisal was made of the value of the "Crete" on the termination of her voyage, and the value of each separate one-third interest of each owner in the vessel and her pending freight was appraised at \$4,171.50, for which value bond was made to stand in the room and place of the boat and her freight. Motion issued in usual form, requiring everyone claiming any loss or damage "by reason of the premises," to appear and make proof of their respective claims.

The appellees were also enjoined from proceeding with the action pending in the said common-law court, and they, together with all the world, were admonished to bring no other or further actions, and to file their claims against the "Crete," or her owners, in the court below, that they 101] might share in the distribution of the appraised value of the said vessel and her pending freight.

The appellee, Judson Harmon, as receiver of the Toledo Terminal & Railway Company, owner of the bridge damaged by the collision mentioned, appeared and excepted to the jurisdiction of the court. This exception was sustained and the injunction dissolved, the court holding that the cause of action asserted in the common-law court of Ohio by said receiver against the owners of the colliding barge was for a non-maritime tort, not cognizable in a court of admiralty, and that the limited-liability act of Congress did not extend to any such right of action.

Prior to the 18th section of the act of June 26, 1884 (23 Stat. at L. pp. 53, 57, chap. 121, U. S. Comp. Stat. 1901, pp. 2804, 2945), it had been the settled law that the district court, sitting as a court of admiralty, had no jurisdiction to try an action for damages against a shipowner,

arising from a fire on land, communicated by the ship, or from a collision between the ship and a structure on land, such as a bridge or pier. The tort in both cases would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court. The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; The Troy (Duluth & S. Bridge Co. v. The Troy) 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416.

Inasmuch as the owner's liability was not limited by the statutes providing for a limited liability, the pendency of a petition to obtain the benefits of the limitation did not operate to draw into such a proceeding action for a liability which could in no wise be affected by it. Ex parte Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. Such was the law, and so it still is unless changed by the 18th section of the act of June 26, 1884. That section is found in a chapter, the title of which is, "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes." The 18th section reads as follows:

"That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities *that[102 his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner, incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

That the provision is not as definite as desirable may be conceded. The contention, upon the one hand, is that the limitation is extended only to obligations *ex contractu*; while, upon the other, that every kind of liability which might fall upon an owner on account of the ship, incurred without his knowledge or privity, is given the benefit of the provision. That it was intended to limit the owner's liability in respect of debts contracted on account of the ship is plain. But if that was the only purpose, why add the significant words, "and liabilities?" The limited-liability act, as it stood, did not include the owner's individual liability for obligations *ex contractu* incurred without his knowledge or privity. Neither did it extend to his individual liability for nonmaritime torts by the master or crew. Was it the purpose of Congress to exclude this kind of an individ-

ual responsibility from the benefits of the limited-liability statute, while including every other class and kind of individual liability, except seamen's wages? Is no significance to be attached to the fact that the provision does not stop by adding to the former kind of claims against an owner "any and all debts," but terminates the clause by inserting, "and liabilities,"—a perfectly unnecessary statement, if it was only meant to extend the limitation to obligations *ex contractu*? The meager debate which occurred upon this section of the act,—an act which included many other matters concerning the shipping interests of 103] the country,—if competent *at all, throws little or no light as to the meaning which was supposed to be attached to liabilities, as distinguished from claims arising out of contract. There does appear, however, a broad general purpose to put a shipowner in the status of one whose risk on account of obligations arising from the conduct of the master and crew is confined to his proportionate interest in the ship and her freight. No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that law to cases not before within it, that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law.

The legislation is *in pari materia* with the act of 1851 [9 Stat. at L. 635, chap. 43, § 3], as carried into the Revised Statutes as §§ 4283 et seq. (U. S. Comp. Stat. 1901, p. 2943), and must be read in connection with that law; and so read, should be given such an effect not incongruous with that law, so far as consistent with the terms of the later legislation. The former law embraced liabilities for maritime torts, but excluded both debts and liabilities for nonmaritime torts. The section under consideration includes debts, save wages of seamen and liabilities of an owner incurred prior to the passage of the law. The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part. True, a liability may arise out of a contract as well as from

a tort. But a liability *ex contractu* is included *ex vi termini*, and the addition of the words "and liabilities" *would be[104 tautology unless meant to embrace liabilities not arising from "debts."

In view of the manifest policy of Congress to further encourage the shipowning industry, and the very broad terms employed in this last legislation, we can but infer that the policy of the government was to confine the risk of an owner not personally at fault to his interest in the ship. To say that Congress meant no more by extending the limitation to any and all debts and liabilities than to include obligations arising *ex contractu* would be to utterly ignore the fact that such a construction would leave an owner subject to a large class of obligations arising from nonmaritime torts, and leave nothing to which the words, "any and all . . . liabilities" could apply. In *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 549, 553, 32 L. ed. 1017, 1022, 1023, 9 Sup. Ct. Rep. 612, the words "the liability of the owner . . . shall in no case exceed," etc., were construed as extending to any liability "for any act, matter, or loss, damage or forfeiture, done or incurred;" and as therefore providing that the "owner shall not be liable beyond his interest in the ship and freight for the acts of the master or crew, done without his privity or knowledge." Upon this interpretation of § 4283, it was held that liabilities of the owner for injuries to persons were included in the limitation, as well as injuries to goods. Referring to the 18th section of the act of 1884, which did not apply in that case, because the injury occurred before its passage, the court said it "seems to have been intended as explanatory of the intent of Congress in this class of legislation. It declares that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. The language is somewhat vague, it is true; but it is possible that it was *intended to remove[105 all doubts of the application of the limited-liability law to all cases of loss and injury caused without the privity or knowledge of the owner. But it is unnecessary to decide this point in the present case. The pendency of the proceedings in the limited-liability cause was a sufficient answer to the libel of the appellants."

Touching the wide purpose of Congress, as indicated by the various provisions

limiting the shipowner's liability, the court, in the same case, said:

"If we look at the ground of the law of limited responsibility of shipowners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of shipbuilding and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew, done without their privity or knowledge. It extends to liability for every kind of loss, damage, and injury. This is the language of the maritime law, and it is the language of our statute, which virtually adopts that law."

Neither is it necessary to conclude that the section in question is a repealing act as to any of the qualifications of the preceding limitations found in §§ 4283 et seq., of the Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose,—that of extending the benefits of §§ 4283 et seq., regardless of the owner's knowledge or privity.

That would be to throw the section out of correspondence with the existing limitations.

We therefore conclude that the section in question was intended to add to the enumerated claims of the old law "any and all debts and liabilities" not therefore included. This is the interpretation suggested in *Butler v. Boston & S. S. S. Co.* supra. That the section operates as such an amendment of the existing law, and not as a [106] repeal of *the qualifications found in that law, is the view adopted by three circuit courts of appeal, in the cases of *The Republic*, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109, in the second circuit, *The Annie Faxon*, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312, in the ninth circuit, and in *Great Lakes Towing Co. v. Mill Transp. Co.* 22 L.R.A.(N.S.) 769, 83 C. C. A. 607, 155 Fed. 11, in the sixth circuit, as well as by a number of district courts, among them being the case of *The Amos D. Carver*, 35 Fed. 665, and *Re Meyer*, 74 Fed. 881.

Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect, and contracts.

If thus the owner's liability for a tort permitted or incurred through the master or crew, although nonmaritime, because due to a collision between the ship and a

structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper district court of the United States, "all proceedings," by the express terms of § 4285, Revised Statutes, "against the owner, shall cease." The procedure in any such case is prescribed by the 54th and 55th rules in admiralty, where it is said that the court shall, "on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims." *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 549, 32 L. ed. 1017, 1022, 9 Sup. Ct. Rep. 612.

The case of *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25, which was a petition for the benefits of the limited-liability act and to stay suits at common law against the owner for liability by fire carried to buildings on land, communicated from the ship, has been cited as holding that the limited-liability statute did not apply to such a claim, and that a *court of admiralty could [107] not draw to itself jurisdiction over any such claim. But that liability was incurred on September 20, 1880, a date antecedent to the act of 1884, which act expressly excluded liabilities which arose before its passage. That the decision by this court was not made until November, 1886, and that the opinion makes no reference to the act of 1884, is of no importance, since the act had no application.

The decree is reversed, and remanded for further proceedings in accordance with this opinion.

GEORGE D. BRYAN, Collector of the Port of Charleston, Petitioner,

v.

ROXANA S. KER, Executrix of W. W. Ker, Deceased.

(See S. C. Reporter's ed. 107-114.)

Marshal — executing invalid process.

A writ in the usual form of a monition and warrant of arrest in a suit *in rem*, issued from the office of the clerk of a Federal district court, and bearing the seal of that court, will protect the marshal in seizing and detaining a vessel in conformity to the command of the writ, although the purported signature of the deputy clerk

NOTE.—As to protection of ministerial officers in the execution of regular process—see note to *Erskine v. Hohnbach*, 20 L. ed U. S. 745.

was affixed under an attempted but ineffectual delegation of authority, and although the case stated in the libel upon which the writ issued was not cognizable as a suit *in rem* in admiralty, but only as a personal action for damages.
[For other cases, see *Marshal*, 22-24, in *Digest Sup. Ct.* 1908.]

[No. 3.]

Argued October 25 and 26, 1911. Decided November 20, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which reversed a judgment of the Circuit Court for the District of South Carolina, in favor of defendant in an action against the collector of the port of Charleston, to recover damages for the alleged unlawful detention of a vessel. Reversed and judgment of Circuit Court affirmed.

See same case below, 90 C. C. A. 179, 163 Fed. 233.

The facts are stated in the opinion.

Assistant Attorney General Denison argued the cause, and, with Mr. Loring C. Christie, filed a brief for petitioner:

A marshal is not liable for his official acts if the process on which he moves is fair on its face, even though not legally valid.

Matthews v. Densmore, 109 U. S. 216, 219, 27 L. ed. 912, 913, 3 Sup. Ct. Rep. 126; *Marks v. Shoup*, 181 U. S. 562-564, 45 L. ed. 1002-1004, 21 Sup. Ct. Rep. 724; *Hill v. Haynes*, 54 N. Y. 153; *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. ed. 745; *Throop*, Pub. Off. §§ 756-762; *Mechem*, Pub. Off. §§ 690, 745, 768-772; *Cooley*, Torts, 2d ed. pp. 538-540; *Conner v. Long*, 104 U. S. 228, 26 L. ed. 723.

This protection goes so far that some cases hold that the marshal's personal knowledge of the defect—which of course he may sometimes casually acquire—does not avoid the application of the rule.

Throop, Pub. Off. § 759; *Mechem*, Pub. Off. § 745; 35 Cyc. 1752, 1753.

The monition was not void, but at most only voidable. It was colorable, and could have been corrected by amendment in the suit in which it was issued.

Texas & P. R. Co. v. Kirk, 111 U. S. 486, 28 L. ed. 481, 4 Sup. Ct. Rep. 500; *Bondurant v. Watson*, 103 U. S. 278, 26 L. ed. 447; *Miller v. Texas*, 153 U. S. 535, 537, 38 L. ed. 812, 813, 14 Sup. Ct. Rep. 874; *Long v. Farmers' State Bank*, 9 L.R.A. (N.S.) 585, 77 C. C. A. 538, 147 Fed. 362; *Cotter v. Alabama G. S. R. Co.* 10 C. C. A. 35, 22 U. S. App. 372, 61 Fed. 747; *Wolf v. Cook*, 40 Fed. 432; *Dwight v. Merritt*, 56 L. ed.

18 Blatchf. 305, 4 Fed. 614; *United States v. Turner*, 50 Fed. 734.

Under the Federal statutes, amendments in technical matters have been allowed with the utmost freedom, the act of June 1, 1872, having been accepted as intending to prevent the obstruction of justice by artificial and technical rules, and to bring cases to decision on their real merits.

Murphy v. Stewart, 2 How. 263, 11 L. ed. 261; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171; *Parks v. Turner*, 12 How. 39, 46, 13 L. ed. 883, 887; *Walton v. Marietta Chair Co.* 157 U. S. 342, 39 L. ed. 725, 15 Sup. Ct. Rep. 626; *Tilton v. Cofield*, 93 U. S. 163, 167, 23 L. ed. 858, 859.

In general, aside from the operation of the Federal statutes, it appears to be clear that such defects make the process at most voidable, and not void.

Ambler v. Leach, 15 W. Va. 681; *Van Fleet*, *Collateral Attack*, p. 332; *Alderson*, *Judicial Writs & Process*, p. 147; *Sweet v. Palmer*, 95 Mich. 449, 54 N. W. 951; *Richardson v. Bachelder*, 19 Me. 82; *Nichols v. Smith*, 26 N. H. 298; *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708; *Donahoe v. Shed*, 8 Met. 326; *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Bogert v. Phelps*, 14 Wis. 89; *Griswold v. Connolly*, 1 Woods, 193, Fed. Cas. No. 5,833; *King v. Belcher*, 30 S. C. 383, 9 S. E. 359.

Mr. J. P. Kennedy Bryan argued the cause and filed a brief for respondent:

If the officer had power to issue the writ there would be protection; but if the officer had no power to issue the writ, there would be no protection. Where there is a want of power, there is no protection. If there is power in the person issuing the writ to issue the writ, and there is a defect or irregularity, the writ is voidable. If there is no power, as here, where a private, unofficial person attempted to do an official act, the writ is void, and there is no protection.

Dynes v. Hoover, 20 How. 80, 81, 15 L. ed. 844; *Boyd v. United States*, 116 U. S. 627, 29 L. ed. 749, 6 Sup. Ct. Rep. 524; *Starr v. United States*, 153 U. S. 617, 618, 38 L. ed. 842, 843, 14 Sup. Ct. Rep. 919; *State v. Vaughn*, Harp. L. 313; *Davis v. Sanders*, 40 S. C. 507, 19 S. E. 138; *Confiscation Cases* (*United States v. Clarke*) 20 Wall. 93, 111, 22 L. ed. 320, 324; *Leas v. Merriman*, 132 Fed. 511; *Middleton Paper Co. v. Rock River Paper Co.* 19 Fed. 252; *Gardner v. Lane*, 14 N. C. (3 Dev. L.) 53; *Covell v. Heyman*, 111 U. S. 176, 177, 28 L. ed. 390, 391, 4 Sup. Ct. Rep. 355; *The Resolute*, 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct.

Rep. 112; *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718; *The Berkeley*, 58 Fed. 920; *Erschine v. Hohnbach*, 14 Wall. 616, 617, 20 L. ed. 745, 747; *Stutsman County v. Wallace*, 142 U. S. 309, 35 L. ed. 1024, 12 Sup. Ct. Rep. 227; *Philadelphia & R. R. Co. v. Kenney*, 9 Phila. 403, Fed. Cas. No. 11,088; *Jacobs v. Measures*, 13 Gray. 74.

The cases cited by the petitioner but confirm this principle.

Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126; *Conner v. Long*, 104 U. S. 228, 26 L. ed. 723; *Buck v. Colbach*, 3 Wall. 334, 18 L. ed. 257; *Marks v. Shoup*, 181 U. S. 562, 45 L. ed. 1002, 21 Sup. Ct. Rep. 724; *Donahoe v. Shed*, 8 Met. 326; *Rex v. Danser*, 6 T. R. 242; *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686; *Earl v. Camp*, 16 Wend. 562; *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Bogert v. Phelps*, 14 Wis. 89; *Nichols v. Smith*, 26 N. H. 298; *Redmond v. Mullenax*, 113 N. C. 511, 18 S. E. 708; *Shepherd v. Lane* 13 N. C. (2 Dev. L.) 148; *Ambler v. Leach*, 15 W. Va. 677, *Harris v. Harde-man*, 14 How. 334, 14 L. ed. 444.

The following further authorities affirm the same principle:

Wimbish v. Wofford, 33 Tex. 109; *Hernandez v. Drake*, 81 Ill. 39; *Greenleaf v. Mumford*, 19 Abb. Pr. 476; *Anderson v. Johett*, 14 La. Ann. 624; *Jacobs v. Measures*, 13 Gray, 75; *Fisher v. McGirr*, 1 Gray, 45, 61 Am. Dec. 381; *Hickam v. Larkey*, 6 Gratt. 210; *Sheldon v. Van Buskirk*, 2 N. Y. 475.

A process cannot be amended where the process itself is invalid, and as served is ineffectual to bring the party or the *res* within the jurisdiction of the court.

Brown v. Pond, 5 Fed. 31; *Bell v. Austin*, 13 Pick. 93; *United States v. Rose*, 14 Fed. 682; *United States v. Riley*, 88 Fed. 480; *Semmes v. United States*, 91 U. S. 25, 23 L. ed. 195.

On the ground that they are not original writs, and that the parties were before this court, and their rights already adjudicated, the following cases cited by petitioner are to be distinguished:

Hill v. Haynes, 54 N. Y. 153; *Griswold v. Connolly*, 1 Woods, 193, Fed. Cas. No. 5,833; *Jett v. Shinn*, 47 Ark. 377, 1 S. W. 693.

The proceeding *in rem* does not exist without a maritime lien, and when there is no maritime lien it cannot exist, and the court has no jurisdiction *in rem* of the subject-matter.

The J. E. Rumbell, 148 U. S. 11, 37 L. ed. 347, 13 Sup. Ct. Rep. 498; *The Corsair*

(*Barton v. Brown*) 145 U. S. 335, 348, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949; *Cutler v. Rae*, 7 How. 729, 731, 12 L. ed. 890, 891; *Rock Island Bridge*, 6 Wall. 215, 18 L. ed. 754; *Vandewater v. Mills*, 19 How. 82, 15 L. ed. 554; *The Freeman v. Buckingham*, 18 How. 188, 15 L. ed. 343; *The Lady Franklin*, 8 Wall. 325, 329, 19 L. ed. 455, 457; *The Keokuk*, 9 Wall. 517-519, 19 L. ed. 744, 745; *The William Fletcher*, 8 Ben. 537, Fed. Cas. No. 17,692.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action at law in the circuit court for the district of South Carolina, by a citizen of Pennsylvania against a citizen of South Carolina, as collector of the port of Charleston, to recover damages for the alleged unlawful detention, from November 16 to December 5, 1895, of the American steamship *Laurada*, of which the plaintiff was the owner.

The answer admitted that the defendant, as such collector, acting under instructions from the Secretary of the Treasury, caused the vessel "to be formally detained by placing an inspector on board;" but alleged that the marshal for the District of South Carolina had seized the vessel on November 15, 1895, under a monition and warrant of arrest issued out of the district court for that district upon a libel filed in that court against the vessel, her engines, etc.; that the marshal retained the custody of the vessel, under that process, from November 15 until December 18, 1895, and that, if any damage was sustained by the plaintiff by reason of the detention of the vessel, it did not result from any act of the defendant.

Upon the trial of the issue so presented, the evidence, without any conflict, established these facts:

On November 15, 1895, the marshal, acting upon the monition and warrant of arrest soon to be mentioned, "seized the vessel at Charleston, and detained her in his custody until December 18, following, when she was surrendered to her master upon the execution of an agreement, with sureties, conformably to Rev. Stat. § 941, U. S. Comp. Stat. 1901, p. 692, and the 11th admiralty rule. On November 16, while the vessel was so in the custody of the marshal, the defendant, as collector of the port, acting under directions from the Secretary of the Treasury, placed an inspector on board the vessel, and thereby assumed a qualified control over her; but the custody of the marshal was not disturbed or questioned, or intended to be, the defendant's purpose being only to make sure that the vessel would be detained, according to the directions of the

Secretary of the Treasury, in the event that the custody of the marshal should be terminated. On December 6, the Secretary of the Treasury abandoned the purpose to detain the vessel, and the defendant thereupon withdrew the inspector, the marshal still retaining his custody.

The monition and warrant of arrest under which the marshal acted was issued out of the district court upon the libel presently to be described, and what was done by him was in strict conformity to the command of the writ. When the writ was issued, the clerk of the district court was fatally ill and absent from his office, and the deputy, his son, was attending him. A second son, who was not a deputy, was temporarily in charge of the clerk's office, with instructions, given by the deputy, to receive and file papers, and, if it became necessary, to sign and issue process. Acting upon these instructions, the brother signed and issued the writ in question, doing so in such manner that it purported to have been signed and issued by the deputy on behalf of the clerk. The libel upon which the writ issued purported in some respects to be one *in rem*, but it plainly disclosed that the libellants were not possessed of a maritime lien upon the vessel, her engines, etc., but only of a right to damages. See *Vandewater v. Mills*, 19 How. 82, 90, 15 L. ed. 554, 556. 112]*There was, however, no suggestion of this on the face of the writ, which was in the usual form of a monition and warrant of arrest in a suit *in rem*. It ran in the name of the President, was addressed to the marshal, commanded him to seize the vessel and to detain it until the further order of the court, bore teste of the judge of the district court, was sealed with the seal of the court, purported to be signed by the deputy on behalf of the clerk, and was transmitted from the clerk's office to the marshal's office in the usual way.

At the conclusion of the evidence showing these facts, the court, at the request of the defendant, directed a verdict in his favor, and entered judgment accordingly. The judgment was subsequently reversed by the circuit court of appeals (90, C. C. A. 179, 163 Fed. 233), and the case is now here on certiorari. 212 U. S. 575, 53 L. ed. 657, 29 Sup. Ct. Rep. 684.

As it is obvious that the verdict for the defendant was rightly directed, if the seizure and detention of the vessel by the marshal were justified by the writ under which he acted, we come at once to the reasons advanced for saying that his acts were not so justified. They are: (1) that the writ was not signed or issued by the clerk or his deputy, but by one who was without lawful authority; and (2) that the case stated

in the libel, upon which the writ issued, was not cognizable as a suit *in rem* in admiralty, but only as a personal action for damages.

Neither reason is sufficient. Both overlook considerations which operated with impelling force to justify the acts of the marshal.

True, the purported signature of the deputy was not his own, but was affixed by his brother under an attempted but ineffectual delegation of authority, and yet the writ, in the usual form, was issued from the office of the clerk, bearing the seal as evidence of its authenticity. In short, although thus irregularly issued, it came into the hands of the marshal as an apparently valid writ. Besides, this irregularity *did not render the writ void, but [113 voidable merely, for it could have been amended by substituting the true for the purported signature of the deputy. *Rev. Stat. § 948*, U. S. Comp. Stat. 1901, p. 695; *Texas & P. R. Co. v. Kirk*, 111 U. S. 486, 28 L. ed. 481, 4 Sup. Ct. Rep. 500; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Semmes v. United States*, 91 U. S. 21, 23 L. ed. 193; *Cotter v. Alabama G. S. R. Co.* 10 C. C. A. 35, 22 U. S. App. 372, 61 Fed. 747; *Long v. Farmers' State Bank*, 9 L.R.A.(N.S.) 585, 77 C. C. A. 538, 147 Fed. 360; *Ambler v. Leach*, 15 W. Va. 677.

True, also, the case stated in the libel was not cognizable as a suit *in rem* in admiralty, and therefore afforded no basis for the issuance of the warrant of arrest. But as this did not appear on the face of the writ, and as the court was empowered to issue such process in a proper case, it still must be said that the writ, as it was received by the marshal, was apparently a valid one.

In this situation the case falls clearly within the rule, often applied in this and other courts, which is well stated in *Cooley on Torts*, 3d ed., vol. 2, p. 883, as follows:

"The process that shall protect an officer must, to use the customary legal expression, be *fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making

service, and he is not concerned with any illegalities that may exist back of it."

See *Conner v. Long*, 104 U. S. 228, 237, 26 L. ed. 723, 726; *Matthews v. Densmore*, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126; *Harding v. Woodcock*, 137 U. S. 43, 34 L. ed. 580, 11 Sup. Ct. Rep. 6; *Stutsman County v. Wallace*, 142 U. S. 293, 309, 35 L. ed. 1018, 1024, 12 Sup. Ct. Rep. 227; 114] *Marks v. *Shoup*, 181 U. S. 562, 45 L. ed. 1002, 21 Sup. Ct. Rep. 724; *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. ed. 745; *Haffin v. Mason*, 15 Wall. 671, 21 L. ed. 196; *Bragg v. Thompson*, 19 S. C. 572; *Goodgion v. Gilreath*, 32 S. C. 388, 11 S. E. 207; *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *People v. Rix*, 6 Mich. 144; *Henline v. Reese*, 54 Ohio St. 599, 56 Am. St. Rep. 736, 44 N. E. 269; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181.

The judgment of the Circuit Court of Appeals is accordingly reversed, and that of the Circuit Court is affirmed.

Reversed.

TEFFT, WELLER, & COMPANY et al.,
Appts.,
v.
JULIAN MUNSURI.

(See S. C. Reporter's ed. 114-121.)

Appeal — from Porto Rico district court — bankruptcy case.

1. The disallowance of certain claims against a bankrupt's estate by the district court of the United States for Porto Rico, sitting as a court of bankruptcy, is not reviewable in the Federal Supreme Court under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3431), § 24a, investing that court with appellate jurisdiction of "controversies arising in bankruptcy proceedings" from the courts of bankruptcy from which it has appellate jurisdiction in other cases, and "a like jurisdiction" from courts of bankruptcy not within any organized circuit, since the allowance or disallowance of a claim in bankruptcy is not a controversy arising in bankruptcy proceedings, but is a proceeding in bankruptcy, the mode of reviewing which is confined, by § 25a, to an appeal to the appropriate circuit court of appeals or territorial supreme court.

[For other cases, see Appeal and Error, 1036-1043a. in Digest Sup. Ct. 1908.]

Appeals — to Federal Supreme Court — in bankruptcy case.

2. An order of a court of bankruptcy in

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rico courts—see note to *Garrozi v. Dastas*, 51 L. ed. U. S. 369.

On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

a proceeding in which there was a controversy between the creditors and one of the members of a bankrupt partnership as to whether he was liable as a general or limited partner cannot be regarded as rendered in a controversy arising in bankruptcy proceedings, for the purpose of sustaining an appeal to the Federal Supreme Court under the bankrupt act of July 1, 1898, § 24a, where such appeal was specifically taken from the order as one disallowing the claim of the appellants of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it, and which was affixed to it by the assignments of error filed at the time the appeal was taken.

[For other cases, see Appeal and Error, 848-859, in Digest Sup. Ct. 1908.]

Appeal — from district court of Porto Rico — bankruptcy case.

3. The right to have an order of the district court of the United States for Porto Rico, sitting as a court of bankruptcy, disallowing certain claims against a bankrupt's estate, reviewed in the Federal Supreme Court, must be found in the bankrupt act, which furnishes the exclusive modes of review of questions arising in steps in proceedings in bankruptcy, and no such right is given by the provisions of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, for appeals to the Federal Supreme Court from final judgments of the district court of Porto Rico, "in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories."

[For other cases, see Appeal and Error, 1036-1043, in Digest Sup. Ct. 1908.]

[No. 22.]

Argued October 30 and 31, 1911. Decided December 4, 1911.

APPEAL from the District Court of the United States for Porto Rico to review a disallowance of certain claims against a bankrupt's estate. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. William G. Johnson argued the cause, and, with Mr. William H. Hawkins, filed a brief for appellants.

Mr. George H. Lamar argued the cause, and, with Mr. Willis Sweet, filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

We are of opinion that a motion made to dismiss this case must prevail, and we therefore state only the facts which are essential to the consideration of that subject.

In 1907, the commercial firm of "Sucesores de José Hernaiz" was adjudicated an involuntary bankrupt. Tefft, Weller, &

Company and those who are here conjointly appellants with that firm presented their claims against the firm, and they were allowed by the referee. In October, 1907, as the result of proceedings whose initiation it is unnecessary to consider, the court held that one Julian Munsuri was not a limited but a general partner of the bankrupt firm, and hence was generally liable for its debts. Munsuri subsequently moved the referee to vacate the allowance previously made of the claims which had been presented by the appellants, and to disallow said claims. This motion was based on alleged settlements of the claims which it was asserted had been made with Munsuri in 1903. The referee denied the motion because he concluded that the asserted settlements, although they had been in form made, had been procured by the fraud of Munsuri, and therefore were not binding. Munsuri, by petition for review, sought to reverse the action of the referee. The court, on February 9, 1909, passing on the 116]*petition for review, reversed the action of the referee. It was held that the settlements relied upon by Munsuri were binding. An order was made directing that the previous allowance of the claims be vacated, and that the claims be disallowed. Thereupon the courts filed its "findings of fact and conclusions of law," which were recited to have been made "in pursuance of general order in bankruptcy No. 36, p. 3." The attorney for the creditors then petitioned for the allowance of an appeal to this court from the judgment and order "whereby the referee's report denying the motion to disallow the claims of said creditors is reversed and set aside and the said claims are disallowed."

At the time the appeal was allowed (the one which is now under consideration), assignments of error were filed assailing the action of the court in disallowing the claims, and the merit of these assignments has been elaborately insisted on in the argument at bar. As appellate jurisdiction over courts of bankruptcy is expressly provided for in the bankrupt law, including the cases or classes of cases in which this court has authority to review the action of courts of bankruptcy, we must turn, at least primarily, to that act in order to test the correctness of the motion to dismiss for want of jurisdiction which has been made. Now, the subject of the power to review the orders of bankruptcy courts disallowing claims in bankruptcy proceedings is in express terms provided for by the bankrupt act in § 25a as follows:

"Appeals and Writs of Error.—a. That appeals and equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals

of the United States, and to the supreme court of the territories, in the following cases, to wit . . . (3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. *Such[117 appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432].

This express provision for the exercise of appellate jurisdiction by the courts therein named over the case here presented by necessary implication must be held to exclude the right of this court to exercise appellate jurisdiction over a subject not delegated unless some other provision of the statute compels to a contrary view. But instead of tending to so do, the context of the statute adds cogency to and makes irresistible the implication arising from the provision of 25a, above quoted. This result flows from the careful provision otherwise made by the statute for the exercise of appellate jurisdiction by this court over proceedings in courts of bankruptcy, or the orders, judgments, and decrees rendered by such courts, none of which embrace the character of case here presented. Indeed, when the context of the statute is considered and the distribution of appellate jurisdiction for which it provides is taken into view, it becomes certain that to extend by remote implication, based upon conceptions of inconvenience, the reviewing power of this court to a subject like the one now in question, would destroy the symmetry of the law, and would render necessary limitations on the power of this court to review as to important subjects concerning which the power would otherwise obtain.

See 25b, paragraphs 1 and 2, defining the appellate power of this court in certain cases, and see also the right to certify questions to this court, and the authority conferred on this court to allow writs of certiorari, conferred in § 25d, as well as authority conferred by 24a, to which we shall hereafter advert. We might well leave the sufficiency of the motion to dismiss to rest upon these conclusive considerations, but we nevertheless briefly refer to the contentions pressed in argument to the contrary.

*1. The main reliance is upon § 24a,[118 which, it is virtually insisted, controls the other provisions of the statute, and therefore confers jurisdiction in this case. The text of 24a is this:

"Jurisdiction of appellate courts.—a. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the ter-

ritories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia."

But the entire argument rests upon a misconception of the words "controversies in bankruptcy proceedings," as used in the section, since it disregards the authoritative construction affixed to those words. *Coder v. Arts*, 213 U. S. 234, 53 L. ed. 777, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690. Those cases expressly decide that controversies in bankruptcy proceedings, as used in the section, do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy. The cases referred to, moreover, by necessary implication, determine that the mere allowing or disallowing a claim in bankruptcy is a proceeding in bankruptcy, and not a controversy arising in bankruptcy, within the intendment of the section. Nor is there force in the contention that because the district court of Porto Rico is a court of bankruptcy "not within an organized circuit of the United States," therefore authority to review its action in a case like this is conferred on this court by the concluding sentence of § 24a. This is 119]true, because *the proposition really rests upon the misconstruction of the section, already pointed out. That is to say, as the sentence relied upon only confers upon this court "a like jurisdiction" to review the acts of the particular courts of bankruptcy which the sentence designates to that conferred by the immediately preceding provisions of § 24a, that is, to review controversies in bankruptcy, it follows that the sentence confers no power to review a mere step in bankruptcy, taken by a bankrupt court, even although such court be one of those referred to in the last sentence relied upon.

The fact that the result of the previous settled construction of the statute causes it to come to pass that orders in mere proceedings in bankruptcy, rendered by the court below when acting as a court in bankruptcy, may not be susceptible of being reviewed in any court unless in some case

where such review is specially provided for in the bankrupt act, affords no ground for disregarding the plain text of the statute by assuming jurisdiction where none exists.

It is true, as suggested in argument, that in *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. ed. 514, 28 Sup. Ct. Rep. 419, jurisdiction was exerted to review the action of the court below in a case which was not susceptible of being reviewed under the construction of the statute which we have here applied. But in that case there was no appearance of counsel for the appellee, and while a general suggestion was made in the argument of appellant as to the duty of the court not to exceed its jurisdiction, no argument concerning the want of jurisdiction was made. The case, therefore, in substance proceeded upon a tacit assumption of the existence of jurisdiction,—an assumption which would not be now possible, in consequence of the authoritative construction given to 24a in *Coder v. Arts*, supra. Under these circumstances, the mere implication as to the meaning of the statute, resulting from the jurisdiction which was in that case merely assumed to exist, is not controlling, and the *Armstrong Case*, *therefore, in so far as it conflicts with [120 the construction which we here give the statute, must be deemed to be qualified and limited.

But it is urged that as the proceeding below was a controversy between the creditors and Munsuri as to whether he was liable as a general partner, the matter before us is susceptible of being treated as a controversy arising in bankruptcy, and as distinct from a step in bankruptcy proceedings. But under the circumstances here disclosed, the contention is wanting in candor. We say this because the appeal was specifically taken from the order as one disallowing the claim of the appellants of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it, and which was affixed to it by the assignments of error filed at the time the appeal was taken. Moreover, we think the contention is necessarily negatived, as we have said, by the ruling in *Coder v. Arts*. Finally, it is contended that the right to review, wholly irrespective of the provisions of the bankrupt act, the order here in question, arises under § 35 of the Foraker act (31 Stat. at L. p. 85, chap. 191), enacted nearly two years after the passage of the bankrupt law, viz.:

"Writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States

in the same manner, and under the same regulations, and in the same cases, as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question and the right claimed thereunder is denied."

Waiving consideration of the question as to whether the present appeal was allowed "in the same manner, and under the same regulations, and in the same cases, as from 121]the *supreme courts of the territories of the United States," we think it evident that, as to questions of the character of those presented by this appeal, arising in steps in bankruptcy proceedings proper, the modes of review specifically provided for in the bankruptcy act are exclusive.

Dismissed for want of jurisdiction.

JULIAN MUNSURI, Plff. in Err.,
v.

J. H. FRICKER,† Trustee.

(See S. C. Reporter's ed. 121-123.)

Appeal — from Porto Rico district court — bankruptcy case.

1. An attempt to have reviewed in the Federal Supreme Court an order of the district court of the United States for Porto Rico, sitting as a court of bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts, cannot be sustained under the judiciary act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, as an appeal solely upon the question of jurisdiction, but any right to have such order reviewed must be found in the bankrupt act.

[For other cases, see Appeal and Error, 1036-1043a, in Digest Sup. Ct. 1908.]

Bankruptcy — review of proceedings and orders.

2. No support can be found in the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 24b, authorizing a petition to superintend and revise in matters of law the proceedings of courts of bankruptcy, for an attempt to have reviewed in the Federal Supreme Court an

order of the district court of the United States for Porto Rico, sitting as a court of bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts. [For other cases, see Bankruptcy, XIII., in Digest Sup. Ct. 1908.]

[No. 21.]

Argued October 27 and 30, 1911. Decided December 4, 1911.

IN ERROR to the District Court of the United States for Porto Rico to review an order holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts. Dismissed for want of jurisdiction.

See same case below, 2 Porto Rico Fed. Rep. 95.

The facts are stated in the opinion.

Mr. George H. Lamar argued the cause, and, with Mr. Willis Sweet, filed a brief for plaintiff in error.

Mr. William G. Johnson argued the cause, and, with Mr. William H. Hawkins, filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

This case relates to the same bankruptcy proceeding, steps in which formed the basis of the appeal in case No. 22 [222 U. S. 114, ante, 118, 32 Sup. Ct. Rep. 67], which has just been dismissed.

*In the petition for voluntary adju-[122 dication of the alleged bankrupt firm, Julian Munsuri was averred to be a limited or special partner. Following certain proceedings before the referee and a motion by general creditors, the court below, on October 25, 1907, entered an order declaring Munsuri to be a general partner of the firm and his personal estate liable for the firm debts. It was not, however, until February 19, 1909,—nearly sixteen months after the entry of the order, and following the disallowance by the court of the claims of certain creditors which had been allowed by the referee,—that this proceeding was commenced to obtain a review of the order and judgment of October 25, 1907. The proceeding for review was begun by the filing in the court below of a document styled "Petition for a Writ of Review to the United States District Court for Porto Rico," verified and certified as such by the attorney for Missouri, which document, however, although couched in part in the phraseology of a petition, is also in form a writ of error, directed to the judge of the court below. In the bond and citation reference is made to the proceeding as the prosecution of a writ of review for the correction of the judgment or order in the petition mentioned.

†Resignation of J. H. Fricker, as trustee, and the appointment of Charles O. Lord, as his successor, suggested October 27, 1911, and the said Charles O. Lord, as trustee, substituted as the party defendant in error herein.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rico courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On appeal and review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

Objection is made by the counsel for the trustee to the exercise of jurisdiction by this court, on the ground that the supposed writ and citation thereon and the docketing of the transcript are insufficient in law under any statute, or rule, or practice of the court, to bring within the appellate jurisdiction of this court, for its consideration or correction, any of the matters and things charged in the transcript. On the other hand, the contention is that the proceeding may be sustained as an appeal solely upon the question of jurisdiction under § 5 of the judiciary act of 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], or as a petition to superintend and revise in matter of law, under § 24b of the bankruptcy act. Aside from any question as to the lapse of time between the entry 123]*of the assailed order and the commencement of this proceeding for review, the decision in *Tefft, W. & Co. v. Munsuri*, No. 22, of this term, just decided, is controlling, because it was there expressly held that the express provisions for review contained in the bankruptcy act were controlling, and that review under 24b by this court is not authorized by the act.

Dismissed.

RAFAEL ENRIQUEZ et al., Appts.,
v.

FRANCISCO ENRIQUEZ and Carmen de
la Cavada de Enriquez, His Wife.

(See S. C. Reporter's ed. 123-127.)

Appeal — jurisdictional amount — affidavit of value.

1. An affidavit that the value of the real property, the title to and possession of which is involved in a suit to set aside a conveyance, is in excess of the jurisdictional amount prescribed by the act of July 1, 1902 (32 Stat. at L. 695, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 226), § 10, governing appeals to the Federal Supreme Court from the supreme court of the Philippine Islands, is inadequate to sustain such an appeal from a decree which, on the appeal of the defendants alone, reversed a decree of the trial court, upholding such conveyance as against the objections of forgery and mental incapacity, and setting the same aside as to one half of the property only, on the ground that it belonged to the estate of the grantor's deceased wife, as an *acquêt* of the community.

[For other cases, see Appeal and Error, 375-379, in Digest Sup. Ct. 1908.]

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the supreme court of the Philippine Islands—see note to *Martinez v. International Bkg. Corp.* 55 L. ed. U. S. 438.

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Appeal — jurisdictional amount — pleadings and record.

2. Statements in the complaint and amended complaint in a suit to set aside a conveyance of real property, from which might be inferred the existence of the jurisdictional amount requisite, under the act of July 1, 1902, § 10, to sustain an appeal from the supreme court of the Philippine Islands to the Federal Supreme Court, are insufficient as against a motion to dismiss, where the record otherwise shows that such amount is not involved.

[For other cases, see Appeal and Error, 449-451, 471-474, in Digest Sup. Ct. 1908.]

[No. 24.]

Argued and submitted October 31, 1911.

Decided December 4, 1911.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which, on the appeal of the defendants alone, reversed a decree of the Court of First Instance of the City of Manila in a suit to set aside a conveyance of real property, upholding such conveyance as against objections of forgery and mental incapacity, and setting the same aside as to one half of the real property only, on the ground that, as to such property, the deed was beyond the grantor's power of disposition. Dismissed for want of jurisdictional amount.

See same case below, 8 Philippine, 565.

The facts are stated in the opinion.

Mr. Jackson H. Ralston argued the cause, and, with Messrs. Frederick L. Sidons and William E. Richardson, filed a brief for appellants.

Mr. Allison D. Gibbs submitted the cause for appellees:

The value stated in the complaint must prevail, and an affidavit is not admissible to enhance it.

Richmond v. Milwaukee, 21 How. 391, 16 L. ed. 72; *Red River Cattle Co. v. Needham*, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 208; *First Nat. Bank v. Hughes*, 106 U. S. 523, 27 L. ed. 268, 1 Sup. Ct. Rep. 489.

It cannot be seriously contended that the amount in controversy in this appeal exceeds that in controversy before the supreme court of the Philippines, or that the amount in controversy in the latter court exceeded the amount of the judgment against the defendants in the court of first instance, when only the defendants appealed therefrom.

See *Troy v. Evans*, 97 U. S. 1, 24 L. ed. 941; *Gordon v. Ogden*, 3 Pet. 33, 7 L. ed. 592; *Smith v. Honey*, 3 Pet. 469, 7 L. ed. 744; *Pacific Exp. Co. v. Malin*, 131 U. S. 394, 33 L. ed. 204, 9 Sup. Ct. Rep. 792; *Cooke v. Woodrow*, 5 Cranch, 13, 3 L. ed. 22,

222 U. S.

124] *Mr. Chief Justice **White** delivered the opinion of the court:

Rafael Enriquez, as administrator of the estate of his father, Antonio Enriquez, and as his heir, joined by other children and a grandchild of the deceased, also suing as heirs, who were plaintiffs below and are appellants here, sued to set aside a purported conveyance of a piece of real estate in the city of Manila, made by the deceased to his daughter-in-law, Carmen, the wife of a son, Francisco, who were defendants below and are appellees here. The case, as ultimately presented to the court of first instance, involved two questions: First, whether the assailed conveyance was forged, and if real, whether Antonio had mental capacity to execute it; and, second, if the sale was real and the mental capacity obtained, was one half the property embraced by the deed beyond the dispositive power of Antonio because such half belonged to the estate of his deceased wife, as an *acquêt* of the community which had existed between husband and wife. The court of first instance held that the sale was real and that there was mental capacity. It, however, decided that one undivided half of the property belonged, not to Antonio, but to his wife, in virtue of her community interest, and vested on her death in her heirs. To that extent the sale was set aside and judgment was directed for 13,250 pesos as the gross value of the use of the one undivided half of the property during the time it was unlawfully retained. This sum, however, was held to be reducible by the amount of one half of the expenditures made for the whole property, including repairs, improvements, etc., and the defendant Carmen Enriquez was ordered to forthwith make a statement of such expenditures for the purpose of an appropriate reduction in the allowance made for rents and profits. The defendants alone appealed.

In disposing of the appeal the supreme court said:

125] * "The plaintiffs in this court have neither assigned as errors the rulings made against them by the lower court, nor have they discussed any such rulings in their brief. So much of the decision, therefore, as is adverse to the plaintiffs, we cannot consider, and the questions to be resolved are those presented by the appeal of the defendants." [8 Philippine, 566].

Confining itself, therefore, to the question of the existence of the community, the court decided that the court below had erred on that subject, and its judgment was accordingly reversed. The court concluded its opinion as follows:

"The judgment of the court below, which

rests solely upon the proposition that at the time of the death of Doña Ciriaca Villanueva one half of this property passed to her heirs, cannot, therefore, be sustained. That judgment is reversed, without costs to either party in this court, and judgment is entered, acquitting the defendants of the complaint, with the costs of the first instance against the plaintiffs."

This appeal was prosecuted. The assignments of error are solely directed to the conclusion of the court below concerning the nonexistence of the community interest, and the grounds of complaint on this subject have been elaborately pressed at bar, both orally and in printed argument. We are of opinion, however, that we may not consider the subject, as we conclude that a motion made to dismiss the appeal on the ground of the absence of the requisite jurisdictional amount must prevail.

The act of July 1, 1902, chap. 1369, § 10, 32 Stat. at L. 695, U. S. Comp. Stat. Supp. 1909, p. 226, authorizes us to review judgments or decrees of the supreme court of the Philippine Islands "in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other *competent witnesses, [126 is involved or brought in question; . . ."

Evidently, in consequence of these requirements of the statute, there was filed with the assignments of error in the court below an affidavit of Rafael Enriquez, stating in general terms "that the real property, the title to and possession of which is involved therein (in the action), exceeds in value the sum of \$25,000 gold coin of the United States." But even if the sum thus stated were to be accepted for the purpose of testing the existence of the requisite jurisdictional amount, the affidavit would be inadequate, since its context clearly gives rise to the inference that the sum stated is not the value of the undivided one half of the property in controversy, but the value of the entire property. But even if it be conceded that the deficiency of the affidavit may be supplied by a resort to the record, we are of opinion that the record establishes that the essential jurisdictional amount does not exist. True, the complaint and amended complaint state amounts from which, if considered alone, it might be possible to conjecture that the jurisdictional amount existed. These pleadings seem, however, not to have been verified, and if they had been their effect would be neutralized by other parts of the record. In the first place, the consideration expressed for the

sale made by Antonio Enriquez of the entire property was only 8,000 pesos, and while the amended complaint, in assailing the conveyance, alleged the actual value of the property to have been 20,000 pesos, the trial court, from the evidence, found that the real value of the property at the time of the sale was 14,000 pesos; that is, \$7,000 currency of the United States. In the second place, that the rents and profits were greatly exaggerated in the complaint and amended complaint is shown by the fact that only 13,250 pesos was allowed by the court 127] as the value of the use of *one half of the property while wrongfully withheld, and this amount was subject to be reduced by charging against it the one half cost of administering the property, including disbursements for repairs, improvements, etc., during such period. In other words, whether we look at the affidavit alone, or whether we consider the record as a whole, we think it is demonstrated not only that there is a failure to establish that the requisite jurisdictional amount exists, but moreover it affirmatively appears that such amount is not involved.

Dismissed for want of jurisdiction.

RAFAEL ENRIQUEZ et al., Appts.,
v.

FRANCISCO ENRIQUEZ and Carmen de la Cavada de Enriquez, His Wife.

(See S. C. Reporter's ed. 127-130.)

Appeal — jurisdictional amount — affidavit.

The value of the real property involved in a suit to set aside conveyances thereof as fraudulent simulations cannot be said to be shown by a preponderance of evidence to be in excess of the jurisdictional amount prescribed for appeals from the supreme court of the Philippine Islands to the Federal Supreme Court by an affidavit to that effect, where there is an opposing affidavit, and the record shows that the requisite value does not exist.

[For other cases, see Appeal and Error, 375-379, Dig. Sup. Ct. 1908.]

[No. 25.]

Argued and submitted October 31, 1911.
Decided December 4, 1911.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which, on a second appeal, reversed a decree

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the supreme court of the Philippine Islands—see note to *Martinez v. International Bkg. Corp.* 55 L. ed. U. S. 438.

of the Court of First Instance of the City of Manila, setting aside certain conveyances of real property as fraudulent simulations. Dismissed for want of jurisdictional amount.

See same case below, 1st appeal, 3 Philippine, 746; 2d appeal, 8 Philippine, 607.

The facts are stated in the opinion.

Mr. Jackson H. Ralston argued the cause, and, with Messrs. Frederick L. Sidons and William E. Richardson, filed a brief for appellants.

Mr. Allison D. Gibbs submitted the cause for appellees:

An appeal will be dismissed when it appears from the whole record that the matter in dispute is less than the jurisdictional amount.

Gray v. Blanchard, 97 U. S. 564, 24 L. ed. 1108; *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192.

The *onus probandi* as to the amount in controversy, to establish the jurisdiction in a case brought before the court by writ of error, is upon the party seeking to obtain a revision of the case.

Troy v. Evans, 97 U. S. 1, 24 L. ed. 941; *Wilson v. Blair*, 119 U. S. 387, 30 L. ed. 441, 7 Sup. Ct. Rep. 230.

An appeal in an action for partition will be dismissed where the value of appellants' share does not reach the jurisdictional amount.

Parker v. Morrill, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14; *McCarthy v. Provost*, 103 U. S. 673, 26 L. ed. 337.

Affidavits as to value are not admissible where evidence has been admitted on both sides and the proofs have been transmitted.

Red River Cattle Co. v. Needham, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 208.

The amount in controversy cannot be held to exceed the amount of the judgment of the court of first instance as to rental value of the property, from which plaintiffs did not appeal.

Troy v. Evans, 97 U. S. 1, 24 L. ed. 941; *Gordon v. Ogden*, 3 Pet. 33, 7 L. ed. 592; *Smith v. Honey*, 3 Pet. 469, 7 L. ed. 744; *Pacific Exp. Co. v. Malin*, 131 U. S. 394, 33 L. ed. 204, 9 Sup. Ct. Rep. 792; *Cooke v. Woodrow*, 5 Cranch, 13, 3 L. ed. 22.

*Mr. Chief Justice White delivered [128 the opinion of the court:

This controversy is substantially between those who were parties of record in cause No. 24, just decided. [222 U. S. 123, ante, 32 Sup. Ct. Rep. 62.] In this action the administrator and the majority of the heirs of Antonio Enriquez assailed a deed of certain property in Manila, executed by Fran-

cisco Enriquez as attorney in fact of his father, Antonio, and also a sale of the same property subsequently made to the wife of Francisco Enriquez by the person to whom he had previously conveyed it, both the deeds being assailed on the ground that they were fraudulent simulations. The prayer was that the deeds be held to be void, and for a judgment for rents and profits. The court of first instance having decreed in favor of the administrator, the defendants appealed to the supreme court of the Philippine Islands, which court reversed the judgment and remanded the cause for further proceedings.

Following a second judgment in favor of the administrator, the cause was again taken to the supreme court, and that tribunal not only again reversed the judgment below, but entered one "acquitting the defendants of the complaint." This appeal was then taken, and a motion to dismiss has been made upon the ground that the requisite jurisdictional value is not involved. Contemporaneous with the allowance of the appeal there was filed in the court below an affidavit of Rafael Enriquez, in which he averred "that the real property the title to and possession of which is involved therein exceeds in value the sum of \$25,000 gold coin of the United States." Thereafter the appellees filed the affidavit of A. B. Powell, chief of the real estate division of the Bureau of Internal Revenue in the city of Manila, whose duty it is to fix the valuation of real property in the city of Manila, to the effect that he was 129]familiar with the value of *such real property. That the assessed value in Philippine currency of the property in question (land and improvements) was as follows:

For the years 1901 and 1902, 12,236.96 pesos.

For the years 1903 to 1907, 12,582.90 pesos.

For the year 1908, 12,192.60 pesos.

He also swore "that such assessed value was and is the true value of the property during the time mentioned." If both the affidavits be accepted, it plainly results that, considering the value of the property alone, the requisite jurisdictional amount has not been established by the preponderance of evidence. But if the conflict between the two statements be resolved by resort to the record, then we think it affirmatively appears that the requisite value does not exist. At the trial the defendants introduced proof tending to show that the value of the property when originally bought by Antonio Enriquez, as well as at the time when it was conveyed to the wife of Francisco Enriquez, was materially less than the assessed value. Indeed, this proof tend-

ed to show that the building on the property was in ruins at the time of the purchase by the wife of Francisco, and was therefore practically worthless for rental purposes. This was sustained by proof that the very small sum of \$750 was attributed to the building or improvements on the lot in the assessment of 1901. Despite this evidence, no proof then was offered on behalf of the plaintiffs as to the value of the property except that of one witness, who expressed the opinion that the property, at the time he testified, was worth about 16,000 pesos, or \$8,000 currency of the United States. The demonstration as to the absence of the jurisdictional amount which results from these considerations is not changed by taking into view the question of rents and profits. This conclusion is inevitable, since even if the amount of rents and revenues, that is, the value of the use of the property allowed by the court of first instance, be taken into account, *and[130 allowance be made at the same ratio to the date of the judgment appealed from, such sum, when added either to the assessed value or to the value fixed by the plaintiff's own witness at the trial, would be much below \$25,000. On this record "we are clear," as was found to be the case in *Red River Cattle Co. v. Needham*, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 208, "that the jurisdictional value is not made out by a preponderance of evidence;" and the appeal is therefore dismissed.

UNITED STATES, Petitioner,
v.
ALBERT ECKSTEIN.

(See S. C. Reporter's ed. 130-138.)

Duties — similitude clause — artificial horsehair.

Imitation horsehair produced from cotton waste by a chemical process, being like cotton yarn as to material and use, is dutiable under the similitude clause of the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), § 7, at the rate levied by paragraph 302 on cotton yarn, and not under § 6, as a nonenumerated manufactured article. [For other cases, see Duties, 61, 84-88, 129, 177, in Digest Sup. Ct. 1908.]

[No. 52.]

Argued November 10, 1911. Decided December 4, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which, reversing a judgment of the Cir-

cuit Court for the Southern District of New York, affirming a decision of the board of general appraisers, held that artificial horsehair was dutiable under the similitude clause of the tariff act at the rate levied on cotton yarn. Affirmed.

See same case below, 93 C. C. A. 192, 167 Fed. 802.

The facts are stated in the opinion.

Assistant Attorney General **Wemple** argued the cause, and, with Mr. Martin T. Baldwin, special attorney, filed a brief for petitioner:

Statutory similitude has been held to be a substantial similitude in one or more of the particulars mentioned in § 7 of the tariff act of 1897.

Arthur v. Fox, 108 U. S. 125, 128, 27 L. ed. 675, 676, 2 Sup. Ct. Rep. 371; Stuart v. Maxwell, 16 How. 150, 162, 14 L. ed. 883, 888; Murphy v. Arnson, 96 U. S. 131, 133, 24 L. ed. 773, 774; Pickhardt v. Merritt, 132 U. S. 252, 259, 33 L. ed. 353, 356, 10 Sup. Ct. Rep. 80.

Substantial similitude in material is not established.

United States v. W. N. Proctor & Co. 76 C. C. A. 96, 145 Fed. 126.

Substantial similitude in use is not established.

John A. Paterson & Co. v. United States, 92 C. C. A. 524, 166 Fed. 733; United States v. Rheims Co. 99 C. C. A. 350, 175 Fed. 778.

Mr. **Wade H. Ellis** argued the cause, and, with Mr. John A. Kratz, Jr., filed a brief for respondent:

The question of the similitude is one of fact.

Erhardt v. Steinhardt, 153 U. S. 177, 38 L. ed. 678, 14 Sup. Ct. Rep. 775; Herrman v. Arthur (Herrman v. Miller) 127 U. S. 363, 370, 32 L. ed. 186, 189, 8 Sup. Ct. Rep. 1090; Wills v. Russell, 100 U. S. 621, 25 L. ed. 607.

Similitude does not mean identity.

United States v. Roessler & H. Chemical Co. 70 C. C. A. 346, 137 Fed. 770; Greenleaf v. Goodrich, 101 U. S. 278, 283, 25 L. ed. 845, 846; Fisk v. Arthur, 103 U. S. 431, 26 L. ed. 520; Arthur v. Fox, 108 U. S. 125, 27 L. ed. 675, 2 Sup. Ct. Rep. 371; Pickhardt v. Merritt, 132 U. S. 252, 33 L. ed. 353, 10 Sup. Ct. Rep. 80; Stuart v. Maxwell, 16 How. 150, 14 L. ed. 883; Mandel v. Seeberger, 39 Fed. 760; Re Herter Bros. 4 C. C. A. 107, 20 U. S. App. 254, 53 Fed. 913; United States v. Dana, 39 C. C. A. 590, 99 Fed. 433; Hahn v. United States, 40 C. C. A. 622, 100 Fed. 635; Tiffany v. United States, 50 C. C. A. 419, 112 Fed. 672; Re Guggenheim Smelting Co. 50 C. C. A. 374, 112 Fed. 517; R. J. Waddell & Co. v. Unit-

ed States, 124 Fed. 301; United States v. Rich, 100 C. C. A. 278, 176 Fed. 732.

The evidence establishes that substantial similitude exists in use to cotton yarn.

Pickhardt v. Merritt, 132 U. S. 252, 258, 33 L. ed. 353, 356, 10 Sup. Ct. Rep. 80; Arthur v. Fox, 108 U. S. 125, 27 L. ed. 675, 2 Sup. Ct. Rep. 371; Stuart v. Maxwell, 16 How. 150, 14 L. ed. 883; United States v. Roessler & H. Chemical Co. 70 C. C. A. 346, 137 Fed. 770.

Mr. Chief Justice **White** delivered the opinion of the court:

This suit concerns the correct classification, under the tariff act of July 24, 1897, chap. 11, 30 Stat. at L. 151, U. S. Comp. Stat. 1901, p. 1626, of artificial or imitation horsehair, imported by the respondent into the port of New York on October 5, 1904.

Artificial or imitation horsehair is made from cotton waste by two processes, the Fremery and the Chardonnet. By the first process, referred to in the opinion of the circuit court of appeals for the second circuit, in Hardt von Bernuth & Co. v. United States, 76 C. C. A. 638, 146 Fed. 61, the cotton waste is dissolved in a solution of cup-ammonium, a salt of copper and ammonia, and this solution is forced through fine openings, discharging into a bath of acetic acid, forming threads of cellulose. By the second process the cotton waste, or raw cotton, is at first turned into gun cotton. This gun cotton is then mixed with alcohol and ether, and dissolved into a liquid, and this liquid is forced by pressure through pipes, at the end of which there are a number of small openings. The material is subsequently subjected to a process which it is not necessary to describe.

In the manufacture under both processes the single filaments are not allowed to solidify, although they are made *to stick[134 together, whereas in the manufacture by the like process of artificial silk, the fine filaments are grouped and twisted together and solidified. The imitation horsehair is usually died black, imported in skeins, and sometimes on spools.

Imitation horsehair is not expressly mentioned in the tariff act of 1897, probably because it was not commercially known when the act was passed.

The provisions of the act of 1897 which are required to be considered in the determination of the question to be decided, briefly, are these, viz.: Section 6. providing for duty on nonenumerated articles; § 7, the "similitude clause;" paragraph 302, the cotton yarn clause; and paragraph 385, the silk yarn clause.

The goods were classified by the collector

at the port of New York as "similar" to silk yarn, and reference was made to prior decisions, viz.: G. A. 4,939, 5,081, and 5,257. Duty was collected at the rate of "30 per centum ad valorem, under paragraph 385, the silk yarn provision, as a result of applying § 7 of the 'similitude clause.' The importer protested, claiming the merchandise to be dutiable at the rate provided by paragraph 302, by similitude to cotton yarn, or at the rate of 20 per cent, under § 6, as a nonenumerated manufactured article."

Before the Board of General Appraisers testimony was seemingly directed on the part of the importers to establishing that the material was, and on the part of the government that it was not, a yarn. On June 22, 1906, the board reversed the action of the collector, and sustained the alternative claim of the importers, that the merchandise was dutiable as a nonenumerated manufactured article under § 6. G. A. 6,387, T. D. 27,442. It is worthy of remark, however, that, pending the hearing before the board, the Secretary of the Treasury, in Treasury Decisions 27,350, May 15, 1906, directed collectors of customs that duty should be assessed on imitation horse-**135**hair as a nonenumerated "manufactured article at the rate of 20 per centum ad valorem, under § 6.

By appropriate proceedings Eckstein, the respondent here, invoked the exercise of jurisdiction by the circuit court for the southern district of New York for the review of questions of law and fact involved in the decision of the Board of General Appraisers, and in that court contended that the merchandise was a yarn, and was by similitude dutiable under paragraph 302 as a cotton yarn. The court, after hearing additional testimony, decided that the merchandise was not yarn, *could not* by similitude be assessed as cotton yarn or yarn of any other kind, and that the board properly assessed it under § 6 as a manufactured article not otherwise provided for. 160 Fed. 287.

The circuit court of appeals reversed the judgment, and held that the merchandise should be classified under § 7 of the act as a nonenumerated article similar to cotton yarn, and the duty should be assessed under the paragraph (302) relating to cotton yarn. Referring to its previous opinion in the Bernuth Case, already referred to, wherein it was held that artificial silk, which, as we have already said, is made by similar processes, should be so classified, the court said:

"The judge of the circuit court affirmed the government's classification, distinguishing that case on the ground that artificial silk was found to be a yarn, whereas arti-

ficial horsehair, being solid, and not composed of twisted or spun filaments, is not a yarn. Admitting that this is so, still, artificial horsehair is like cotton yarn in material, each being composed almost entirely of cellulose, and like it in use, being largely used as glazed cotton is in making hat braids, shoe laces, binding braids, tapes, and imitation horsehair. We think these resemblances establish its similitude to cotton yarn, even if the texture of the two articles is different." [93 C. C. A. 193, 167 Fed. 802.]

This writ of certiorari was thereupon allowed.

*The question is simply this: Did**136** the circuit court of appeals properly classify the merchandise?

The portion of § 7, the similitude clause of the act of 1897, with which we are concerned, is as follows:

"Section 7. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; . . ."

In the brief for the government it is said: "It is well established that the requirements of the similitude clause of § 7 are satisfied if there be shown a proper similarity in any one of the four particulars,—material, quality, texture, or use"—enumerated in the section. *Arthur v. Fox*, 108 U. S. 125, 27 L. ed. 675, 2 Sup. Ct. Rep. 371.

As said by the circuit court of appeals for the second circuit, in *United States v. Roessler & H. Chemical Co.* 70 C. C. A. 346, 137 Fed. 770: "It must be borne in mind that the statute does not require identity; if that were necessary, the statute would have no *raison d'être*."

The decisions of the Board of General Appraisers and of the circuit court were placed upon the ground that the merchandise produced by a chemical process was not structurally a yarn, such as is produced by the mechanical process of spinning. It was not, by either the board or the court, found that there was no substantial similarity to cotton yarn in material or use. We think the evidence justifies the contention of counsel for the importer that commercially the merchandise is a yarn. As we have before said, the government originally contended that it was a yarn, and it is reflex significance that in the tariff act of 1909 [36 Stat. at L. 60, chap. 6, U. S. Comp. Stat. Supp. 1909, p. 717], special provision is made for these things in paragraph 405,

as for "yarns, threads, filaments of artificial or imitation silk, or *of artificial or imitation horsehair, by whatever name known, and by whatever process made." But assuming, for argument sake, as did the circuit court of appeals, that the merchandise is not a yarn, let us consider, even if the texture of the articles, be different, whether it was correctly held that the similitude to cotton yarn was established because "artificial horsehair is like cotton yarn in material, each being composed almost entirely of cellulose, and like it in use, being largely used as glazed cotton is, in making hat braids, shoe laces, binding braids, tapes, and imitation horsehair."

As to material: Respondent does not claim similarity between the merchandise in question and cotton because cellulose is found in each; the contention is that there is similarity in material because the proportion of the ingredients—cellulose, water, etc.—is the same in the merchandise in question as the proportion of the same ingredients in cotton. Counsel say, and the contention is, we think, supported by the evidence:

"The goods are made of cotton fibers. Cotton consists of pure cellulose with a small percentage of hygroscopic water. The merchandise in suit is pure cellulose with a small percentage of hygroscopic water. It differs only from the cotton fiber in that the cell structure has been broken down. Other than this, cotton and the merchandise in suit are identical in material. No element is found in cotton which is not present in this merchandise; no element is in this merchandise which is not found in cotton; and the proportion of elements in both is approximately the same."

As to use: Paragraph 302 of the act covers cotton yarns regardless of their use. Thus, yarns have four broad, general uses, viz.: knitting, weaving, sewing, and braiding; and manifestly a given cotton yarn could not be used for all the purposes of all cotton yarns. In the group of hard twisted yarns is found cotton yarn, used in the production of hat braids, and in the same commercial group appears the merchandise in suit. One of the many varieties of cotton yarn used in making hat braids is what is known as glazed or polished cotton yarn. It is asserted and not denied that such merchandise has been uniformly classified for customs purposes as a cotton yarn, and so far from being a highly specialized and unusual commodity, it has been an important article of commerce for at least thirty years. However, while imitation horsehair is generally used in the production of hat braids, and is used interchangeably with glazed cotton yarn for such

purpose, it has, in common with cotton yarns, other uses, which are referred to in the opinion of the circuit court of appeals.

Upon the whole, we are of opinion that there is a substantial statutory similitude between cotton yarns enumerated in paragraph 302 and the merchandise in question, both as to material and use. As the requirement of the statute is not that there shall be similarity in all of the four particulars enumerated in § 7, but a substantial similarity in one of those particulars may be adequate, the classification adopted by the Circuit Court of Appeals was proper, and its judgment is therefore affirmed.

*MORRIS GLICKSTEIN [139]
v.
UNITED STATES.

(See S. C. Reporter's ed. 139-144.)

Witnesses — privilege — immunity.

1. Congress may compel the giving of testimony which may serve to incriminate the witness, provided immunity be accorded in all respects commensurate with the guaranty of U. S. Const., 5th Amend., against self-crimination.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

Witnesses — privilege — immunity — perjury.

2. The immunity which must, under U. S. Const., 5th Amend., be accorded to a witness compelled to give evidence against himself, relates only to past offenses, and need not exempt the witness from prosecution for perjury committed when so testifying.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

Witnesses — privilege — immunity — perjury by bankrupt.

3. The immunity clause in the bankrupt act of July 1, 1898 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3425), § 7, subd. 9, that no testimony given by the bankrupt under the command of that section shall be offered in evidence against him in any criminal proceeding, does not bar a criminal prosecution for perjury for false swearing when giving such testimony. [For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[No. 486.]

NOTE.—As to the constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to *Levy v. Superior Ct.* 29 L.R.A. 811.

As to sufficiency of statutory immunity to satisfy the constitutional guaranty against self-crimination—see notes to *Re Buskett*, 14 L.R.A. 407; *United States v. James*, 26 L.R.A. 418; and *Interstate Commerce Commission v. Baird*, 48 L. ed. U. S. 860.

Submitted October 19, 1911. Decided December 4, 1911.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit, presenting the question whether the immunity accorded to a bankrupt testifying under the command of the bankrupt act is applicable to a prosecution for perjury committed by the bankrupt when so testifying. Answered in the negative.

The facts are stated in the opinion.

Messrs. N. P. Bryan and John E. Hart-ridge submitted the cause for Glickstein:

When the language of a Constitution or statute is clear, plain, and without ambiguity, effect must be given to it; in such event, there is no uncertainty to be explained, there is nothing to be construed.

Sturges v. Crowninshield, 4 Wheat. 122, 202, 4 L. ed. 529, 550; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Yerke v. United States*, 173 U. S. 439, 442, 43 L. ed. 760, 761, 19 Sup. Ct. Rep. 441; *Hamilton v. Rathbone*, 175 U. S. 414, 419, 421, 44 L. ed. 219, 221, 222, 20 Sup. Ct. Rep. 155; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; *Lewis's Sutherland*, Stat. Constr. 2d ed. §§ 366, 367.

The immunity from self-crimination is applicable in a prosecution for an offense other than one connected with bankruptcy.

Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787.

The other Federal courts which have had to deal with this question have uniformly construed the immunity afforded to be applicable to cases similar to this.

Remington, Bankr. § 1558; *United States v. Simon*, 146 Fed. 89; *Jacobs v. United States*, 88 C. C. A. 554, 161 Fed. 694; *Re Marx*, 102 Fed. 676; *Re Logan*, 102 Fed. 876; *Re Gaylord*, 50 C. C. A. 415, 112 Fed. 668; *Re Leslie*, 119 Fed. 406.

Solicitor General Lehmann submitted the cause for the United States:

The criminal proceeding intended by the statute, in which the testimony given by the bankrupt at the examination may not be offered against him, is a proceeding for a past offense, and not a proceeding for perjury committed in the examination itself.

Edelstein v. United States, 9 L.R.A. (N.S.) 236, 79 C. C. A. 328, 149 Fed. 636; *Wechsler v. United States*, 86 C. C. A. 37, 158 Fed. 579; *United States v. Brod*, 176 Fed. 165; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728.

56 L. ed.

*Mr. Chief Justice White delivered [140 the opinion of the court:

Glickstein, an adjudicated bankrupt, was indicted for perjury in having falsely sworn in the bankruptcy proceeding, while under examination before a referee, as required by the 7th section, subdiv. 9, of the bankrupt act of 1898 [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3425]. The indictment was demurred to on the following grounds: "(a) A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie; (b) The indictment was based upon testimony given by the bankrupt, affecting the administration and settlement of his estate; (c) A person cannot be compelled in any criminal case to be a witness against himself." At the trial which followed the overruling of the demurrer, the testimony of Glickstein, which was the subject of the indictment, was offered and objected to on the same grounds upon which the demurrer was based, and exceptions were taken to the admission of the testimony in evidence.

When the legality of a conviction and sentence of Glickstein was before the court below, as the result of error prosecuted by him, the court, stating the facts which we have recited, certified the following question: "Is subsec. 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?"

Section 7, subdiv. 9, which we are required to consider in order to solve the question, is as follows:

"The bankrupt shall . . . (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given *by [141 him shall be offered in evidence against him in any criminal proceeding."

It is difficult to determine from the contentions urged in favor of an affirmative answer, whether it is deemed the solution of the problem requires us to decide a question of constitutional right, or simply calls for an interpretation of the provision of the bankrupt act to which the question relates. To exclude irrelevant matter, and to confine our attention to the precise subject to be passed upon, we state certain propositions which are not open to controversy, because foreclosed by decisions of this court, or which, if not expressly foreclosed, are so indubitably the result of set-

tled principles as to cause them also to be not subject to reasonable dispute.

1st. It is undoubted that the constitutional guaranty of the 5th Amendment does not deprive the lawmaking authority of the power to compel the giving of testimony, even although the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation. The authorities which establish this elementary proposition are too numerous to be cited, and we therefore simply refer to a few of the leading cases on the subject: *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Burrell v. Montana*, 194 U. S. 572, 578, 48 L. ed. 1122, 1123, 24 Sup. Ct. Rep. 787; *Jack v. Kansas*, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 A. & E. Ann. Cas. 689; *Ballmann v. Fagin*, 200 U. S. 186, 195, 50 L. ed. 433, 437, 26 Sup. Ct. Rep. 212; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. ed. 652, 662, 26 Sup. Ct. Rep. 370; and *Heike v. United States*, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539.

2d. As the authority which the proposition just stated embraces exists, and as the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, they are included in that grant of authority, and are not prohibited by the immunity as to self-incrimination. Of 142]*course, this proposition is essentially the resultant of the first, since, unless it be well founded, the first also must be wanting in foundation. This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury. That this is not disputable is shown by the fact that it has been accepted as self-evident in providing for immunity for one compelled to testify, as shown by the reservation in Rev. Stat. § 860 (U. S. Comp. Stat. 1901, p. 661), declaring that the im-

munity shall not extend to "exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," and by a like provision, contained in the act of February 11, 1893 (27 Stat. at L. p. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173). The first of these provisions was considered in *Counselman v. Hitchcock*, supra, and the second in *Brown v. Walker*, supra, where it was expressly decided that the statute containing it complied with the constitutional guaranty.

With these propositions in hand, it follows that the precise question for decision is, Did the guaranty of immunity contained in the 9th subdivision of § 7 of the bankrupt act bar a prosecution for perjury for false swearing in giving testimony under the command of the section? In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution? The argument to maintain that it does is that, as the statute provides for immunity, and does not contain the *reservation found in either [143 § 860, Rev. Stat., or that embodied in the act of 1893, therefore, under the rule that the inclusion of one is the exclusion of the other, such reservation cannot be implied. Or, to state the proposition in another form, it is that as the statute in the immunity clause says, "But no testimony given by him (the witness who is compelled to be examined) shall be offered in evidence against him in any criminal proceeding," and as these words are unambiguous, there is no room for limiting the language so as to cause the immunity provision not to prohibit the offer of the testimony in a criminal prosecution for perjury. But the contention assumes the question for decision, since it excludes the possibility of construction when, on the face of the statute, the meaning attributed to the immunity clause cannot be given to it without destroying the words of the statute and frustrating its obvious object and intent. This may not be denied, since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in Rev. Stat., 860, and the act of 1893, therefore it is to be presumed that it was in-

tended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity, in the absence of the most express and specific command to that effect.

Bearing in mind the subject dealt with, we think the reservation of the right to prosecute for perjury, made in the *statutes to which we have referred, was but the manifestation of abundant caution; and hence, the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure.

Some of the considerations which we have pointed out were accurately expounded in *Edelstein v. United States*, 9 L.R.A. (N.S.) 236, 79 C. C. A. 328, 149 Fed. 636, by the circuit court of appeals for the eighth circuit, and in *Wechsler v. United States*, 86 C. C. A. 37, 158 Fed. 579, by the circuit court of appeals for the second circuit. And this leads us to observe that the necessary result of the conclusion now reached is to disapprove the opinions in *Re Marx*, 102 Fed. 676, and *Re Logan*, 102 Fed. 876.

It follows that the question propounded must receive a negative answer, and our order will be, question certified answered "No."

HENRY C. RIPLEY, Appt.,
v.
UNITED STATES. (No. 498.)

UNITED STATES, Appt.,
v.
HENRY C. RIPLEY. (No. 499.)

(See S. C. Reporter's ed. 144-148.)

Appeal — from court of claims — remanding for additional findings — compliance with mandate.

Additional findings made by the court of claims do not conform to the mandate of the Federal Supreme Court, remanding the record on cross appeals from an award under a contract for a public work, for an explicit finding as to the knowledge and good faith of the government inspector whose action is alleged to have impeded greatly the progress of the work, to the claimant's injury where the statement in such findings that the inspector was knowingly acting in bad faith is qualified by other language which shows that such knowledge and bad faith are inferred solely from lapse of time, 56 L. ed.

with nothing to indicate that such an inference is a necessary conclusion. [For other cases, see Appeal and Error, 3368a-3370, in Digest Sup. Ct. 1908.]

[Nos. 498 and 499.]

Decided December 4, 1911.

CROSS APPEALS from the Court of Claims to review an award under a contract for a public work. On return to a mandate directing additional findings. Cause again remanded for compliance with mandate.

See same case below, 45 Ct. Cl. 621.

The facts are stated in the opinion.

Messrs. William H. Robeson, Ben Carter, and F. Carter Pope for Ripley.

Attorney General Wickersham, Assistant Attorney General John Q. Thompson, and Mr. P. M. Ashford for the United States.

Mr. Chief Justice White delivered the opinion of the court:

Ripley recovered the sum of alleged losses occasioned by the delay consequent on the refusal of the inspector in charge of certain jetty work, being performed under contract with the United States in Aransas Pass, Texas, to permit the placing of certain crest blocks on the foundation intended to receive them. Both the United States and Ripley appealed. At the last term, when the case was before us, it became necessary to ascertain how far the findings of fact established the good or bad faith of the inspector in refusing to permit the crest blocks to be placed in position, and even upon the hypothesis of bad faith, to determine whether Ripley had been so negligent in notifying the engineer officer who was in charge of the work of the refusal of the inspector as to bar a right to recover for loss occasioned by such refusal. Concluding that the findings of fact on these subjects were so inadequate and possibly so misleading as to render it impossible for us to decide the cause on the merits, our action was stayed, and the court below was directed to make and transmit as *speedily as possible additional findings on the subject referred to, as follows:

"First. Whether, when the claimant was laying the slope stones, and during the months of December, 1903, and January, February, March, and April, 1904, as recited in finding 7, the inspector in charge knew that large parts of the work done by the claimant had fully settled and consolidated.

"Second. Whether, in the various refusals to permit the laying of crest blocks,

stated in finding 7, the inspector in charge acted in good faith.

"Third. Whether at any time the claimant notified the engineer officer in charge or the chief of engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and, if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer."

[See 220 U. S. 491, 55 L. ed. 557, 31 Sup. Ct. Rep. 478].

The case is now before us upon additional findings made by the court below in assumed compliance with our previous order. These findings are as follows:

"(1) When denying permission to the claimant to lay crest blocks, as stated in finding 7, the inspector in charge knew, from the time which had elapsed, that large parts of the core theretofore completed by the claimant had fully settled and consolidated, and were ready for the crest blocks to be laid thereon.

(2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said finding 7, thereby unreasonably delayed the work, and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

(3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose office was in Galveston), or to the Chief of Engineers (whose office was in Washington), or to any officer other than the assistant engineer in immediate charge of the work of inspection."

But when we again approach the duty of deciding the case on its merits in the light afforded by these additional findings, we are constrained to the conclusion that they fail to comply with our previous order, directing a finding as to knowledge on the part of the inspector, and an unequivocal finding as to his good or his bad faith.

A few words will suffice to indicate the reasons which compel us to this conclusion. Thus, in the first place, while paragraph 1 finds that the inspector knew, at the time he made the refusal to permit the placing of the crest blocks upon the foundations, that they had sufficiently consolidated to be able to receive the blocks, this is qualified by the statement that such knowledge on the part of the inspector was but derived from the period which had elapsed between the building of the foundations and the time when the refusal to permit the laying of the crest blocks was made. But this qualification causes the paragraph

to be ambiguous as to the existence or non-existence of good faith on the part of the inspector, since there is nothing in the paragraph which directly or indirectly establishes that the mere lapse of time, in view of the nature and character of the work, the materials which had entered into it, and the situation in which it was placed, caused it to be impossible for the inspector to have been in good faith when he refused to permit the crest blocks to be laid.

And the same result arises from an accurate consideration of the second paragraph. This is true because, although that paragraph states that the refusal to permit the laying of crest blocks unreasonably delayed the work and was a gross mistake on the part of the inspector, these statements are qualified by the finding that there is no other evidence of bad faith "on the part of the assistant *engineer in immediate charge,"—a qualification which necessarily correlates the two paragraphs, and again causes the inference of gross mistake to depend upon the lapse of time referred to in the first paragraph, without any finding whatever justifying the deduction that the lapse of time, in view of the other proof in the case, excluded the possibility of the exercise of an honest judgment on the part of the inspector.

Again, while the third paragraph is clear when considered in and of itself, it nevertheless, when read in connection with the two other paragraphs, exhibits such an inaccuracy of statement as may tend to mislead, and therefore requires to be corrected. The refusal to permit the laying of the crest blocks, as shown by the original findings, was made by the inspector in immediate charge of the work, and it was as to the good or bad faith of that person to which our previous order was directed. Evidently, recognizing that fact, the first paragraph of the additional finding speaks solely with reference to the assumed knowledge of the inspector in charge, and yet the second and third paragraphs, by referring, the one to "the assistant engineer in immediate charge," and the other to "the assistant engineer in immediate charge of the work of inspection," may give rise to confusion by suggesting that these two findings, by their change of language, refer to a different person than the mere inspector in charge.

Concluding, for the reasons stated, that the additional findings do not conform to our previous order, since they do not make a direct and unequivocal finding as to the good or bad faith of the inspector, it becomes necessary that such findings be returned to the court below, to the end that our previous direction may be complied

with, and an order to that effect will be therefore entered.

The case will therefore be remanded for compliance with our previous order.

149] *A. H. GRIGSBY, Petitioner,

v.

R. L. RUSSELL and Lillie Burchard, Administrators of John C. Burchard, Deceased.

(See S. C. Reporter's ed. 149-157.)

Insurance — forfeiture for nonpayment of premium — waiver.

1. A condition in a policy of life insurance that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company, and a breach of the condition may be waived.

[For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

Insurance — assignment of policy — insurable interest of assignee.

2. The holder of a valid policy of insurance upon his own life may, as a matter of financial necessity, make a valid assignment of the policy to a person having no insurable interest in the life of the insured, in consideration of a small sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured.

[For other cases, see Insurance, X., in Digest Sup. Ct. 1908.]

Insurance — assignment of policy — insurable interest of assignee.

3. A clause in a policy of life insurance that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay.

[For other cases, see Insurance, X., in Digest Sup. Ct. 1908.]

[No. 53.]

Argued November 10 and 13, 1911. Decided December 4, 1911.

NOTE.—On the validity of an assignment of interest in life insurance policy to one paying premiums—see notes to Metropolitan L. Ins. Co. v. Elison, 3 L.R.A.(N.S.) 935, and McRae v. Warmack, 33 L.R.A.(N.S.) 949.

As to insurable interest as affecting assignment of insurance policy—see notes to Rylander v. Allen, 6 L.R.A.(N.S.) 128; Kopetovske v. Mutual L. Ins. Co. 111 C. C. A. 273; and Page v. Burnstine, 26 L. ed. U. S. 268.

56 L. ed.

(ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Middle District of Tennessee, held an assignment of a policy of life insurance to an assignee with no insurable interest valid only to the extent of the money actually given for it and the premiums subsequently paid. Reversed.

See same case below, 94 C. C. A. 61, 168 Fed. 577.

The facts are stated in the opinion.

Messrs. Montague S. Ross and John A. Pitts argued the cause, and with Mr. K. T. McConnico, filed a brief for petitioner:

The circuit court of appeals erred in holding that the sale and assignment of this policy of insurance by the insured to the petitioner, under the circumstances revealed in this record, was void.

Gordon v. Ware Nat. Bank, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Chamberlain v. Butler, 61 Neb. 730, 54 L.R.A. 338, 87 Am. St. Rep. 478, 86 N. W. 481; Bursinger v. Bank of Watertown, 67 Wis. 76, 58 Am. Rep. 848, 30 N. W. 290; Fitzpatrick v. Hartford Life & Annuity Ins. Co. 56 Conn. 116, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411; Amick v. Butler, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; Davis v. Brown, 159 Ind. 644, 65 N. E. 908; Hardy v. Aetna L. Ins. Co. 152 N. C. 286, 67 S. E. 767; Bacon, Ben. Soc. 2d ed. § 302; 2 Joyce, Ins. §§ 914-919; May, Ins. 1891 ed. § 398a; Vance, Ins. 1904 ed. pp. 140, 141; 25 Cyc. 709; 3 Am. & Eng. Enc. Law, 2d ed. 1025; Crosswell v. Connecticut Indemnity Assn. 51 S. C. 103, 28 S. E. 200; Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 101 Am. St. Rep. 657, 55 Atl. 191; Steinback v. Diepenbrock, 158 N. Y. 24, 44 L.R.A. 417, 70 Am. St. Rep. 424, 52 N. E. 662; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Aetna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501; Murphy v. Red, 64 Miss. 614, 60 Am. Rep. 68, 1 So. 761; Olmsted v. Keyes, 85 N. Y. 593; Valton v. National Loan Fund Life Assur. Soc. 20 N. Y. 32; St. John v. American Mut. L. Ins. Co. 13 N. Y. 31, 64 Am. Dec. 529; Rylander v. Allen, 125 Ga. 206, 6 L.R.A.(N.S.) 128, 53 S. E. 1032, 5 Ann. Cas. 355; Ancient Order U. W. v. Brown, 112 Ga. 545, 37 S. E. 890; Matlock v. Bledsoe, 77 Ark. 60, 90 S. W. 849; Mutual L. Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 250; King v. Cram, 185 Mass. 103, 69 N. E. 1049; Brown v. Green-

field Life Asso. 172 Mass. 498, 53 N. E. 129; Dixon v. National L. Ins. Co. 168 Mass. 48, 46 N. E. 430; Tateum v. Ross, 150 Mass. 440, 23 N. E. 230; Robinson v. Hurst, 78 Md. 67, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956; Ritter v. Smith, 70 Md. 261, 2 L.R.A. 844, 16 Atl. 890; Souder v. Home Friendly Soc. 72 Md. 511, 20 Atl. 137; Eckel v. Renner, 41 Ohio St. 232; Vivar v. Supreme Lodge, K. P. 52 N. J. L. 469, 20 Atl. 36; Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. 585; Brown v. Equitable Life Assur. Soc. 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968, 1126; Hogue v. Minnesota Packing & Provision Co. 59 Minn. 39, 60 N. W. 812; Martin v. Stubblings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; Bloomington Mut. Ben. Asso. v. Blue, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; Moore v. Chicago Guaranty Fund Life Soc. 178 Ill. 202, 52 N. E. 882; Givens v. Veeder, 9 N. M. 256, 50 Pac. 316; Harrison v. Northwestern Mut. L. Ins. Co. 78 Vt. 473, 112 Am. St. Rep. 932, 63 Atl. 321; Lewis v. Edwards, — Tenn. —, 1903, December Term, Mss. Nashville; Davis v. Brown, 159 Ind. 644, 65 N. E. 908; Millner v. Bowman, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094; Huston v. Merrifield, 51 Ind. 24, 19 Am. Rep. 722; Wheeland v. Atwood, 192 Pa. 237, 73 Am. St. Rep. 803, 43 Atl. 946; Ulrich v. Reinoehl, 143 Pa. 238, 13 L.R.A. 433, 24 Am. St. Rep. 534, 22 Atl. 862; Grant v. Kline, 115 Pa. 618, 9 Atl. 150; Fairchild v. Northeastern Mut. Life Asso. 51 Vt. 613; Hearing's Succession, 26 La. Ann. 326; Miller v. Manhattan L. Ins. Co. 110 La. 654, 34 So. 723; Stuart v. Sutcliffe, 46 La. Ann. 240, 14 So. 912; Prudential Ins. Co. v. Liersch, 122 Mich. 436, 81 N. W. 258; Sheets v. Sheets, 4 Colo. App. 450, 36 Pac. 310; Lemon v. Phoenix Mut. L. Ins. Co. 38 Conn. 294; Farmers' & T. Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074; Curtiss v. Aetna L. Ins. Co. 90 Cal. 255, 25 Am. St. Rep. 114, 27 Pac. 211; McFarland v. Creath, 35 Mo. App. 121; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed, 269; Ashley v. Ashley, 3 Sim. 149; Dalby v. India & L. Life Assur. Co. 15 C. B. 365, and note, 3 C. L. R. 61, 24 L. J. C. P. N. S. 2, 18 Jur. 1024, 3 Week. Rep. 116, 13 Eng. Rul. Cas. 383; Law v. London Indisputable Life Policy Co. 1 Kay & J. 223; Vezina v. New York L. Ins. Co. 6 Can. S. C. 30; North American Life Assur. Co. v. Croigen, 13 Can. S. C. 278, 18 N. S. 440; Mutual Life Assur. Co. v. Anderson, 1 N. B. Eq. Rep. 466; Brett v. Warnick, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061; Cunningham v. Smith, 70 Pa. 450; Bliss, Life Ins. § 30.

The only reason assigned for extending the rule condemning "wagering policies" and

"covers for wager policies" to assignments of valid policies, made in good faith, is that, in either case, the death of the insured would be a pecuniary advantage to the assignee or the beneficiary, as the case might be. Is this a sufficient reason? Must every transaction be condemned of which the same thing is true? If so, the court must strike down:

1. All reversionary interests, particularly if the reversioner leases the life estate for a stipulated yearly rental.

2. All expectancies of every kind, except where there is an insurable interest in the life of the tenant in possession.

3. All purchases of estates in consideration of life support of the vendor by the vendee.

4. All contracts to pay annuities.

5. All legacies or devises to persons without interest in testator's life.

6. All policies in which beneficiaries without interest have been named in the policy itself, as in the cases of—

Foster v. Preferred Acci. Ins. Co. 125 Fed. 537; American Employers' Liability Ins. Co. v. Barr, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; Kentucky Life & Acci. Ins. Co. v. Hamilton, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 93; Langdon v. Union Mut. L. Ins. Co. 14 Fed. 273; Aetna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287.

7. All policies where interest has ceased, as in the cases of—

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Sides v. Knickerbocker L. Ins. Co. 16 Fed. 651.

8. All assignments where assignee's interest has ceased before the maturity of the policy, as in—

Manhattan L. Ins. Co. v. Hennessy, 39 C. C. A. 625, 99 Fed. 65.

9. All purchases of policies at judicial sales, by persons without interest, as in—

Gordon v. Ware Nat. Bank, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444.

10. All policies where beneficiaries without interest are designated subsequent to the issuance of the policy by some means other than assignment, as in—

Robinson v. United States Mut. Acci. Asso. 68 Fed. 825; Ingersol v. Knights of Golden Rule, 47 Fed. 272; Lamont v. Grand Lodge, I. L. H. 31 Fed. 177; Lamont v. Hotel Men's Mut. Ben. Asso. 30 Fed. 817.

The reason for the law against "wager policies" is not applicable to assignments of valid policies.

Ashley v. Ashley, 3 Sim. 149; Dalby v. India & L. Life Assur. Co. 15 C. B. 365, 3 C. L. R. 61, 24 L. J. C. P. N. S. 2, 18 Jur.

1024, 3 Week. Rep. 116, 13 Eng. Rul. Cas. 383; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 597, 29 L. ed. 999, 6 Sup. Ct. Rep. 877.

There is no provision in the life insurance policy itself which militates against the right of the petitioner, as assignee, to collect the amount of the policy.

Bliss, *Life Ins.* 445; 2 Cooley, *Briefs on Insurance*, pp. 1082, 1859; 1 Cooley, *Briefs on Insurance*, p. 277; May, *Ins.* § 384; 3 Joye, *Ins.* § 2325; 1 Bacon, *Ben. Soc.* §§ 298, 310b; *Spencer v. Myers*, 150 N. Y. 269, 34 L.R.A. 175, 55 Am. St. Rep. 675, 44 N. E. 942; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Foster v. Perferred Acci. Ins. Co.* 125 Fed. 536; *Clark v. Equitable Life Assur. Soc.* 143 Fed. 175; *Robinson v. Hurst*, 78 Md. 59, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956; *Hogue v. Minnesota Packing & Provision Co.* 59 Minn. 39, 60 N. W. 812; *Myers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Johnson v. Van Epps*, 110 Ill. 551; *Groff v. Mutual L. Ins. Co.* 92 Ill. App. 207; *Bank of Oil City v. Guardian Mut. L. Ins. Co.* 6 Legal Gaz. 348; *Jarvis v. Binkley*, 206 Ill. 541, 69 N. E. 582; *Lec v. Murrell*, 9 Ky. L. Rep. 104; *Connecticut Mut. L. Ins. Co. v. Tucker*, 27 R. I. 170, 61 Atl. 142; *Powell v. Dewey*, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381; *Moore v. Chicago Guaranty Fund Life Soc.* 178 Ill. 202, 52 N. E. 882; *Buckbee v. United States Ins. Annuity & T. Co.* 18 Barb. 541; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 83; *Burges v. New York L. Ins. Co.* — Tex. Civ. App. —, 53 S. W. 602; *Ramsay v. Myers*, 6 Pa. Dist. R. 468.

By the decisions of the supreme court of Tennessee, the assignment in question is good.

Lewis v. Edwards, — Tenn. —, M. S. Opin. 1903; *Rison v. Wilkerson*, 3 Sneed, 565; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269; *Tennessee Lodge No. 20, K. H. v. Ladd*, 5 Lea, 716; *Williams v. Carson*, 9 Baxt. 516; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561; *Scobey v. Waters*, 10 Lea, 551; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 869; *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672.

Mr. George T. Hughes argued the cause and filed a brief for respondents:

This court will not, except it be in a case where the decision of the state court is imperative, reverse its own holdings to conform them to a decision by the state court.
56 L. ed.

Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85.

The Federal court, equally with the state court, has the power to determine what is the law of the state.

Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Smith v. Alabama*, 124 U. S. 478, 31 L. ed. 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

Decisions of state courts as to questions concerning contracts of insurance are not binding.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; *Scott v. Sandford*, 19 How. 603, 15 L. ed. 782; *Washburn & M. Mfg. Co. v. Reliance M. Ins. Co.* 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. Rep. 1; *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444; *Mutual L. Ins. Co. v. Lane*, 151 Fed. 276.

Public policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against public good; and questions of public policy arise out of and are determined by common-law principles.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Gibbs v. Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 704, 28 L. ed. 570, 4 Sup. Ct. Rep. 663; *Louisville & N. R. Co. v. Palmer*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

The only legitimate conclusion which can be reached from the opinions of this court is that, in whatever form presented, this court will not give effect to a mere speculative contract upon human life, whereby a person acquires an interest in the early death of another without any counterbalancing interest in the prolongation of that life, the result of which transaction would have a tendency to create a desire for the death of the other.

Cammack v. Lewis, 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Ætna L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 261; *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 597, 29 L. ed. 999, 6 Sup. Ct. Rep. 877; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749.

With the single exception of the case of *Gordon v. Ware*. Nat. Bank, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444, there is not to be found in the books a single case reported from any of the Federal courts in the Union where the question is raised or discussed which does not sustain our contention that the assignment of a policy to one having no insurable interest, under circumstances which exist in the case at bar, is contrary to public policy, and void.

American Employers' Liability Ins. Co. v. Barr, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; *Manhattan L. Ins. Co. v. Hennessy*, 39 C. C. A. 625, 99 Fed. 64; *Fidelity Mut. Life Asso. v. Jeffords*, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; *Foster v. Preferred Acci. Ins. Co.* 125 Fed. 536; *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. 273; *Lamont v. Grand Lodge*, I. L. H. 31 Fed. 177; *Alexander v. Lane*, 85 C. C. A. 677, 157 Fed. 1002; *Mutual L. Ins. Co. v. Lane*, 151 Fed. 276.

If it be the law that a policy is assignable as any other chose in action, to any person, why not allow the assignee in bankruptcy to realize the most he could?

Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; *Re White*, 26 L.R.A.(N.S.) 451, and note, 98 C. C. A. 205, 174 Fed. 333.

The cases which hold that a policy cannot be assigned to one having no insurable interest are abstracted in the elaborate note of Judge Freeman to the case of *Chamberlain v. Butler*, 87 Am. St. Rep. 509, and in the full note to *Metropolitan L. Ins. Co. v. Elison*, 3 L.R.A.(N.S.) 953, which contains an exhaustive memoranda of all the authorities on both sides of this question.

See also *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329, 1 So. 561; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; *Basye v. Adams*, 81 Ky. 368; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057; *Bromley v. Washington L. Ins. Co.* 122 Ky. 402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 Ann. Cas. 685; *Heuser v. Mutual L. Ins. Co.* 47 Mo. App. 339; *Mutual L. Ins. Co. v. Richards*, 99 Mo. App. 88, 72 S. W. 487; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Hoffman v. Hoke*, 122 Pa. 377, 1 L.R.A. 229, 15 Atl. 437; *Price v. Supreme Lodge*, K. H. 68 Tex. 361, 4 S. W. 633; *Equitable L. Ins. Co. v. Hazelwood*, 75 Tex. 338, 7 L.R.A. 217, 16 Am. 136

St. Rep. 893, 12 S. W. 621; *Wilton v. New York L. Ins. Co.* 34 Tex. Civ. App. 156, 78 S. W. 403; *Tate v. Commercial Bldg. Asso.* 97 Va. 74, 45 L.R.A. 243, 75 Am. St. Rep. 770, 33 S. E. 382; *Roller v. Moore* (*Roller v. Beam*) 86 Va. 512, 6 L.R.A. 136, 10 S. E. 241.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of \$100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The circuit court of appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. 94 C. C. A. 61, 168 Fed. 577.

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And *although that [155 counter interest always exists, as early was emphasized for England in the famous case of *Wainewright* (*Janus Weathercock*), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third

premium *ad diem*, and that when Grisby paid, he was making a new contract. But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Oakes v. Manufacturers' F. & M. Ins. Co.* 135 Mass. 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least, in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has [156]no *universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in *Shelley's Case*. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 George III., chap. 48.

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the bankruptcy law, § 70, which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only (*Godsall v. Boldero*, 9 East, 72), long has disappeared (*Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501). And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, 56 L. ed.

it is true that there are intimations in favor of the result come to by the circuit court of appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. *On the other hand, it has been [157]decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. And expressions more or less in favor of the doctrine that we adopt are to be found also in *Ætna L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877. It is enough to say that while the court below might hesitate to decide against the language of *Warnock v. Davis*, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the supreme court of that state came to the conclusion that we adopt, in an unreported case,—*Lewis v. Edwards*, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side.

Some reference was made to a clause in the policy that "any claim against the company, arising under any assignment of the policy, shall be subject to proof of interest." But it rightly was assumed below that if there was no rule of law to that effect, and the company saw fit to pay, the clause did not diminish the rights of Grigsby, as against the administrators of Burchard's estate.

Decree reversed.

Mr. Justice Lurton took no part in the decision of this case.

*UNITED STATES, Appt., [158
v.

FIDELITY TRUST COMPANY (Formerly the Fidelity Insurance, Trust, & Safe Deposit Company), as Executor and Trustee under the Last Will and Testament of Walter H. Tilden, Deceased.

(See S. C. Reporter's ed. 158-160.)

Federal succession tax — vested interest — refunding.

The entire clear value of a legacy under a

will devising the residuary estate in trust to pay over to the testator's niece the net income in quarterly payments for life, and not merely so much of such life estate as she had actually received before July 1, 1902, had "vested" prior to that date, in the sense of the provision of the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160, U. S. Comp. Stat. Supp. 1909, p. 878), § 3, for the refunding of so much of the succession tax as may have been collected on "contingent beneficial interests which shall not have become vested" before the date mentioned.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 280.]

Argued November 15, 1911. Decided December 4, 1911.

APPEAL from the Court of Claims to review a judgment for the refunding of a portion of a succession tax. Reversed.

See same case below on demurrer, 45 Ct. Cl. 362.

The facts are stated in the opinion.

Assistant Attorney General **Barr** argued the cause, and, with Solicitor General Lehmann, filed a brief for appellant:

A present right to enjoy the income of property is a vested and indefeasible interest.

Bouvier's Law Dict. p. 422, "Contingent interest;" *Mozley & W. Law Dict.* "Contingent interest;" *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331.

The history of the act shows clearly that Congress used the expression "contingent beneficial interest" in its ordinary sense, and intended to cover only such interests as depended for their vesting in possession or enjoyment upon the happening of some certain event.

Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331.

Life estates in personal property are as well recognized now as life estates in realty, and are governed largely by the same rules.

18 Am. & Eng. Enc. Law, 410.

A bequest of the income of personal property, with remainder over to the heirs and children of the first taker, passes merely

NOTE.—As to taxes on succession and collateral inheritances—see notes to *Re Howe*, 2 L.R.A. 825; *Wallace v. Myers*, 4 L.R.A. 171; *Com. v. Ferguson*, 10 L.R.A. 240; *Re Romaine*, 12 L.R.A. 401; and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

As to internal revenue tax on legacies, inheritances, and transfers—see note to *Ward v. Sage*, 108 C. C. A. 417.

a life estate to the first taker, and not an absolute interest.

Page, *Wills*, p. 686.

The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle in our law.

Smith v. Bell, 6 Pet. 68, 8 L. ed. 322.

Bequests of life interests in both real and personal property were taxed without question under the inheritance tax act of 1864, the taxation of remainder interests which had not actually vested alone being held illegal.

Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894.

The decisions of this court as to the subject of the tax and when it is imposed are conclusive of the proposition that a legacy of the income of personal property was taxable the moment such beneficial interest was acquired,—that is to say, upon the death of the testator—if the legatee immediately succeeded to the beneficial use or enjoyment of such right.

Hertz v. Woodman, 218 U. S. 205, 219, 54 L. ed. 1001, 1007, 30 Sup. Ct. Rep. 621; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 240, 22 L. ed. 80, 82.

Great weight should be given to the long and consistent construction placed by an executive department upon a statute which it was its province to administer.

Pennoyer v. McConaughy, 140 U. S. 1, 23, 35 L. ed. 363, 370, 11 Sup. Ct. Rep. 699; *Schell v. Fauché*, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376.

The use of mortality tables for the purpose of determining the present value of vested interests in personal property was authorized and proper.

Dunbar v. Dunbar, 190 U. S. 345, 47 L. ed. 1090, 23 Sup. Ct. Rep. 757.

A legacy of the income of personal property for life or years, according to its estimated present value, has been held taxable in the second and eighth circuits.

Title Guarantee & T. Co. v. Ward, 164 Fed. 459, 107 C. C. A. 41, 184 Fed. 447; *Westhus v. United States*, 90 C. C. A. 441, 164 Fed. 795; *Chouteau v. Allen*, 95 C. C. A. 582, 170 Fed. 412; *Shanley v. Herold*, 141 Fed. 423.

Mr. **Paul Fuller** argued the cause, and, with Mr. **Barry Mohun**, filed a brief for appellee:

The funding act embraces taxes collected on remainder interests accruing subsequent to July 1, 1902.

Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331.

The refunding act embraces taxes collected on annuity payments accruing subsequent to July 1, 1902.

Disston v. McClain, 77 C. C. A. 340, 147 Fed. 114.

The principle involved in the taxation of, and the refundment of taxes collected upon, remainders and annuities, and ordinary income payments (as in the case at bar), is the same.

Union Trust Co. v. Lynch, 148 Fed. 49, affirmed in 90 C. C. A. 147, 164 Fed. 161.

The taxing statute only taxed the clear and actual value of that which actually passed to the legatee or distributee.

Vanderbilt v. Eidman and Disston v. McClain, supra.

The use of mortuary tables and of an assumed rate of interest were both unauthorized by the taxing statute.

Disston v. McClain, 77 C. C. A. 340, 147 Fed. 117; *Herold v. Shanley*, 76 C. C. A. 478, 146 Fed. 20; *Kahn v. Herold*, 147 Fed. 575.

Messrs. A. R. Serven, H. T. Newcomb, Morris F. Frey, and R. W. Joyce also filed a brief for appellee:

The refunding sentence must be liberally interpreted.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Treat v. White*, 181 U. S. 264, 267, 45 L. ed. 853, 854, 21 Sup. Ct. Rep. 611.

The refunding sentence must be interpreted so as to avoid injustice.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The refunding sentence must be interpreted so as to give effect to every word which it contains.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783.

When Congress, in the amendatory and refunding act, specifically excluded from taxation all interests not "absolutely vested," its purpose was far broader than would have been adequately expressed had it used the single word "vested."

McCulloch v. Maryland, 4 Wheat. 316, 414, 415, 4 L. ed. 579, 603.

The decision in *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, if properly understood, establishes the principle that rights such as those of Mary Wadleigh Stokes, in so far as they were not to be realized until after July 1, 1902, were not taxable under the act of June 13, 1898, and amendments. As the uncertainties as to their realization, existing on July 1, 1902, made them untaxable, it follows that the amounts illegally collected on account of such rights are 56 L. ed.

within the scope of the refunding clause of the act of June 27, 1902.

Federal courts have repeatedly held that rights such as those taken by Mary Wadleigh Stokes are within the principle laid down by this court in *Vanderbilt v. Eidman*, supra; *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114; *Lynch v. Union Trust Co.* 90 C. C. A. 147, 164 Fed. 161, 148 Fed. 49.

After the denial of the writ of certiorari in *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114, the Treasury Department accepted that case as settling the law as to collections in respect to annuity rights extending beyond July 1, 1902, and proceeded to pay claims for the refunding of sums so collected as they were presented. In view of the substantial identity of this class of rights with the rights of Mary Wadleigh Stokes, the present case calls for the application of the rule that an interpretation of a taxing statute which would result in injustice will be avoided.

Writs of certiorari were denied in *Disston v. McClain*, supra, and *Union Trust Co. v. Lynch*, 148 Fed. 49, for one or the other or both of the two reasons given in *Re Lau Ow Bew*, 141 U. S. 583, 589, 35 L. ed. 868, 870, 12 Sup. Ct. Rep. 43,—that is to say, either because (first) the question was not of sufficient importance, or (second) it was not "sufficiently open to controversy."

See also *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; *Re Woods*, 143 U. S. 202, 206, 36 L. ed. 125, 126, 12 Sup. Ct. Rep. 417; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 270, 37 L. ed. 445, 447, 13 Sup. Ct. Rep. 594; *Warner v. New Orleans*, 167 U. S. 467, 474, 42 L. ed. 239, 241, 17 Sup. Ct. Rep. 892; *Fields v. United States*, 205 U. S. 292, 296, 51 L. ed. 807, 810, 27 Sup. Ct. Rep. 543.

The granting of the writ in *Eidman v. Tilghman*, 203 U. S. 580, 51 L. ed. 326, 27 Sup. Ct. Rep. 779; *McCoach v. Philadelphia Trust, S. D. & Ins. Co.* 205 U. S. 539, 51 L. ed. 921, 27 Sup. Ct. Rep. 783; and *United States v. Marion Trust Co.* 205 U. S. 539, 51 L. ed. 1191, 27 Sup. Ct. Rep. 794, shows that the interpretation of the legacy tax provisions is of sufficient importance to require the issuance of the writ, where the questions at issue are sufficiently open to controversy.

The interpretation asked for in this case by the government would result in injustice, in that it would subject to taxation some incomes paid long after the repeal of the legacy tax act of June 13, 1898, while

other incomes paid at the same time, under similar conditions, under similar wills, would not be taxed.

Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621; *Shanley v. Herold*, 141 Fed. 423; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The words and phrases necessary to impose the tax upon rights passing by will or intestate laws to receive income from property were well known, and had frequently been used at the time of the enactment of the war revenue act of June 13, 1898, and subsequent amendments, and if it had been the purpose of Congress to tax these interests, the necessary express terms would have been used.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

While mortuary tables have frequently been admitted as evidence, there is no case in which they have been regarded as conclusive, and their essential limitations have always been recognized, as well as the necessity of supplementing them by testimony showing the degree in which they should probably be corrected to meet the conditions of the particular life to which they were to be applied.

Herold v. Shanley, 76 C. C. A. 478, 146 Fed. 20; *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114; *Lynch v. Union Trust Co.* 90 C. C. A. 147, 164 Fed. 161; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1; *Grove v. Youell*, 110 Mich. 285, 33 L.R.A. 298, 68 N. W. 132; *Unger v. Leiter*, 32 Ohio St. 210; *Mandel v. McClave*, 46 Ohio St. 407, 5 L.R.A. 519, 15 Am. St. Rep. 627, 22 N. E. 290; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; *Illinois C. R. Co. v. Houchins*, 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530; *Kahn v. Herold*, 147 Fed. 575, affirmed in 86 C. C. A. 598, 159 Fed. 608.

Assuming that Congress intended to reach such interests as that presented by this case, the commissioner of internal revenue forced himself, into a position where reliance upon the results of pure speculation could not be avoided. Taxation may not rest upon such a foundation.

Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

Congress can neither delegate power to fix a rate of taxation, nor power substantially equivalent thereto; and hence, if Congress had intended to intrust to the commissioner of internal revenue the power

to fix a rate of interest to be used in assessing future interests, the attempted delegation would be void.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Cooley*, Taxn. 3d ed. pp. 99, 100; *The Aurora v. United States*, 7 Cranch, 382, 3 L. ed. 378; *Wayman v. Southard*, 10 Wheat, 1, 41, 6 L. ed. 253, 262; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 287, 52 L. ed. 1061, 1064, 28 Sup. Ct. Rep. 616; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

The theory of the law of June 13, 1898, for which the government now contends, would impose the tax before the beneficiary could be identified. As the rate of the tax depends upon the relationship, or lack thereof, of the beneficiary to his testator or intestate, this construction would make the law inconsistent with itself.

Knowlton v. Moore, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342.

There is no administrative interpretation of the act of June 13, 1898, or of any earlier legacy tax act, which could be made to support the conclusion that the pretended tax in the case at bar was authorized by the statute.

Vanderbilt v. Eidman, 196 U. S. 480, 489, 49 L. ed. 563, 566, 25 Sup. Ct. Rep. 331; *Clapp v. Mason*, 94 U. S. 591, 24 L. ed. 213; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. ed. 1048; *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894; *Sturges v. United States*, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767; *Hertz v. Woodman*, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621; *High v. Coyne*, 178 U. S. 111, 44 L. ed. 997, 20 Sup. Ct. Rep. 747; *Fidelity Ins. Trust & S. D. Co. v. McClain*, 178 U. S. 113, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; *Sherman v. United States*, 178 U. S. 150, 44 L. ed. 1014, 20 Sup. Ct. Rep. 779; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Moore v. Ruckgaber*, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; *Herold v. Shanley*, 76 C. C. A. 478, 146 Fed. 20; *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114; *Thacher v. United States*, 222 U. S.

149 Fed. 902; Herold v. Kahn, 86 C. C. A. 598, 159 Fed. 608.

Mr George P. Montague filed a brief as *amicus curiæ*:

So long and so far as the enjoyment is postponed to the future, to that extent no taxable legacy passes; and where the passing of the taxable legacy is in the future, or to the extent that the enjoyment of it is postponed to the future, the beneficial interest is contingent, within the meaning of the act.

Doe ex dem. Poor v. Considine, 6 Wall. 458, 474, 18 L. ed. 869, 874; Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; Mason v. Sargent, 104 U. S. 689, 26 L. ed. 894; Vanderbilt v. Eidman, 196 U. S. 480, 493, 49 L. ed. 563, 567, 25 Sup. Ct. Rep. 331.

The mere right to receive something in the future, even though the right to receive has become vested in the present, does not constitute a taxable legacy or succession within the meaning of the act.

Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; Mason v. Sargent, 104 U. S. 689, 26 L. ed. 894.

Life or mortuary tables are properly used only to get at proximate values, and never when definite or actual values are obtainable.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 556, 30 L. ed. 257, 259, 7 Sup. Ct. Rep. 1; Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 167; Kahn v. Herold, 147 Fed. 575.

The act itself certainly contains no express provision authorizing the use of life tables, while the fact that the statute not only uses but reiterates the phrase "clear value," instead of saying "estimated or probable value," or even "market value," seems to negative any implied authority for the employment of such tables.

Herold v. Shanley, 76 C. C. A. 478, 146 Fed. 20.

Even where the use of life tables is allowed, the general rule is that the condition of the individual's health and the particular circumstances of the case are also to be considered, and that the computation by the tables is subject to modification thereby.

Rowley v. London & N. W. R. Co. L. R. 8 Exch. 221, 42 L. J. Exch. N. S. 153, 29 L. T. N. S. 180, 21 Week. Rep. 869; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 557, 30 L. ed. 257, 259, 7 Sup. Ct. Rep. 1.

In Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; Mason v. Sargent, 104 U. S. 689, 26 L. ed. 894, it was decided that where the right to a succession vested and passed at the time of the testator's death, but where

the passing of the taxable succession was deferred till the time of actual possession and enjoyment, a repeal of the act prior to the last-mentioned event defeated the tax.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to recover a portion of a succession tax paid under the act of June 13, 1898, chap. 448, 30 Stat. at L. 448, 464. U. S. Comp. Stat. 191, p. 2286, *the[159] action being based on the act of June 27, 1902, chap. 1160, § 3, 32 Stat. at L. 406, U. S. Comp. Stat. Supp. 1909, p. 878, which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." The petitioner, appellee, was residuary legatee under a will, in trust to hold the fund "either as at present invested, or in such securities as to my said trustee may be deemed safe," and to pay over the net income to the testator's niece "in quarterly payments during all the period of her natural life." On June 8, 1900, the appellee made a return to the collector of internal revenue, stating that the value of the residuary estate was \$120,303.94, and that of a specific legacy of silverware, etc., to the niece, \$500. With the aid of mortuary tables, the rate of interest being assumed to be 4 per cent, the clear value of the legacies to the niece was fixed at \$74,678.68, and an inheritance tax of \$5,600.90 was assessed upon it, which was paid on August 16, 1900. Up to July 1, 1902, the date fixed by the statute, the petitioner had paid to the niece \$17,027.59 income from the residue and had delivered to her the specific legacy valued at \$500. The tax on these sums at the rate of taxation was \$1,314.59, which, deducted from the whole tax paid, leaves \$4,286.31, to recover which this suit is brought. The appellee had judgment in the court of claims. 45 Ct. Cl. 362.

The words "which shall not have become vested," quoted above, mean the same as "absolutely vested in possession or enjoyment" in a later clause ending the tax on contingent interests unless so vested before July 1, 1902. Vanderbilt v. Eidman, 196 U. S. 480, 500, 49 L. ed. 563, 570, 25 Sup. Ct. Rep. 331. On this ground it is argued at great length that only so much of the life interest of the niece as she had received before the date mentioned had vested in the sense of the clause. We are of opinion that this argument cannot be maintained. The interest of the niece was not a contingent right to income as *it should accrue[160] in her lifetime; it was a vested life estate

in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity. Objections like those that are made to treating a life estate as a present unity in the enjoyment of the life tenant might be made to the similar treatment of absolute ownership in fee. In actual life a fee can be enjoyed only minute by minute; but, although eternal in theory of law, by the same theory at every moment it is all and wholly in the owner's hands. The statute does not invite speculation in a new nonenclature, or attempt to reach profounder conceptions than those familiar to the law. When it speaks of interests absolutely vested in possession we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment. No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun; none that more clearly and absolutely excludes the qualification "contingent" in the sense of the law. *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, concerned a life estate in remainder, which, whether the remainder was technically vested or contingent (*Ibid.* 501, 502), was not vested in possession or enjoyment. It was assumed that the tax was payable in a case like this. *Id.* 488, 495.

Decree reversed.

161]*A. SANDOVAL and P. Sandoval,
Appts.,
v.
EPES RANDOLPH.

(See S. C. Reporter's ed. 161-164.)

Evidence — ownership — option agreement.

The contention of one sued in assumpsit as the agent for the buyer of a mine, upon an implied promise to refund a secret profit made in the execution of the agency, that he was in fact the owner of the mine at the time he agreed to act for the buyer in purchasing it, is not established by a contract antedating the agency, by which the owners agreed to sell the mine to the defendant in consideration, with right of redemption within six months, of a specified sum, with the further agreement that they would not exercise the right of redemption if he should pay to them the further considera-

tion of a specified sum, since such contract is nothing more than an option.

[For other cases, see Evidence, XII. e, in Digest Sup. Ct. 1908.]

[No. 4.]

Submitted October 26, 1911. Decided December 4, 1911.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Santa Cruz County, in that territory, in favor of plaintiff in an action of assumpsit. Affirmed.

See same case below, 11 Ariz. 371, 95 Pac. 119.

Messrs. Frank P. Flint and Henry S. Van Dyke submitted the cause for appellants. Mr. G. Bullard was on the brief:

The variances amounted to a total failure of proof.

Wilson v. Haley Live Stock Co. 153 U. S. 39, 38 L. ed. 627, 14 Sup. Ct. Rep. 768; *Volkening v. De Graaf*, 81 N. Y. 268, 12 Jones & S. 424; *Decker v. Saltzman*, 59 N. Y. 275; *Degraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562; *Walter v. Bennett*, 16 N. Y. 250; *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Bernhard v. Seligman*, 54 N. Y. 661; *Barnes v. Quigley*, 59 N. Y. 265; *Farmer v. Cram*, 7 Cal. 135; *Elmore v. Elmore*, 114 Cal. 521, 46 Pac. 458; *Forsell v. Pittsburgh & M. Copper Co.* 38 Mont. 403, 100 Pac. 221; *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81; *Mullinax v. Lowry*, 140 Mo. App. 42, 124 S. W. 572.

Plaintiff and his assignor are estopped to maintain this action, and, further, are guilty of laches.

St. John v. Hendrickson, 81 Ind. 350; *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899; *Pom. Eq. Jur.* §§ 897, 917, 965; *Smith, Frauds*, § 236.

The trial court committed prejudicial error in denying appellants' motion to amend their answer and specifically plead the statute of limitations applicable thereto.

Perrin v. Mallory Commission Co. 8 Ariz. 407, 76 Pac. 476.

Lindsay's cause of action, if any, was not assignable to plaintiff herein as a matter of law.

2 Am. & Eng. Enc. Law, 2d ed. 1020; *Story, Eq. Jur.* § 1040 G; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *Graham v. La Crosse & M. R. Co.* 102 U. S. 154, 26 L. ed. 108; *Mullinax v. Lowry*, 140 Mo. App. 42, 124 S. W. 573.

NOTE.—As to the rights conferred by a "refusal" or "option"—see note to *Litz v. Goosling*, 21 L.R.A. 127.

Mr. Eugene S. Ives submitted the cause for appellee:

Whatever conflict there may have been in the evidence has been resolved by the findings of fact made by the trial court, and, in legal contemplation, adopted by the supreme court of the territory and upon these facts the law is entirely clear.

Bain v. Brown, 56 N. Y. 285; *Crump v. Ingersoll*, 44 Minn. 84, 46 N. W. 141; *Rorebeck v. Van Eaton*, 90 Iowa, 82, 57 N. W. 694; 2 Am. & Eng. Enc. Law, 2d ed. 1071-1073.

The allegations that the conduct of the agent was fraudulent were entirely unnecessary and wholly unimportant, and in no way change the character of the cause of action.

Frishmuth v. Farmers' Loan & T. Co. 46 C. C. A. 222, 107 Fed. 169; *Seitz v. Seitz*, 59 App. Div. 150, 69 N. Y. Supp. 170.

This court has uniformly declined to disturb the construction of a territorial statute by the territorial court, and has, in effect, given to the construction of territorial statutes by territorial courts the same weight as the construction of state statutes by state courts.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695.

Memorandum opinion by direction of the court. By **Mr. Justice Lurton**:

Action for money had and received for the use of the plaintiff. A jury was waived and there was judgment for plaintiff upon a special finding of fact. This judgment was affirmed by the court below, the court holding that there was evidence supporting the findings of fact, and that when 162]*that was the case, the court could not go behind the facts so found.

The facts so found were in every essential respect the facts stated in the complaint. They were, in substance:

1. That the plaintiff procured the defendants to negotiate with the supposed owner of a silver mine in Mexico, and buy it from the owner for the lowest possible price for the plaintiff and another, who had since assigned his interest to the plaintiff.

2. That the defendants did thereafter bargain for the property, and did buy the same at the price of 20,000 dollars, Mexican silver, taking the title to one of them.

3. That the defendants represented that they had agreed to pay 20,000 dollars in American money for the mine, and that the plaintiff, believing this to be true, paid over to the defendants the full sum of 20,000 dollars in American currency, which was the equivalent of twice the sum which the

defendants had actually agreed to pay and did later pay for the said property.

The action was in debt to recover this excess over the cost of the property, as money had and received for the use of the plaintiff.

It would be a great scandal if a principal thus betrayed by his agent might not declare in assumpsit without relying upon fraud and deceit in an action for damages. And so the court below held was the law, and that such was the action, notwithstanding the conduct of the Sandovals was characterized as deceitful and fraudulent.

Neither is it now contended that an agent who makes a secret profit in the execution of his agency may not be compelled to disgorge, and required to do so in an action upon an implied promise.

Neither do the appellants now deny that there was abundant evidence to support the finding that they did *agree to act as [163 the plaintiff's agents, and to buy for him from the supposed owner the mine they did buy; nor do they now deny that they represented to the plaintiff that they had bought the property for him at the price averred, when in fact they had paid for same only one half that price.

What they do say is that, as a matter of law, there was no relation of principal and agent, since there was conclusive evidence that they were themselves the owners of the property at the time they agreed to act for the plaintiff in buying it. Upon this hypothesis it is said that there is no evidence to support a judgment grounded upon their liability for a breach of duty as agents, since one may not act as agent for the buyer in the sale of property of which he is himself the sole owner.

But the finding of fact was that the defendants, after agreeing to purchase in behalf of the plaintiff, "*and in pursuance of that agreement*," purchased the said mining property," etc. This finding is a flat contradiction of the claim that they were the owners when they agreed to represent the plaintiff in buying the property. We lay out of consideration, in the present situation of this case, all conflicting oral evidence relating to the agreement. There is left only what is said to be conclusive documentary evidence to support the claim. But that does not do so. It consists in a contract antedating the agency agreement, by which the real owners, Ortiz and two others, agreed to sell the mine in question to one of the Sandovals, in consideration, with right of redemption within six months, of 1,060 pesos, Mexican, with the further agreement that they would not exercise the right of redemption if Sandoval should pay to them "the further considera-

tion of the sum of 20,000 Mexican pesos." This was nothing more than an option, of which Sandoval availed himself in time, and while executing his agreement of agency.

164] *Every other suggestion of error hinges upon this alleged inability to act as agent, or upon points of procedure clearly foreclosed by the rulings of the Arizona courts.

Judgment affirmed.

PETER ANDERSON, Plff. in Err.,
v.

UNITED REALTY COMPANY, Dow-Snell
Company, John P. Freeman, et al.

(See S. C. Reporter's ed. 164-167.)

Removal of causes — further proceedings in state court — restoring jurisdiction.

The restoration of the jurisdiction of a state court after one of the original defendants had filed its petition and bond for the removal of a separable controversy to a Federal circuit court was effected by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remander by the Federal court, where the plaintiff, before any order was made in the state court, or the record filed in the Federal court, had an order entered in the state court, dismissing his action against the removing defendant and certain others having a like ground of removal, the order reciting that, in consideration of such dismissal, the petition for removal was withdrawn, and thereafter the case was proceeded with against the remaining defendants to verdict and judgment without any objection by either the plaintiff or the remaining defendants.

[For other cases, see Removal of Causes, X, in Digest Sup. Ct. 1908.]

[No. 27.]

Argued November 1, 1911. Decided December 4, 1911.

IN ERROR to the Supreme Court of the State of Ohio, to review a judgment which affirmed a judgment of the Circuit Court of Lucas County, in that state, af-

NOTE.—As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 155; Pollitz v. Wabash R. Co. 100 C. C. A. 4; Sloane v. Anderson, 29 L. ed. U. S. 899; Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

firming a judgment of the Court of Common Pleas of that county, in favor of defendants in an action in which one of the original defendants had filed its petition and bond for the removal of a separable controversy to a Federal circuit court. Affirmed.

See same case below, 79 Ohio St. 23, — L.R.A.(N.S.) —, 86 N. E. 644.

Mr. Rhea P. Cary argued the cause and filed a brief for plaintiff in error.

Messrs. Harry E. King, Clayton W. Everett, and Oliver B. Snider argued the cause, and, with Messrs. Edward H. Rhoades, Edward H. Rhoades, Jr., Elmer E. Davis, George A. Bassett, and Rathbun Fuller, filed a brief for defendants in error:

If any right of removal ever existed in this case, it was abandoned and waived and the jurisdiction of the state court restored.

Home Ins. Co. v. Morse, 20 Wall. 445-450, 22 L. ed. 365-368; Hanover Nat. Bank v. Smith, 13 Blatchf. 224, Fed. Cas. No. 6,035; McLean v. St. Paul & C. R. Co. 17 Blatchf. 363, Fed. Cas. No. 8,893, affirmed in 108 U. S. 212, 27 L. ed. 703, 2 Sup. Ct. Rep. 498; Barron v. Burnside, 121 U. S. 186-198, 30 L. ed. 915-919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Anderson v. United Realty Co. 79 Ohio St. 23, — L.R.A.(N.S.) —, 86 N. E. 644; Pollock v. Cohen, 32 Ohio St. 514; St. Louis, W. & W. R. Co. v. Ransom, 29 Kan. 298; Amy v. Manning, 144 Mass. 153, 10 N. E. 737, affirmed in 140 U. S. 137, 35 L. ed. 386, 11 Sup. Ct. Rep. 757; Smithson v. Chicago G. W. R. Co. 71 Minn. 224, 73 N. W. 853, affirmed in 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 192, 53 L. ed. 963, 964, 29 Sup. Ct. Rep. 546; Columbus Home Ins. Co. v. Curtis, 32 Mich. 402; First Nat. Bank v. Conway, 67 Wis. 210, 30 N. W. 215; Wadleigh v. Standard Life & Acci. Ins. Co. 76 Wis. 439, 45 N. W. 109; Hazard v. Durant, 9 R. I. 606; Dart v. Arnis, 19 How. Pr. 429; Gaffney v. Gillette, 4 Dill. 264, note, Fed. Cas. No. 5,168; Hudson River R. & Terminal Co. v. Day, 54 Fed. 545; West Virginia v. King, 112 Fed. 369.

Memorandum opinion by direction of the court. By Mr. Justice Lurton:

The single question for our consideration upon this writ of error concerns the jurisdiction of the state court to proceed with the action after one of the original defendants had filed its petition and bond for removal to the circuit court of the United States.

If, as we shall assume, there was a separable controversy and the requisite diversity of citizenship, it was the duty of the state court to accept the petition and bond and proceed no further in the case. A trial and judgment thereafter would be coram non iudice, unless its jurisdiction over the cause and the parties was in some way restored. *National S. S. Co v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; 166] *Madisonville Traction *Co. v. St. Bernard Min. Co.* 196 U. S. 253, 49 L. ed. 468, 25 Sup. Ct. Rep. 251. But we are of opinion that the plaintiff in error is not in a position to now assert that the state court's subsequent exercise of jurisdiction was without authority. When the removal petition and bond was filed, the plaintiff, before any order was made in the state court or the record filed in the United States court, had an order entered in the state court, dismissing his action against the removing defendant and certain others having like ground of removal, the order reciting that in consideration of such dismissal the petition for removal was withdrawn. Thereafter the cause was proceeded with against the remaining defendants without the hint of any objection by either the plaintiff or the remaining defendants. Upon the contrary, many steps were taken and a long jury trial had, resulting in a verdict and judgment for the defendants. Not until the cause was carried to the Ohio circuit court by appeal of the plaintiff was there any objection made to the jurisdiction of the trial court.

The state court had jurisdiction over the subject-matter. It recovered jurisdiction over the remaining parties by action and conduct equivalent to a formal waiver of new process and new pleadings, or any formal remander by the United States court.

The *Tugman Case*, cited above, does not help the plaintiff in error. The defendant, whose right to remove had been erroneously denied, was held not to have waived his right to remove by subsequently consenting to a reference of the case to a referee, or by defending the suit both before the referee and the court, without protesting. This court said:

"When the state court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its exercise 167]*of jurisdiction. Indeed, such a course would scarcely have been respectful to the state court, after its ruling upon the point of jurisdiction had been made."

If, on the other hand, he had thereafter 56 L. ed.

invoked the court's jurisdiction in his own behalf, he would not have been permitted later to deny it. *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; *Garrozi v. Dastas*, 204 U. S. 64, 73, 51 L. ed. 369, 376, 27 Sup. Ct. Rep. 224; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546.

Judgment affirmed.

UNITED STATES, Plff. in Err.,

v.

GEORGE F. STEVER, J. B. Stever, and Harry I. Ball.

(See S. C. Reporter's ed. 167-175.)

Postoffice — fraud by use of mails — false pretenses.

1. The offense of using the mails in furtherance of "schemes devised for the purpose of obtaining money or property under false pretenses," denounced by U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659, includes only schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section, and does not cover the use of the mails to promote other schemes to obtain money or property by means of false pretenses, which is embraced by the provisions of § 5480 (U. S. Comp. Stat. 1901, p. 3696), making criminal the use of the mails to carry on any scheme or artifice to defraud.

[For other cases, see Postoffice, 113-115, in Digest Sup. Ct. 1908.]

Postoffice — fraud by use of mails — false pretenses.

2. Making false and fraudulent representations through the mails to prospective buyers of cattle, to promote a scheme to defraud by inducing them to come and inspect the cattle, after which inferior cattle were to be substituted in the place of those inspected and sold, is not punishable under U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659, making criminal the use of the mails in furtherance of lotteries, or schemes of gain dependent upon chance, or "schemes devised for the purpose of obtaining money or property under false pretenses," but such acts constitute the offense prohibited by § 5480 (U. S. Comp. Stat. 1901, p. 3696), of using the mails to carry on any scheme or artifice to defraud.

[For other cases, see Postoffice, 113-115, in Digest Sup. Ct. 1908.]

[No. 448.]

Argued October 20, 1911. Decided December 4, 1911.

IN ERROR to the District Court of the United States for the Western District of Kentucky to review a judgment quash-

ing an indictment for the use of the mails to promote a scheme to obtain money or property by means of false pretenses. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **Harr** argued the cause and filed a brief for plaintiff in error:

There is a manifest difference between schemes to obtain money by false pretenses and schemes to defraud generally.

Durland v. United States, 161 U. S. 306, 312, 313, 40 L. ed. 709, 711, 712, 16 Sup. Ct. Rep. 508; *Jackson v. People*, 126 Ill. 149, 18 N. E. 286.

Obtaining money by false pretenses was an offense at common law; to defraud was not necessarily so.

State v. Hewett, 31 Me. 396.

It was not strange, therefore, that Congress dealt with the common-law offense in a separate statute.

Section 3894 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2659) is not limited, either in its terms or by necessary implication, to lottery schemes.

United States v. Sears, Robuck & Co. decided February 23, 1909 (D. C. S. D. Iowa).

This court, in *Public Clearing House v. Coyne*, 194 U. S. 497, 505, 48 L. ed. 1092, 1097, 24 Sup. Ct. Rep. 789, held that U. S. Rev. Stat. § 3929, U. S. Comp. Stat. 1901, p. 2686, which like § 3894, refers to both lottery schemes and schemes to defraud, covered two distinct subject matters.

Messrs. **W. M. Smith** and **J. S. McKemey** argued the cause and filed a brief for defendants in error:

U. S. Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659, only includes, by proper construction, lottery schemes.

Homer v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *United States v. Sauer*, 88 Fed. 249.

Where words of a particular description in a statute are followed by general words that are not specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind as those designated by the particular words.

Nichols v. State, 127 Ind. 406, 26 N. E. 839.

Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are *in pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times.

Lewis's Sutherland, Stat. Constr. § 443;

Alexander v. Alexandria, 5 Cranch, 1-7, 3 L. ed. 19-21; *United States v. Freeman*, 3 How. 556-564, 11 L. ed. 724-728; *Atkins v. Fibre Disintegrating Co.* 18 Wall. 272-301, 21 L. ed. 841-844; *Cope v. Cope*, 137 U. S. 682-688, 34 L. ed. 832-834, 11 Sup. Ct. Rep. 222; *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 22 L. ed. 348.

In the construction of statutes, general words preceded or followed by particular words in the same or a subsequent clause, are qualified and restrained by the particular words; or, to state it somewhat differently, when general words follow, in a statute, words of particular and special meaning, if there be not a clear manifestation of a different legislative intent, they are construed as applicable to persons or things, or cases of like kind, as are designated by the particular words.

United States v. Garretson, 42 Fed. 22; *Bishop, Statutory Crimes*, §§ 245, 246; *Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236; *Woolsey v. Cade*, 54 Ala. 385, 25 Am. Rep. 711; *Amos v. State*, 73 Ala. 501.

Criminal statutes are to reach no further in meaning than their words. No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions are covered by them which are within both their spirit and their letter.

Bishop, Statutory Crimes, 2d ed. §§ 119, 193, 194, 218, 220, 227.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a writ of error to review a judgment quashing an indictment, as not stating an offense triable in the western district of Kentucky. The indictment contained two counts. The first is drawn to bring the offense within § 3894, Revised Statutes (U. S. Comp. Stat. 1901, p. 2659), as amended, and the second is based upon § 5480, Revised Statutes (U. S. Comp. Stat. 1901, p. 3696), and is for a conspiracy *to commit the offense charged in the[170 first count. The government now concedes that the latter count states no offense within western district of Kentucky, and withdraws the assignments of error relating to the judgment quashing it.

The count to be considered charges, in substance, that the defendants, on April 20, 1908, in the state of Iowa, devised a certain scheme for the purpose of obtaining money, etc., "by and under false pretenses," from various persons, among others, certain persons named, residing at Colesburg, within the jurisdiction of the court, to be effected by means of the United States mail,

through correspondence with them. The scheme, summarily stated, was to be effected by inducing persons who should read their advertisements offering high grade cattle for sale, to open correspondence with them. That then the defendants were, through the mail, to make false and fraudulent representations as to the character of the cattle they offered for sale, and thereby induce such correspondents to come and inspect the cattle at Fairfield, Iowa, and that after a sale of cattle so inspected, were to substitute inferior cattle in the place of those inspected and sold. It is then averred that defendants succeeded in opening up correspondence with certain persons at Colesburg, Kentucky, and that in furtherance of said scheme, and for the purpose of obtaining money under false pretenses, they, the defendants, on April 20, 1908, "unlawfully did knowingly and fraudulently deposit and cause to be deposited in the mail, . . . at Fairfield, Iowa, and did then and there knowingly cause to be sent by said mail of the United States a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the state of Kentucky, and in the western district thereof," to be delivered to persons there addressed and residing, which letter was calculated to accomplish the scheme intended, and which said letter the defendants are 171] charged *as "having caused to be delivered by mail to the person addressed."

For convenience we set out in the margin §§ 3894 and 5480, Revised Statutes, as amended.†

172]*The last clause of § 3894 provides that an offense against any of the provisions of the section "may be proceeded against

. . . either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery, according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

The claim is that an indictment lies in the western district of Kentucky, because that is the district in which the defendants caused the letter mentioned "to be delivered by mail" to the person addressed.

The government has suggested that there is a distinction at common law between a false pretense and an indictable *cheat[173 or fraud. It may be conceded that, at the common law, a false pretense is not a promise, but a fraudulent and false representation of an existing or past fact, designed to induce one to part with money or goods. Bishop, Crim. Law, 6th ed. §§ 415, 419, and cases, English and American, there cited.

Whether the facts averred in this count constitute a scheme to obtain goods or money by a common-law false pretense may admit of grave doubt. But whether that be so or not, it would require very subtle distinction to conceive of a use of the mail to promote a scheme to obtain property or money by means of false pretenses which would not also be a "scheme or artifice to defraud" within the plain meaning of § 5480. For the purpose of the present discussion it is not important whether the pleader has characterized the scheme described as a false pretense or as "a scheme or artifice to defraud," since in either case a use of the mail prohibited by § 5480 is shown. That section was construed by this court, in *Durland v. United States*,

†Sec. 3894. No letter, postal card, or circular concerning any lottery, so-called gift concern, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any postoffice or branch thereof, or by any letter carrier, nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person

who shall knowingly deposit or cause to be deposited, or who shall knowingly send or or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment, and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

Sec. 5480. If any person, having devised, or intending to devise, any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlaw-

161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508, as "including everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."

If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment *under one not possible under the other. Thus, under § 3894, an indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under § 5480. Under § 3894, one may be imprisoned not longer than one year, while under the other he may be imprisoned for eighteen months. Under § 3894, he is subject to indictment for any number of violations. Under the other the indictment may only charge offenses to the number of three committed within the same six calendar months.

No such purpose can be fairly said to have actuated Congress. The two sections are intended to prevent the use of the mail

for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being "any scheme or artifice to defraud." A scheme to defraud by means of false pretenses is, as we have seen, a "scheme or artifice to defraud," within the plain meaning and purpose of this section. The general words, "or concerning schemes devised for the purpose of obtaining money or property under false pretenses," found in § 3894, do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General. So construed, they would trench upon the ground covered by § 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance, and are followed by further particular words relating to the same kind of lottery schemes.

In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words.

Construing the two sections together as legislation in **pari materia*, we find [175] no manifest legislative intent forbidding the application of the rule of construction referred to. We therefore conclude that the words, "or concerning schemes devised for the purpose of obtaining money or property by false pretenses," are to be limited to schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section. This view finds strong support in

ful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by means of the Postoffice Establishment of the United States, or by inciting such other person or any person to open communication with

the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any postoffice, branch postoffice, or street or hotel letter box of the United States, to be sent or delivered by the said Postoffice Establishment, or shall take or receive any such therefrom, such person so misusing the Postoffice Establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Postoffice Establishment enters as an instrument into such fraudulent scheme and device.

the case of *United States v. Sauer*, 88 Fed. 249, where the opinion was by Judge Sevens, then district judge.

The judgment of the court below is accordingly affirmed.

UNITED STATES, Plff. in Err.,

v.

CHARLES F. MUNDAY and Archie W. Shiels.

(See S. C. Reporter's ed. 175-185.)

Mines — entry for disqualified principal — coal lands.

1. The prohibition against more than one entry of coal lands by the same person, which is made by U. S. Rev. Stat. § 2350, U. S. Comp. Stat. 1901, p. 1441, prevents a qualified person from making a coal-land location apparently for himself, but in fact as an agent, for the purpose of securing to a corporation a larger area of coal lands than such corporation could lawfully locate for itself.

[For other cases, see *Mines*, 18-18b, in Digest Sup. Ct. 1908.]

Mines — entry for disqualified principal — unsurveyed coal lands.

2. The restriction to one entry by the same person, made by U. S. Rev. Stat. § 2350, U. S. Comp. Stat. 1901, p. 1441, governing entries of coal lands under the three preceding sections, which relate solely to surveyed lands, and which were expressly extended to Alaska by the act of June 6, 1900 (31 Stat. at L. 658, chap. 796, U. S. Comp. Stat. 1901, p. 1441), was made applicable to entries on unsurveyed coal lands in Alaska by the act of April 28, 1904 (33 Stat. at L. 525, chap. 1772, U. S. Comp. Stat. Supp. 1909, p. 556), enacted solely to provide for the sale of such lands, and continuing in force in Alaska all the coal-land laws of the United States not in conflict with its provisions, the fact that such statute imposes no restrictions upon alienation by one who has made a lawful location not warranting a different conclusion, and the words, "the three preceding sections," found in § 2350, having no material significance, but having been necessitated because the provisions of the original act of March 3, 1873 (17 Stat. at L. 607, chap. 279), when carried into the Revised Statutes, were made a part of the general land law embracing the sale of other public lands.

[For other cases, see *Mines*, 18-18b, in Digest Sup. Ct. Rep. 1908.]

[No. 593.]

Argued October 25, 1911. Decided December 4, 1911.

NOTE.—On the location of a mining claim—see note to *Dwinnell v. Dyer*, 7 L.R. A. (N.S.) 763.

56 L. ed.

IN ERROR to the Circuit Court of the United States for the Western District of Washington to review a judgment quashing an indictment for a conspiracy to defraud the United States by unlawfully obtaining title to coal lands in the District of Alaska. Reversed.

See same case below, 186 Fed. 375.

The facts are stated in the opinion.

Solicitor General Lehmann argued the cause and filed a brief for plaintiff in error:

U. S. Rev. Stat. § 2350, U. S. Comp. Stat. 1901, p. 1441, is, by the express terms of §§ 1 and 4 of the act of April 28, 1904, continued in force in the district of Alaska, and this prohibits more than one entry of coal land by or for the same person or association of persons.

Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45; *United States v. Doughten*, 186 Fed. 226; *Morton v. Nebraska*, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451; *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; *United States v. Scofield*, General Land Office, June 21, 1911.

Authorities declaring the general principles of statutory construction, and particularly of the construction of statutes making grants of public rights or property, might be cited in great abundance, but it would serve no good purpose. Such statutes, we know, are to be strictly construed against the grantee.

Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45.

A manifest policy of the government with regard to some distinctive public property, which has been long established and steadfastly pursued, will not be deemed to have been abandoned unless the law on the subject admits of no other construction.

Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451.

Mr. E. C. Hughes argued the cause, and, with Mr. Wilmon Tucker, filed a brief for defendant in error Charles F. Munday:

A legislative act is to be interpreted according to the intention of the legislation apparent on its face.

United States v. Fisher, 109 U. S. 145, 27 L. ed. 886, 3 Sup. Ct. Rep. 154.

The primary and general rule of construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar.

United States v. Goldenberg, 168 U. S. 102, 42 L. ed. 398, 18 Sup. Ct. Rep. 3.

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.

Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651.

The title of an act is referred to only in cases of doubt or ambiguity.

Cornell v. Coyne, 192 U. S. 430, 48 L. ed. 509, 24 Sup. Ct. Rep. 383.

A provision in a statute continuing in force all other laws not in conflict amounts to no more than a statutory declaration of the common-law rule of construction.

It is a general rule of construction that where two statutes relate to the same or similar subjects, the later act will not be held to repeal the earlier by implication, unless there is a necessary repugnance between some or all of their provisions. Repeals by implication are never favored by the courts.

Frost v. Wenie, 157 U. S. 58, 39 L. ed. 619, 15 Sup. Ct. Rep. 532; United States v. Healey, 160 U. S. 146, 147, 40 L. ed. 373, 16 Sup. Ct. Rep. 247; United States v. Matthews, 173 U. S. 388, 43 L. ed. 740, 19 Sup. Ct. Rep. 413.

Considering the act of 1904 on the hypothesis that it was intended by Congress as an amendment of the act of June 6, 1900, extending U. S. Rev. Stat. §§ 2347-2352, U. S. Comp. Stat. 1901, pp. 1440, 1441, to the district of Alaska, and that the two laws, so far as not in conflict, are to be considered as one body of law, providing for the disposition of coal lands in that territory, the act of 1904 would constitute the later provision in a single body of laws.

Courts, in construing an amendment to a statute, must consider the amendment as a part of the original act, and the entire act as amended must be given the same construction as if the amendment had been a part of the original law.

Endlich, Interpretation of Statutes, § 294; Blair v. Chicago, 201 U. S. 475, 50 L. ed. 832, 26 Sup. Ct. Rep. 427.

In this view, §§ 2347-2352 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1440, 1441) would appear first in the body of the law, and would define the right and the method of procedure of qualified persons to make cash entry of surveyed coal lands of the United States; and the provisions of the act of 1904 would follow and define the right and method of procedure of qualified persons who have opened or improved coal mines, to locate and acquire unsurveyed coal lands of the United States

in the district of Alaska. So considered, § 2350 would, by its terms, be confined to the three sections immediately preceding it; in other words, it would declare that the sections of the law authorizing cash entry of surveyed lands "shall be held to authorize only one entry by the same person or association of persons." Upon what theory of statutory construction could the limitations of this section be held to apply to the subsequent provisions of the law granting a different right, providing a different method of procedure, and relating to a different classification of lands; namely, unsurveyed coal lands in the district of Alaska?

No reference can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision.

Deffebach v. Hawke, 115 U. S. 402, 29 L. ed. 426, 6 Sup. Ct. Rep. 95.

Words cannot be ingrafted upon one statute or provision of the law merely by reference to a public policy assumed to be declared by another statute, even though relating to the same general subject: and particularly where they relate to different classifications of that subject and provide different methods of procedure.

Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 18 L. ed. 518; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; Dewey v. United States, 178 U. S. 521, 44 L. ed. 1174, 20 Sup. Ct. Rep. 981.

Where a provision is left out of the statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; State ex rel. Everding v. Simon, 20 Or. 365, 26 Pac. 171; United States v. Coombs, 12 Pet. 80, 9 L. ed. 1007.

Had Congress intended, when it enacted the law of 1904, to limit the right of qualified persons to associate themselves together in making, or in contracting to assign, locations of unsurveyed coal lands in the district of Alaska, it would have so declared in the law. Was it left out in words, to be put back by construction?

Pirie v. Chicago Title & T. Co. 182 U. S. 448, 45 L. ed. 1177, 21 Sup. Ct. Rep. 906.

If, in the construction of the statute upon which the indictment in this case must rest, a doubt arises as to the legislative intent, what, then, is the rule of construction? Unless an express prohibition is

found in the statute against doing the acts which are here charged as constituting a fraud intended to be committed against the government, how can it be said that the court erred in quashing the indictment? The essence of the crime attempted to be charged in the indictment is conspiracy to defraud by doing acts which the statute prohibits. In order, therefore, that the alleged violation of the law shall be made the basis of a crime, it is necessary that the contemplated acts shall be prohibited in clear and express terms. The law is intended to be read and understood by laymen and its terms complied with by them. Its language must be interpreted according to the ordinary and usual meaning of the words employed; and, when so construed, if a doubt arises, that doubt, in a penal case, must be resolved in favor of the defendant.

United States v. Keitel, 211 U. S. 394, 53 L. ed. 243, 29 Sup. Ct. Rep. 123; United States v. Clayton, 2 Dill. 219, Fed. Cas. No. 14,814; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 89; France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219; United States v. Harris, 177 U. S. 305, 309, 44 L. ed. 780, 781, 20 Sup. Ct. Rep. 609; Sutherland, Stat. Constr. §§ 518, 520; The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499; The Ben R. 67 C. C. A. 290, 134 Fed. 784; United States v. Reese, 92 U. S. 219, 23 L. ed. 565; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; Ex parte Bailey, 39 Fla. 734, 23 So. 552.

Mr. Charles W. Dorr argued the cause, and, with Mr. Hiram E. Hadley, filed a brief for defendant in error Archie W. Shiels:

The Alaska coal land act of April 28, 1904, provides the exclusive method for acquiring title to unsurveyed coal lands within the district of Alaska. It carries no restrictions against, nor limitations upon, alienation, but affirmatively recognizes assignments.

The freedom of sale and purchase is absolute unless restricted by statute.

Myers v. Croft, 13 Wall. 291, 296, 20 L. ed. 562, 563; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Adams v. Church, 193 U. S. 510, 516, 517, 48 L. ed. 769, 771, 772, 24 Sup. Ct. Rep. 517; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; Barnes v. Poirier, 12 C. C. A. 9, 27 U. S. 56 L. ed.

App. 500, 64 Fed. 18; Mullen v. Wine, 26 Fed. 206; Thredgill v. Pintard, 12 How. 24, 13 L. ed. 877; Pereles v. Weil, 157 Fed. 419; Fackler v. Ford, 24 How. 322, 16 L. ed. 690; Beley v. Naphtaly, 169 U. S. 353, 363, 42 L. ed. 775, 778, 18 Sup. Ct. Rep. 354; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Stark v. Starr, 94 U. S. 477, 24 L. ed. 276; Irvine v. Marshall, 20 How. 558, 562, 15 L. ed. 994, 996; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 650, 651, 26 L. ed. 875, 880, 11 Mor. Min. Rep. 673; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181.

Nor can a prohibition in another act *in pari materia* be read into an act in which no prohibition is invested by Congress.

French v. Spencer, 21 How. 228, 238, 16 L. ed. 97, 99; Maxwell v. Moore, 22 How. 185, 191, 16 L. ed. 251, 253.

It being admitted that the locator may assign, it follows that there may be assignees, as it is not less lawful to buy than to sell.

United States v. Budd, 144 U. S. 154, 162, 163, 36 L. ed. 384, 386, 387, 12 Sup. Ct. Rep. 575.

If we read the Alaska act and §§ 2347-2352 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1440, 1441) together as one entire statute, then the restriction cannot apply to unsurveyed lands in Alaska, unless the first three sections of the 1904 statute are interpolated between §§ 2349 and 2350 of the Revised Statutes; and if so interpolated, then the restrictions under the present "three preceding sections" would be removed,—a result which is altogether ridiculous.

United States v. Bowen, 100 U. S. 508, 25 L. ed. 631.

Defendants are entitled to the benefit of a strict construction of the law in their favor.

The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499; Harrison v. Vose, 9 How. 372, 379, 13 L. ed. 179, 182; Bolles v. Outing Co. 175 U. S. 262, 265, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; United States v. Corbett, 215 U. S. 244, 54 L. ed. 176, 30 Sup. Ct. Rep. 81; The Ben R. 67 C. C. A. 290, 134 Fed. 784; Field v. United States, 69 C. C. A. 568, 137 Fed. 8; United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; United States v. Reese, 92 U. S. 214, 219, 220, 23 L. ed. 563, 565; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; United States v. Gooding, 12 Wheat. 460, 477, 6 L. ed. 693, 698; United States v. Houghton, 14 Fed. 544; Sarlls

v. United States, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; United States v. Reed, 1 Low. Dec. 232, Fed. Cas. No. 16,136; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609.

Messrs. E. C. Hughes and Charles W. Dorr also filed a separate brief for defendants in error:

Public land laws intended by Congress as means or instrumentalities to promote the exploration, settlement, and development of the public domain have uniformly received a liberal construction by the courts.

United States v. Denver & R. G. R. Co. 150 U. S. 14, 37 L. ed. 979, 14 Sup. Ct. Rep. 11; United States v. Iron Silver Min. Co. 128 U. S. 675, 32 L. ed. 572, 9 Sup. Ct. Rep. 195; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 384, 39 L. ed. 183, 193, 15 Sup. Ct. Rep. 103; Knepper v. Sands, 194 U. S. 485, 48 L. ed. 1086, 24 Sup. Ct. Rep. 744; Silver v. Ladd, 7 Wall. 219-224, 19 L. ed. 138-140; Johnson v. Towsley, 13 Wall. 72-90, 20 L. ed. 485-489; Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 351, 352, 49 L. ed. 509, 510, 25 Sup. Ct. Rep. 266.

Mr. Justice Lurton delivered the opinion of the court:

This writ of error is prosecuted by the United States from a judgment sustaining a motion to quash an indictment.

The indictment is founded upon § 5440, Revised Statutes (U. S. Comp. Stat. 1901, p. 3676), and charges a conspiracy to defraud the United States by illegally obtaining title to 40 contiguous tracts of coal lands in the district of Alaska, aggregating 6,087 acres, collectively known as the Stracey group, and averred to be of the value of \$10,000,000.

The indictment is too long to be set out, even in an abbreviated form. The gravamen of the conspiracy charged is that the defendants induced or procured divers qualified persons to take the several steps required by law *to make locations of Alaska coal lands, not for themselves, but as the mere agents or representatives of the defendants, for the purpose of securing to two named corporations a larger area of coal land than such corporations could lawfully locate for themselves.

For the defendants in error it has been very ably urged that since the concededly applicable coal-land law gives to every individual who is of age and a citizen of the United States, the right to make a coal-land location for himself, and to assign his location when made, that there can be no fraud if he makes such location in the

first instance for the benefit of another competent to buy the location when made. But if the provisions of the general coal-land entry law, found in § 2350, Revised Statutes (U. S. Comp. Stat. 1901, p. 1441), apply to the entry of coal lands in Alaska, the contention is now no longer an open one under the repeated interpretations of that section found in the cases of United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; and United States v. Forrester, 211 U. S. 399, 53 L. ed. 245, 29 Sup. Ct. Rep. 132.

The corporations by whose procurement the forty locations by forty different persons were made, under the express terms of the statute referred to, were disqualified from making more than one location each, and being thus disqualified could not make a second location through an agent acting for their use and benefit. Any construction which would permit one prohibited by express command of the law from making more than one entry or location to make other entries or locations through the agency of a third person, qualified to make an entry for himself, would be to sanction a device which would nullify the purpose of the restriction.

The result must turn upon whether the restrictive features of § 2350, Revised Statutes, are applicable to the sale of coal lands in Alaska. The ruling of the court below and the contention made by the defendants in error is that the act of April 28, 1904 (33 Stat. at L. p. 525, chap. 1772, U. S. Comp. Stat. Supp. 1909, p. 556), is the *only act applicable to the *unsurveyed* [178 coal lands of Alaska. That act will be found set out in the margin.†

It purports to be an amendment of the act of June 6, 1900 (31 *Stat. at L. p. [179 658, chap. 796, U. S. Comp. Stat. 1901, p. 1441), which extended to Alaska "so much of the public land laws of the United States . . . as relate to coal lands, namely, §§

†That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of

2347 to 2352, inclusive, of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1440, 1441):" The sections of the general law thus extended to Alaska are set out in the margin.†

These sections came from the act of March 1803, 1873 (17 Stat. at L. p. 607, chap. 279). The only change made is in the substitution in § 2350 of the words, "The three preceding sections shall be held to authorize," etc., for the words of the 4th section of the original act, reading, "That this act shall be held to authorize,"—a change made necessary because the provisions of the original act are made a part of a chapter of the general land law embracing the sale of other public lands. The act of 1873, as thus carried into the Revised Statutes,

this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor general for the district of Alaska and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises, for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse in-

terest or claim to the tract of land, or any part thereof, sought to be purchased, shall file in the land office where such application is pending, under oath, and adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

Sec. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

†Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved; Provided, That when any association of not less than

This was the situation which brought about the act of April 28, 1904, set out in the margin.

The contention is that although this act of 1904 expressly provides "that all of the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska," that the restrictions in the general coal-land law authorizing "only one entry by the same person or association of persons," etc., is in conflict, and therefore not operative to locations authorized by the later legislation.

Prior to the act of 1873, the disposition of coal lands was included in the general provisions regulating the sale of public lands, and under which there were no limitations upon the number of entries one person might make. But in 1873, when Congress sought to deal with the specific subject of the sale of coal lands, the rule was adopted of confining every qualified entryman to one entry, and every association of persons, not less than four in number and under certain conditions, to the entry of not exceeding 640 acres. A corporation has been held to be an association of persons within the meaning of this section. *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 169, 34 L. ed. 640, 643, 11 Sup. Ct. Rep. 57. The policy of this restriction was to prevent 182] a monopolization of such coal lands by securing to every citizen the right to obtain for himself one tract, not exceeding 160 acres, of such coal land. *Ibid.* *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123.

That continued to be the uniform policy

four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement and no sale under the provisions of this section

of Congress, and so continues, unless a departure has been made by the act of 1904. But, if so, it is only as to the unsurveyed, coal lands of Alaska, for undoubtedly when such lands shall be surveyed they will come at once under the restrictions of the general law as found in §§ 2347 to 2350, inclusive, of the Revised Statutes, since the act of 1904 applies only to the unsurveyed public lands of Alaska.

There occurs to us no reason for assuming that Congress intended to abandon the policy of keeping open the right of every citizen to enter one tract, and no more, of the unsurveyed coal lands of Alaska, that would not lead also to the abandonment of the policy as respects coal lands which had been surveyed.

An intention to depart from a uniform policy so long enforced in regard to coal lands should not be imputed to Congress unless the act of 1904 admits of no other construction. *Morton v. Nebraska*, 21 Wall. 660, 669, 22 L. ed. 639, 643, 12 Mor. Min. Rep. 451.

But it is said that the purpose to depart from the policy which imposed a restriction upon the number of locations which had before been authorized is manifest in the provision of § 2 of the act in question, which requires that the locator or locators, "*or their assigns*," who are citizens of the United States, shall receive a patent to the lands so located, etc. The fact that one who has made a lawful location is permitted to make an assignment, as is the plain implication from the requirement that a patent "shall" issue to "the locator or his assigns," is not indicative of a purpose to abandon the prohibition upon more than one location. By go-

shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefits of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

ing upon coal land, opening up a mine, permanently marking the boundaries, and filing 183]*and making the notices required under the law, one otherwise qualified initiates a claim to the land, and may, by further compliance with the law, earn the right to a patent. That the policy of the law stops at this point, and leaves him free to assign his location, does not impeach the intent of Congress to confine a locator to a single location. The prohibition is against more than one entry, not against alienation after a good-faith location.

Of the restrictions concerning the entry of land under the timber and stone act, it was said: "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement,—the acting for another in the purchase." *United States v. Budd*, 144 U. S. 154, 163, 36 L. ed. 384, 387, 12 Sup. Ct. Rep. 575.

The same argument was addressed to this court in *United States v. Keitel*, 211 U. S. 370, 389, 53 L. ed. 230, 241, 29 Sup. Ct. Rep. 123, as a reason for confining the prohibition to one entry made by a qualified person for the use and benefit of another, who was disqualified from making a second entry. But this court said: "True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition, affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows, since the right to sell that which one has lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire in violation of an express prohibition." *Ibid*.

Upon the same line of reasoning we find no reason for supposing that Congress intended by the act of 1904 to remove the restriction upon more than one entry by the 184]*same person, because it imposed none upon alienation after the right to a patent had accrued by a good-faith location.

But it is said that the restriction upon the right to make more than one entry by the same person applied only to entries made under the three preceding sections, i. e., §§ 2347, 2348, and 2349. That this peculiar limitation has no material significance, we have already pointed out, its presence in the section being due to the fact that § 2350, and the preceding three sections, constituting the original act of 1873, 56 L. ed.

were placed in the midst of a chapter embracing many other provisions in no wise related to the entry of coal lands. It is, however, to be borne in mind that this act of 1904 is but an amendment to the act of 1900, which extended these sections of the general coal entry law to the district of Alaska. The three acts are *in pari materia* and must be read together, and no part of the previously existing law upon the same subject is to be regarded as inoperative unless no other construction of the later legislation is reasonable.

The single object of Congress in the act of 1904 was to provide for the sale of coal lands which had not been surveyed. The provisions for the sale of such coal lands, in or out of Alaska, which had been surveyed, so that entries could be made "by legal subdivision," had already been covered by the general law which had been extended to Alaska. The conditions in Alaska were but temporary. When the coal land there should be brought under the system of surveys which prevailed in the better settled parts of the country, the act of 1904 would cease to be operative, having nothing to which it could apply. The legislation, read in the light of the situation and of the uniform policy which had so long prevailed of prohibiting more than one entry to one person, makes it plain that Congress did not intend to except the unsurveyed coal lands of Alaska from the operation of the restrictions which attached to *the sale of the surveyed coal lands in[185 Alaska and elsewhere.

The judgment must be reversed and the case remanded for further proceedings, not inconsistent with this opinion.

Reversed.

MISSOURI & KANSAS INTERURBAN
RAILWAY COMPANY, Plff. in Err.,
v.

CITY OF OLATHE, Kansas.

(See S. C. Reporter's ed. 185, 186.)

Error to state court — finality of judgment.

A judgment of the highest court of a state, affirming, without directing a dismissal, the judgment of the court below, which had sustained a demurrer to the petition in a civil suit upon the ground that it did not state facts sufficient to constitute a cause of action, but had not dismissed the suit, lacks the finality requisite to sustain a

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v.*

writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, I. d. in Digest Sup. Ct. 1908.]

[No. 726.]

Submitted November 13, 1911. Decided December 4, 1911.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed, without directing a dismissal, a judgment of the District Court of Johnson County, in that state, which had sustained a demurrer to the petition upon the ground that it did not state facts sufficient to constitute a cause of action, but had not dismissed the suit. Dismissed for want of final judgment.

See same case below, 81 Kan. 328, 36 L.R.A.(N.S.) 861, 105 Pac. 521; on rehearing, 82 Kan. 4, 107 Pac. 539.

Mr. Frank Doster submitted the cause for plaintiff in error. Messrs. A. F. Hunt, Jr., A. M. Harvey, and J. E. Addington were on the brief.

Mr. Stephen H. Allen submitted the cause for defendant in error.

Memorandum opinion by direction of the court. By Mr. Justice Hughes:

Motion to dismiss. This suit was brought by the railway company, plaintiff in error, against the city of Olathe, Kansas, in the 186]district court of Johnson county, *in that state, to recover damages caused by the repeal of an ordinance authorizing the use of certain streets of the city for an inter-urban railway, and by the consequent prevention, until the passage of a new ordinance, of its construction and operation. The defendant demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and its decision was affirmed by the supreme court of the state. And this writ of error is brought.

The record fails to disclose a final judgment. The supreme court affirmed the judgment of the lower court, but this merely sustained the demurrer without dismissing

Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what judgments of state courts are final for the purpose of review in the Federal Supreme Court—see note to Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

the suit. The supreme court did not direct its dismissal, but the cause was left standing in the court below for such proceedings as might be had according to law after the decision on the demurrer, either by amendment of the petition or entry of final judgment.

As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause, this court is without jurisdiction. *Miners' Bank v. United States*, 5 How. 213, 12 L. ed. 121; *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

Dismissed.

*MISSOURI & KANSAS INTERUR-**[187**
BAN RAILWAY COMPANY, William B.
Strang, F. R. Ogg, et al., Plffs. in Err.,
v.

CITY OF OLATHE, Kansas.

(See S. C. Reporter's ed. 187-190.)

Error to state court — Federal question — decision on non-Federal ground.

A decision of the highest court of a state, enforcing the payment by a street railway company to a municipality of the sum contracted to be paid when the road should be completed, is not reviewable in the Federal Supreme Court, as giving effect to a resolution of the common council which the company asserts impaired its contract right to construct a certain turn-out, where the court placed its decision distinctly upon the ground that, without regard to that resolution or to the question of the right of the company to construct the turn-out, the money was payable because the road had been substantially completed.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 727.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

Submitted November 13, 1911. Decided December 4, 1911.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Johnson County, in that state, enforcing the payment by a street railway company to a municipality of the sum contracted to be paid when the road should be completed. Dismissed for want of jurisdiction.

See same case below 84 Kan. 408, 114 Pac. 228.

Mr. Frank Doster submitted the cause for plaintiffs in error. Messrs. A. F. Hunt, Jr., A. M. Harvey, and J. E. Addington were on the brief:

Federal questions arise on objections to the reception of evidence specifically setting forth the Federal right claimed.

Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

It is part of the duty of the Federal courts, under the impairment of obligation of contract clause in the Constitution, to decide whether there is a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation.

Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311-320, 51 L. ed. 198-202, 27 Sup. Ct. Rep. 83.

When a claim of constitutional right is distinctly set up and relied on in the state court, appellate jurisdiction exists, even though the state court does not decide the question raised, as by resting its decision on some non-Federal ground, if the necessary effect of the judgment rendered is to deny the claim of a Federal right.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 260, 41 L. ed. 992, 17 Sup. Ct. Rep. 581; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

Whenever the highest court in a state shall adjudge that not to be a contract which, on the other hand, has been asserted by a litigant to be one, and, being such, to have been impaired by state legislation, a Federal question arises.

Jefferson Branch Bank v. Skelly, 1 Black. 436, 17 L. ed. 173; Bridge Props. v. Ho-
56 L. ed.

boken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

Mr. Stephen H. Allen submitted the cause for defendant in error:

No Federal question is presented by the record in this case. The defendants sought to raise the question whether the passage of the resolution setting aside the approval of the specifications operated as an impairment of the contract resulting from such approval. The court not only declined to pass on this question, but declined to consider the controversy concerning the passing track. It decided the case on the broad ground that the defendant was liable whichever way that question might be resolved, and held that the right to construct a passing track, without which the railway could be and was operated, was a mere matter of detail, and that the denial of the right to construct it afforded no defense to the plaintiff's claim.

Bacon v. Texas, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Knox v. Exchange Bank, 12 Wall. 370, 20 L. ed. 414; St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; McQuade v. Trenton, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; Seeberger v. McCormick, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

Memorandum opinion by direction of the court. By Mr. Justice Hughes:

Motion to dismiss. The city of Olathe, Kansas, granted to the railway company, plaintiff in error, the privilege *of us-[188 ing certain streets for its railway, and the railway company agreed to pay therefor the sum of \$9,000 when the road was completed. This suit was brought in October, 1908, to recover this amount, and the rail-

way company defended upon the ground that the road had not been completed, and hence that the money was not due. It appeared that the company had built and was operating its railway over the entire route save only a certain "turn-out," the construction of which the city prevented. On the trial, evidence was received, over objection, of a resolution adopted by the mayor and common council on March 21, 1910, pending the suit, which purported to set aside their approval of the plans and specifications so far as the "turn-out" was concerned. But the decision of the court, which went for the city, was not in any sense based on that. The trial court found the facts to be as follows:

"The map or ground plan of the said proposed railway contained a red line indicating the main line of the said railway, over the streets of said city, and in addition to said main railway the Y on Santa Fé street was indicated on said map. The said map also contained a red line, which indicated a contemplated turn-out on East Park street, near the State Institution. The specifications filed with the city clerk by the defendant company specifies in detail the work therein named, but does not mention the 'turn-out' above mentioned. The mayor and members of the city council at the time did not know that the red line above mentioned indicated the turn-out claimed by the defendant.

"On August 28th, 1907, the city brought an injunction suit restraining the defendant company from laying the said switch or turn-out above mentioned, which suit is still pending.

"The said railway company laid its main tracks, together with the Y on Santa Fé street, and commenced operating cars over the entire distance from some time in the 189]*month of August, 1907, and has continued to use said track down to the present time, excepting the period of a few months when the operation of said railway was interrupted by changing from a motor car service to an electric service.

"The turn-out above mentioned is not a necessary part of the construction of said road in order to reasonably operate the same throughout said city, and to the terminus, as provided in said ordinance.

"The road as contemplated by said franchise was substantially completed within the meaning of said franchise in the month of August, 1907."

Judgment, entered accordingly, was affirmed by the supreme court of the state, and the grounds of its decision are thus stated in its opinion:

"In brief, the question involved is whether the work to be done by the company under the franchise can be regarded as hav-

ing been completed, in such sense as to make the payment of the \$9,000 due, in view of the fact that the city has prevented the construction of the turn-out. The company maintains that upon the acceptance of its specifications it acquired a contract right to build the turn-out, which cannot be affected by any subsequent action of the city. The city contends that it cannot by contract divest itself of the power to control the use of the streets for the benefit of the public, and that the turn-out, if constructed at the point designated, would unreasonably interfere with the use of the street as a highway. These matters need not be determined in this case. They are proper subjects for consideration in the injunction suit. In whatever way they may be determined, we think the judgment here appealed from must be affirmed upon the ground that the work of the company authorized by the franchise has long since been substantially completed. The location of the turn-out is a mere detail. The right of the company to construct it at the place selected can be determined in the *injunction action. A final judgment[190 for the city in that proceeding will demonstrate that the stopping of work on the turn-out was rightful, and therefore could not be a just ground for the company's refusing to make the promised payment. If, on the other hand, it develops that the injunction was wrongfully issued, the company's remedy for any consequent injury lies in seeking damages therefor, not in delaying payment of the amount agreed upon as the consideration for the granting of the franchise." [84 Kan. 410, 114 Pac. 228.]

It thus plainly appears that the decision did not give effect to the subsequent resolution, which it is asserted impaired the obligation of the contract, but was placed distinctly upon the ground that, without regard to that resolution, or to the question of the right of the company to construct the turn-out, the money was payable, as the road had been substantially completed. The judgment would have been the same had the resolution not been adopted at all. No effect whatever has been given to it by the state court, and this court is without jurisdiction to review its judgment. *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Kennebec & P. R. Co. v. Portland & K. R. Co.* 14 Wall. 23, 20 L. ed. 850; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 392, 36 L. ed. 191, 200, 12 Sup. Ct. Rep. 530; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *New Orleans Waterworks Co. v. Louisiana*,

185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691. As was said by Mr. Justice Gray in New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. pp. 38, 39, 31 L. ed. 614, 615, 8 Sup. Ct. Rep. 741: "But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

Dismissed.

191]*MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, William B. Strang, F. R. Ogg, et al., Pliffs. in Err.,

v.

CITY OF OLATHE, Kansas.

[No. 728.]

By Mr. Justice Hughes:

In case No. 728, between the same parties, the same judgment will be entered as in the preceding case, No. 727.

JOHN I. MARTIN et al., Pliffs. in Err.,

v.

A. J. WEST.

(See S. C. Reporter's ed. 191-198.)

Error to state court — scope of review — statutory construction.

1. The Federal Supreme Court, on writ

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens, Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

Admiralty jurisdiction of action arising out of collision of vessel with bridge.

This question is to be solved, as is pointed out by Mr. Justice Van Devanter in the principal case, according to the locality of the injured thing at the time of the collision. Hence, when the action is against the owners of the bridge for the injuries received by the vessel, we should expect to find, and do find, that the case is one for the admiralty courts. Assante v. Charleston Bridge Co. 40 Fed. 765; Hill v. Essex County, 45 Fed. 260; Boston v. Crowley, 38 Fed. 202; Etheridge v. Philadelphia, 26 Fed. 43; Re Rock Island Bridge Co. 6 Wall. 56 L. ed.

of error to a state court, will accept that court's construction of a state statute giving a lien on vessels for injuries committed by them to persons or property, as including injuries to a bridge, caused by a foreign vessel engaged in interstate commerce. [For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Admiralty — jurisdiction — collision with bridge.

2. A collision between a vessel and a supporting pier of a bridge over a navigable water way of the United States, caused by the negligent management of the vessel, and resulting in the collapse of a span of the bridge, and its fall into the stream, is a nonmaritime tort, and a cause of action arising thereon is therefore not within the exclusive admiralty jurisdiction of the Federal courts, but the owner of the bridge may pursue the remedy afforded by a state statute, even though that law gives a lien on the vessel.

[For other cases, see Admiralty, 187-192, in Digest Sup. Ct. 1908.]

Commerce — state regulation — lien on foreign vessel.

3. The creation and enforcement of a lien for a nonmaritime tort against a foreign vessel engaged in interstate commerce, under Ballinger's (Wash.) Anno. Codes & Statutes, §§ 5953, 5954, which embrace all vessels, whether domestic or foreign, and whether engaged in intrastate or interstate commerce, does not offend against the commerce clause of the Federal Constitution.

[For other cases, see Commerce, 364-366, in Digest Sup. Ct. 1908.]

[No. 33.]

Argued and submitted November 2, 1911.
Decided December 4, 1911.

213, 18 L. ed. 753; Oregon City Transp. Co. v. Columbia Street Bridge Co. 53 Fed. 549.

But actions against the vessel for injuries to the bridge, due to a collision between the two, are not within the admiralty jurisdiction. Charleston Bridge Co. v. The John C. Sweeney, 55 Fed. 540; Milwaukee v. The Curtis, 3 L.R.A. 711, 37 Fed. 705; Chicago v. The Queen City, 17 Ill. App. 203; The Neil Cochran, Brown, Adm. 162, Fed. Cas. No. 10,087; The Savannah, Fed. Cas. No. 12,384; Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125; The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416.

An analogous case involving the same principle is Phoenix Constr. Co. v. The Poughkeepsie, 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687, where the Federal Supreme Court, on the authority of the two cases last above cited, affirmed the decree below, dismissing for want of jurisdiction a libel *in rem* against a vessel for injuries inflicted by such vessel upon certain borings made in the Hudson river for the purpose of locating a tunnel aqueduct under the river bed.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed, on rehearing, a judgment of the Superior Court for Chehalis County, in that state, enforcing a lien for a nonmaritime tort against a foreign vessel engaged in interstate commerce. Affirmed.

See same case below, 47 Wash. 417, 92 Pac. 334; on rehearing 51 Wash. 85, 21 L.R.A. (N.S.) 324, 97 Pac. 1102.

The facts are stated in the opinion.

Mr. John Trumbull argued the cause, and, with Messrs. Aldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for plaintiffs in error:

If the wrong or negligence originates on the land, but the substance and consummation of the injury and damage—in other words, the cause of action—takes place upon the high seas or navigable waters, the admiralty must have exclusive jurisdiction.

Hermann v. Port Blakely Mill Co. 69 Fed. 646; The City of Lincoln, 25 Fed. 835.

Whilst the supreme court of Washington has held the statute of that state applicable to sustain the attachment of the vessel thereunder for the tort alleged, it by no means follows that such construction by that court can be accepted as binding in this court.

The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; Guffey v. Alaska & P. S. S. Co. 64 C. C. A. 571, 130 Fed. 278.

In all cases where it is necessary to determine whether or not the rights secured by the Constitution or some law of the United States have been violated by a state statute or a municipal ordinance, the Supreme Court of the United States will place its own independent construction upon such state law.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Yick Wo v. Hawkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522.

The principle of maritime law—that the vessel, in whosoever hands she lawfully is, is herself considered the wrongdoer, and liable for the tort, and subject to a maritime lien for damages (Ralli v. Troop, 157

U. S. 386-403, 39 L. ed. 742-750, 15 Sup. Ct. Rep. 657; Homer Ramsdell Transp. Co. v. La Compagnie Générale Trans-atlantique, 182 U. S. 406-414, 45 L. ed. 1155-1160, 21 Sup. Ct. Rep. 831)—was apparently clearly in the mind of the legislature when this act was passed.

It is common knowledge that the maritime law does not give liens against domestic vessels for supplies, material, repairs, service, etc., furnished them in the home ports.

Norton v. Switzer, 93 U. S. 355, 23 L. ed. 903; The Edith (Poole v. Tyler) 94 U. S. 518, 24 L. ed. 167; Peyroux v. Howard, 7 Pet. 324, 8 L. ed. 700; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Lottawanna (Wilson v. Bell) 20 Wall. 201, 22 L. ed. 259.

In the absence of a statute no maritime lien exists in favor of a master for service (Norton v. Switzer, 93 U. S. 355, 23 L. ed. 903) not even for maritime wages (The Orleans v. Phœbus, 11 Pet. 175, 9 L. ed. 677).

The statute only contemplates a lien where there has been any contract or service.

Waddell v. The Daisy, 2 Wash. Terr. 84, 3 Pac. 616; Washington Iron Works v. Jensen, 3 Wash. 587, 28 Pac. 1019; The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; The Laurel, 113 Fed. 373; Guffey v. Alaska & P. S. S. Co. 64 C. C. A. 517, 130 Fed. 271; The Lyndhurst, 48 Fed. 839; The Kate, 164 U. S. 458-470, 41 L. ed. 512-518, 17 Sup. Ct. Rep. 135; Cuddy v. Clement, 51 C. C. A. 288, 113 Fed. 454; The Iris, 40 C. C. A. 301, 100 Fed. 104; The Electron, 21 C. C. A. 12, 45 U. S. App. 16, 74 Fed. 689.

That a state may enact lien laws as to ships owned within it has long been settled. Not a line, however, of any decision to that effect, can be fairly construed as authorizing also liens on ships owned without the state. Indeed, it is questionable whether such liens were intended to be supported, even within the state, beyond the home port, but, be this as it may, they are supported on local ships only. Examine any decision in which one of these liens was directly involved, and it will be found to go no further; nay, by plain intendment, to forbid more.

The General Smith, 4 Wheat. 438, 4 L. ed. 609; Peyroux v. Howard, 7 Pet. 324, 8 L. ed. 700; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; The Roanoke, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491; Benedict, Admiralty, 4th ed. § 198; Hughes, Admiralty, p. 109.

The Washington statute, as interpreted by the state supreme court, offends against the commerce clause of the Constitution of the United States.

The *Chusan*, 2 Story, 255, Fed. Cas. No. 2,717; *The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491; *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Mr. W. C. Keegin submitted the cause for defendant in error:

The case is one that was within the jurisdiction of the state court, and the admiralty court of the United States did not have jurisdiction thereover.

The *Savannah*, Fed. Cas. No. 12,384; *Milwaukee v. The Curtis*, 3 L.R.A. 711, 37 Fed. 705; *The John C. Sweeney*, 55 Fed. 540; *The Poughkeepsie*, 162 Fed. 494, affirmed in 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687; *The Plymouth (Hough v. Western Transp. Co.)* 3 Wall. 20, 18 L. ed. 125; *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; *The Troy*, 208 U. S. 322, 52 L. ed. 513, 28 Sup. Ct. Rep. 416.

The validity of this statute has been recognized by the United States in the district court for the state of Washington, as well as by the circuit court of appeals for that circuit, subsequent to the decision of this court in the case of *The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491. (See *The Energia*, 124 Fed. 842, and *Guffey v. Alaska & P. S. S. Co.* 64 C. C. A. 517, 130 Fed. 278.)

And the construction put upon the statute by the state supreme court as to its scope and effect is conclusive here (*Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Gatewood v. North Carolina*, 203 U. S. 531, 541, 51 L. ed. 305, 309, 27 Sup. Ct. Rep. 167).

That the provisions of state statutes like those here in question are valid and effective when they do not intrench upon the dominion of admiralty is well settled.

Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; *Knapp, S. & Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; *The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.)* 205 U. S. 355, 51 L. ed. 837, 27 Sup. Ct. Rep. 509; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 56 L. ed.

823, 30 Sup. Ct. Rep. 463, 18 A. & E. Ann. Cas. 907; *Berwin-White Coal Min. Co. v. Metropolitan S. S. Co.* 166 Fed. 782, affirmed in 97 C. C. A. 477, 173 Fed. 471; *Olsen v. Birch*, 133 Cal. 479, 85 Am. St. Rep. 215, 65 Pac. 1032; *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; *Scatcherd Lumber Co. v. Rike*, 113 Ala. 559, 59 Am. St. Rep. 147, 21 So. 136; *Globe Iron Works v. The John B. Ketcham*, 2d, 100 Mich. 583, 43 Am. St. Rep. 464, 59 N. W. 247; *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000, 93 N. W. 455.

Mr. Justice Van Devanter delivered the opinion of the court:

This case arose out of the collision, on May 7, 1906, of the steamer *Norwood*, owned and enrolled at San Francisco, with a supporting pier of a toll drawbridge between Aberdeen and South Aberdeen, in Chehalis county, Washington, over the Chehalis river, a navigable stream flowing into an arm of the Pacific ocean. The pier stood upon the bed of the river, in navigable water, and the bridge was maintained and used as a connection between highways on either side of the stream, and not as an aid to navigation. The vessel was engaged in interstate commerce, was proceeding under her own motive power, and so struck the pier as to do serious injury to it, and to cause one span of the bridge to collapse and fall into the river within a few hours thereafter. The cause of the collision was the negligent management of the vessel by her master and owners.

In a suit brought in the superior court of Chehalis county, by the owner of the bridge, against the master and owners of the vessel, the former asserted and sought to enforce, under a statute of the state (*Ballinger's Anno. Codes & Statutes*, §§ 59-53, 5954), a lien against the vessel for his damages so sustained; caused the vessel to be seized and detained by a temporary receiver, until released by the substitution of a bond by the master and owners in place of the vessel; and recovered a judgment, assessing his damages at \$13,751.89, and establishing the lien so asserted. The judgment was affirmed by the supreme court of the state (51 Wash. 85, 21 L.R.A. (N.S.) 324, 97 Pac. 1102), and its decision is now called in question upon various grounds, which, in view of our prior decisions, require but brief notice.

*The pertinent portions of the state[196 statute are as follows:

"Sec. 5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,—

"6. For injuries committed by them to

persons or property within this state, or while transporting such persons or property to or from this state.

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.

"Sec. 5954. Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory."

1. It is objected that the statute does not include injuries to a fixed structure like a bridge, but only to persons or property while being transported, or, at most, to movable property susceptible of being transported; and does not include a foreign vessel, such as the *Norwood*, but only domestic vessels. But of this it is enough to say, the supreme court of the state has construed the statute otherwise, and the case is on in which we accept that construction. *The Winnebago* (*Iroquois Transp. Co. v. De Laney Forge & Iron Co.*) 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167.

2. It next is insisted that the injury on account of which the lien was asserted was a maritime tort, and therefore the cause of action was within the exclusive admiralty jurisdiction of the courts of the United States; the argument being that, as the collapsing span of the bridge fell into the river, it was there that the substance and consummation of the wrong took place.

197] *It may be that the damage ensuing from the collision was aggravated by the fact that the span fell into the stream and was subjected to the force of the current, and submerged in the water; but, if that be so, it furnishes no criterion for determining whether the tort was maritime or non-maritime, because that question must be resolved according to the locality and character of the injured thing—the bridge, with its spans and supporting piers—at the time of the collision. It was then that the causal influence of the negligent management of the vessel took effect injuriously and gave rise to a cause of action; and what followed is important only as bearing upon the extent of the injury and resulting liability. This is well illustrated in *Johnson v. Chi-*

cago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254. There, the jib boom of a schooner, in the Chicago river, was negligently driven through the wall of a warehouse on adjacent land, whereby a large quantity of shelled corn, stored in the warehouse, ran out into the river and was lost. It was held that the substance and consummation of the wrong took place on land, and that the tort was nonmaritime, although the damage inflicted consisted chiefly of the loss of the corn. Other applications of the same principle are shown in *The Strabo*, 90 Fed. 110, and *The Haxby*, 95 Fed. 170.

As the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was nonmaritime (*The Plymouth* [*Haugh v. Western Transp. Co.*] 3 Wall. 20, 18 L. ed. 125; *The Blackheath* [*United States v. Evans*] 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; *The Troy*, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416); and consequently it was admissible to pursue in the state court the remedy provided by the state statute, even though that law gave a lien on the vessel (*Johnson v. Chicago & P. Elevator Co.* supra; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; *The Winnebago*, supra).

3. Lastly, it is contended that the statute, as interpreted *by the supreme[198] court of the state, offends against the commerce clause of the Constitution of the United States, in that the creation and enforcement of such a lien against a foreign vessel engaged in interstate commerce is an unwarranted interference with such commerce.

We do not perceive in the statute, as interpreted and applied in the present case, any basis for this contention. As interpreted, the statute embraces all vessels, whether domestic or foreign, and whether engaged in intrastate or interstate commerce, and therefore it cannot be said that its purpose is to regulate the latter. Its enforcement may occasionally and temporarily interrupt or prevent the use of a vessel in such commerce, as in this instance; but such an interference is incidental only, is almost inseparable from the compulsory enforcement of liabilities of the class in question, is not in conflict with any regulation of Congress, and does not in itself offend against the commerce clause of the Constitution. *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 400, 30 L.

ed. 447, 451, 7 Sup. Ct. Rep. 254; The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 354, 362, 51 L. ed. 836, 840, 27 Sup. Ct. Rep. 509; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 179, 54 L. ed. 708, 720, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 A. & E. Ann. Cas. 907.

We think the questions presented were rightly decided by the Supreme Court of the state, and its judgment is affirmed.

Affirmed.

199]*UNITED STATES OF AMERICA et al., Plffs. in Err.,

v.

CONGRESS CONSTRUCTION COMPANY et al.

(See S. C. Reporter's ed. 199-204.)

Error to circuit court — jurisdiction below.

1. The objection that an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948), amending the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), for his failure to pay certain designated subcontractors for labor and materials used in construction, should, under such statutes, when rightly construed, have been brought in the Federal circuit court for the district wherein the contract was to be performed, instead of in the court for the district where the defendants reside, raises a question of the jurisdiction of the circuit court which will sustain a direct writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

Federal courts — proper district for suit — action on bond of public contractor.

2. The restriction as to the place of suit when persons holding unpaid demands for labor or materials bring an action in the name of the United States, on the bond of a public contractor, given conformably to the act of February 24, 1905, amending the act of August 13, 1894, to the Federal circuit court for the district in which said contract is to be performed, "and not elsewhere," governs as well where the action is brought by the United States against the principal and sureties on the bond, for the

failure to pay certain designated subcontractors for labor and materials used in the construction of the work.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Federal courts — proper district for suit — action on bond of public contractor — absent defendants.

3. The limitation to the Federal circuit court of the district wherein a contract for a public work is to be performed of an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to the act of February 24, 1905, amending the act of August 13, 1894, for his failure to pay certain designated subcontractors for labor and materials used in construction, operates *pro tanto* to displace the provisions upon that subject in the general jurisdictional act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, and amply authorizes the circuit court for the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them of its process in whatever district they may be found.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

[No. 63.]

Argued and submitted November 14 and 15, 1911. Decided December 4, 1911.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment dismissing, because brought in the wrong district, an action brought by the United States against the principal and sureties on the bond of a contractor for a public work, for his failure to pay certain designated subcontractors for labor and materials used in construction. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **Harr** argued the cause and filed a brief for the United States.

Mr. **Jesse R. Long** submitted the cause for plaintiffs in error other than the United States.

Mr. **Allen G. Mills** submitted the cause for S. N. Crowen, one of the defendants in error.

*Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action by the United States against the principal and sureties on a bond, given conformably to the act of August 13, 1894, chap. 280, 28 Stat. at L. 278, U. S. Comp. Stat. 1901, p. 2523, as amended February 24, 1905, chap. 778, 33 Stat. at L. 811, U. S. Comp. Stat. Supp.

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741; and *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333.

As to proper Federal district for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

56 L. ed.

1909, p. 948, for the performance of a contract for the construction of a public building, and containing the required additional condition relating to the payment of claims for labor and materials. As stated in the declaration, the right of action arose out of the fact that, although the building had been satisfactorily completed, and full payment therefor had been made to the contractor, the latter had failed to make payment to designated subcontractors who had furnished labor and materials used in the construction of the building. The action was brought in the circuit court of the district whereof the defendants were inhabitants, which, as appeared on the face of the declaration, was not the district in which the contract was to be performed. The subcontractors intervened and asked to have their claims adjudicated and judgment rendered thereon. The principal in the bond did not appear, but the sureties appeared specially, and interposed pleas to the jurisdiction, upon the ground that, under the statute, conformably to which the bond was given, power to entertain the action was vested exclusively in the circuit court of the district wherein the contract was to be performed. The pleas were sustained and the action dismissed for want of jurisdiction, whereupon this direct writ of error was sued out and the jurisdictional question duly certified.

Before coming to that question it is necessary to consider a motion to dismiss, wherein the position is taken that the jurisdiction of the circuit court was not in issue in the sense of the 5th section of the act of March 3, 1891, chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 549. The position evidently rests upon a misconception *of the true import of the clause, "In any case in which the jurisdiction of the court is in issue," in that section, as interpreted by repeated decisions of this court, which, with one accord, hold that the jurisdiction of a circuit or district court is in issue in the sense intended whenever the power of the court to hear and determine the cause, as defined or limited by the Constitution or statutes of the United States, is in controversy. The cases of *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; and *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185, cited in support of the motion, do not conflict, but fully accord, with this holding. In the first case, as this court was careful to state, the power of the circuit court under the Federal law was not in controversy, but only its authority, in the exercise of

that power, to proceed in harmony with recognized rules of law applicable alike to all courts, whether Federal or state, possessing concurrent jurisdiction. In the second case, neither the interpretation nor the operation of any statute defining or limiting the power of the district court was in issue, but only the place of seizure of jewels sought to be forfeited as fraudulently imported, which was a subsidiary matter, not amounting to a jurisdictional question in the sense of the statute. In the third case, the issue related, as was expressly said, to the applicability of a rule of law which was general in its nature, and quite as controlling in other courts as in those of Federal creation. And so it was that in those cases the jurisdiction of the courts below was held not to have been in issue in the sense intended. On the other hand, in *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324, a case closely in point here, the application of the same guiding principle operated to sustain our jurisdiction. There, as here, the objection to the jurisdiction of the circuit court was that the action was brought in one district, when, under the Federal statutes, rightly interpreted, it should have been brought *in another. The [202 objection was overruled, the case came here upon a direct writ of error, and the ruling was reviewed and reversed; it being said in the opinion: "A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and, the decision being against his objection, may of right bring the question directly to this court."

Here the jurisdiction of the circuit court, in the sense of its power to entertain the action, in view of the statutory provisions bearing upon the place for bringing such an action, was directly in issue, and so the case is rightly here upon a direct writ of error. The motion to dismiss is accordingly denied.

Whether or not, under the act of 1894, as amended in 1905, power to entertain the action was vested exclusively in the circuit court of the district wherein the contract was to be performed, is the question which was presented to the court below and answered in the affirmative; and the correctness of that answer turns upon the nature of the action and the provisions of the statute.

According to the declaration, the contract for the construction of the building had been satisfactorily performed, full payment therefor had been made to the contractor, the conditions of the bond had been breached only by his failure to pay designated

subcontractors for labor and materials used in the construction of the building, and the object sought to be attained was the adjudication and enforcement of those demands, unaccompanied by any pecuniary demand of the United States. Manifestly, therefore, the action, although brought by the United States, was essentially one in behalf of the subcontractors, and the respective interests of the United States and the subcontractors therein were in no wise different from what they would have been had the action been brought in the 203]*name of the United States by the subcontractors, for the use and benefit of the latter.

The statute, whilst authorizing persons holding unpaid demands for labor or materials to bring such an action in the name of the United States, expressly requires that it be brought "in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere," and also provides that only one such action shall be brought, and that it shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery.

Considering the purpose of the statute, as manifested in these provisions, we think the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States, for the purpose only of securing an adjudication and enforcement of demands for labor or materials, whether instituted by the United States or by the creditors themselves. The reasons for the restriction are as applicable in the one instance as in the other, and it is difficult to believe that it was intended that it should be less potent when the United States acts for the creditors than when they act for themselves. The contention to the contrary is rested largely upon the supposition that, in instances like the present, where the defendants, or some of them, are inhabitants of another district, there is an insuperable barrier to the maintenance of the action in the district wherein the contract was to be performed. But this supposition is a mistaken one, for the provision restricting the place of suit operates *pro tanto* to displace the provision upon that subject in the general jurisdictional act (25 Stat. at L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508), and amply authorizes the circuit court in the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants 204]through *the service upon them of its 56 L. ed.

process in whatever district they may be found.

We conclude that the question of jurisdiction was rightly resolved by the Circuit Court, and its judgment is affirmed.

Affirmed.

UNITED STATES OF AMERICA, EX
RELATIONE LUCY ANN TURNER,
Dixey Criswell, and Maude Turner, Willie
Turner, Anna Turner, and Florence Turner,
Minors, Suing by Their Mother and
Next Friend, Lucy Ann Turner, Plffs. in
Err.,

v.

WALTER L. FISHER,†Secretary of the Interior.

(See S. C. Reporter's ed. 204-209.)

Constitutional law — due process of law — notice and hearing.

1. Those whose names were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior acquired rights of which they could not be deprived without the notice and opportunity to be heard essential to due process of law.

[For other cases, see Constitutional Law, 764-773, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing.

2. Notice to the attorney for those whose names were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior, given a few hours before the hearing of a motion to strike their names from the roll on the ground that their enrolment had been secured by perjury, was not such notice as afforded due process of law.

[For other cases, see Constitutional Law, 764-773, in Digest Sup. Ct. 1908.]

Mandamus — to control executive action.

3. Mandamus will lie, in the absence of other controlling facts, to compel the Sec-

†Resignation of Richard A. Ballinger as Secretary of the Interior suggested October 30, 1911, and Walter L. Fisher, his successor in office, substituted as the party defendant in error herein.

NOTE.—On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluney v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

retary of the Interior to restore to the freedmen rolls of the Creek Nation the names of those who have been arbitrarily stricken from such rolls without the notice and opportunity to be heard essential to due process of law.

[For other cases, see *Mandamus*, II. d, in *Digest Sup. Ct.* 1908.]

Mandamus — not a writ of right.

4. *Mandamus* is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

Mandamus — to control executive action — defense.

5. Proof that the enrolment of certain persons as Creek freedmen was procured by fraud defeats the right to compel the Secretary of the Interior by *mandamus* to restore their names to the rolls, even though such names have been arbitrarily stricken therefrom without the notice and opportunity for hearing essential to due process of law.

[For other cases, see *Mandamus*, III. f, in *Digest Sup. Ct.* 1908.]

Mandamus — standing on demurrer.

6. *Mandamus* to compel the Secretary of the Interior to restore to the freedmen rolls of the Creek Nation the names of those who had been arbitrarily stricken therefrom without due process of law was properly refused where a general demurrer to the answer, setting up that the original enrolment was procured by fraud, was overruled, and the relators, instead of replying, elected to stand on their demurrer.

[Procedure in *mandamus*, see *Mandamus*, III., in *Digest Sup. Ct.* 1908.]

[No. 60.]

Argued November 14, 1911. Decided December 4, 1911.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which, on a second appeal, affirmed a judgment of the Supreme Court of the District, refusing *mandamus* to require the Secretary of the Interior to restore the names of relators to the freedmen rolls of the Creek Nation, from which they had been stricken. Affirmed.

See same case below, 33 App. D. C. 195; on prior appeal, 31 App. D. C. 332.

Statement by Mr. Justice Lamar:

In error from a judgment of the court of appeals of the District of Columbia, affirming an order of the lower court, refusing to issue a writ of *mandamus* requiring the Secretary of the Interior to restore the names of relators to the freedmen rolls of the Creek Nation, from which they had been stricken. 31 App. D. C. 332, 33 App. D. C. 195.

Mr. Charles H. Merillat argued the cause, and, with Messrs. Charles J. Kappler, James K. Jones, and W. D. Halfhill, filed a brief for plaintiffs in error:

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law.

Garfield v. United States, 211 U. S. 255, 53 L. ed. 172, 29 Sup. Ct. Rep. 62.

Even receivers' certificates cannot be canceled without a hearing.

Cornelius v. Kessell, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122.

When Congress declared that the rolls, when approved by the Secretary of the Interior, shall be final rolls of citizenship, upon which distribution of lands and moneys should be made, it meant that, with the approval of the Secretary of the Interior, the matter was final, not interlocutory or tentative or preliminary, and that thereafter his jurisdiction had ceased and determined.

Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486.

It did not, of course, mean that the courts of equity, exercising their usual powers as courts of equity, could not be resorted to in any exceptional and extraordinary cases.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716; *Germania Iron Co. v. United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

Due process of law, in addition to notice and a hearing, also means a hearing before a tribunal authorized by law to conduct the proceedings it undertakes; arbitrary assumption of a power by a tribunal, and proceedings by it without jurisdiction, are not due process of law; and where the tribunal has jurisdiction, its action is not due process of law if it refuses the accused a right to put in his defense.

Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80; *Windsor v. McVeigh*, 93 U. S. 277, 23 L. ed. 915; *Dent v. West Virginia*, 129 U. S. 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231.

If the proceedings taken by the Secretary of the Interior were proceedings taken after his authority and jurisdiction in the premises had been exhausted, then those proceedings are a nullity,—of course, except as they might be taken for his information, as a basis for some independent and legal proceedings warranted by due course of law.

Noble v. Union River Logging R. Co. 147 U. S. 170, 37 L. ed. 125, 13 Sup. Ct. Rep. 271.

If they were taken without a hearing, they amount to nothing, and the pleading of the same cannot in law be a good defense,

and the demurrer does not admit them to be a good defense, but concedes merely that if it be true that these illegal findings were made and those unwarranted and hence unlawful sworn statements given by so-called witnesses, they do not in law constitute a good defense to the facts stated in the petition of plaintiffs in error. The recitation of the so-called evidence and the findings thereon is not a pleading of facts, as in *United States ex rel. Redfield v. Windom*, 137 U. S. 637, 34 L. ed. 812, 11 Sup. Ct. Rep. 197, but a recitation of some irrelevant and illegal proceedings and evidence.

The plaintiffs in error, who, as given vested rights by regular proceedings, must be made defendants before these rights could be forfeited, would be compelled to be plaintiffs, and to assume the burden of proof as such before they could have any lawful standing. They would have to prove, by a preponderance of evidence, that their right, already vested, was a lawful, and not a fraudulent right, whereas enrolled parties have a right in equity to insist that their enrolment shall be set aside only upon the most clear and convincing proof of fraud or gross mistake, and by an appropriate judicial proceeding.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575.

It is respectfully submitted that this would not be law in the due and regular course of its administration, and that it is as true in this case as in the criminal case of *Clyatt v. United States*, 197 U. S. 223, 49 L. ed. 732, 25 Sup. Ct. Rep. 429; that only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.

As to the pleadings, the rule is that it is not sufficient to charge fraud generally, but that the facts showing the fraud must be distinctly set forth, and not evidence tending to show there was fraud, and the charges then must be proved by clear and satisfactory evidence.

Lalone v. United States, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74.

There is in the instant case every reason to apply the doctrine set forth in 13 Enc. Pl. & Pr. 723, that, according to the weight of authority, denials in the return or answer must be positive, and not on information and belief, and the further rule (same page) that, in the return to a mandamus, facts are to be stated, and not evidence, and the further rule that the return or answer must

have a high degree of certainty, and is to be construed most strongly against the respondent.

13 Enc. Pl. & Pr. 716; *Harwood v. Marshall*, 10 Md. 464.

The return must be good, tested by the ordinary rules of pleading, both in form and substance. It must either deny the facts stated in the writ, on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the relator's claim; and these facts should be stated positively and distinctly; and if, instead of stating facts, the return merely sets out or refers to matters of evidence from which these facts are inferred, it is objectionable.

People v. Baker, 35 Barb. 105; *Com. ex rel. Middleton v. Allegheny County*, 37 Pa. 237; *Moses, Mandamus*, p. 210.

Where the return fails to answer the important facts alleged in the petition, every intendment and presumption will be made against it.

People ex rel. Brewster v. Kilduff, 15 Ill. 502, 60 Am. Dec. 769.

The plaintiffs in error have no remedy by mandamus. If the enrolment were fraudulent, defendant has a remedy,—that of a suit to cancel the enrolment; for just as a patent to land can be canceled for fraud, so an enrolment can be similarly canceled.

Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

The writ in the *United States* is a writ of right; and where a party is entitled to a right, though it be in the discretion of the court, still, being a right, it cannot be said to be discretionary on the part of the court.

Merrill, Mandamus, §§ 62–64.

The Secretary of the Interior had jurisdiction expressly conferred on him to consider applications for enrolment and to approve enrolments. This conferred jurisdiction and power; exercise of the right was a power he had; the correctness or otherwise of its exercise is but a matter of wisdom, and not of power.

Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 581, 60 Fed. 316.

That there are errors in the exercise of jurisdiction does not mean an absence of lawful power to do the act authorized.

McNitt v. Turner, 16 Wall. 364, 21 L. ed. 347.

Assistant Attorney General **Harr** argued the cause and filed a brief for defendant in error:

By their demurrer, upon which they have elected finally to stand, relators admit the allegation of fraud, as well as that they are not members of the Creek Nation.

Re Sanford Fork & Tool Co. 160 U. S.

247, 257, 40 L. ed. 414, 417, 16 Sup. Ct. Rep. 291.

Counsel contended that by their demurrer they merely admit that the respondent believed that relators had procured their enrolment by fraud. Manifestly such a construction of the answer is unwarranted. The allegation is direct and specific that the enrolment of relators was procured by fraud. The fact that such allegation was made upon information and belief does not alter the character of the charge, but merely shows the basis therefor. Respondent could not make the averment upon his own knowledge, because he was referring to the acts of his predecessor.

United States ex rel. Redfield v. Windom, 137 U. S. 636, 640, 646, 34 L. ed. 811, 813, 815, 11 Sup. Ct. Rep. 197.

A court of law, following the rule in equity, will not lend its aid by the extraordinary writ of mandamus to enforce rights fraudulently acquired.

High, Extr. Legal Rem. § 26; Merrill, Mandamus, §§ 68, 71, 72; 2 Spelling, Inj. & Extr. Rem. §§ 1371, 1380; People ex rel. Wood v. Board of Assessors, 137 N. Y. 204, 33 N. E. 145; People ex rel. Durant Land & Improv. Co. v. Jeroloman, 139 N. Y. 17, 34 N. E. 726; Com. ex rel. Vandyke v. Henry, 49 Pa. 538; State ex rel. McBride v. Phillips County, 26 Kan. 419; State ex rel. McCellan v. Graves, 19 Md. 351, 81 Am. Dec. 639; Macoupin County v. People, 58 Ill. 191; People v. Ketchum, 72 Ill. 212; Ansonia v. Studley, 67 Conn. 170, 34 Atl. 1030; People ex rel. Mabley v. Superior Ct. Judge, 41 Mich. 31, 1 N. W. 985; State ex rel. Clarke v. Earle, 42 N. J. L. 94; State ex rel. Gillilan v. Home Street R. Co. 43 Neb. 830, 62 N. W. 225.

Memorandum opinion by direction of the court. By Mr. Justice Lamar:

1. Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

2. Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrolment had been secured by perjury, was not such notice as afforded due process. *Roller v. Holly, 176 U. S. 399, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4

Sup. Ct. Rep. 663; Iowa C. R. Co. v. Iowa, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 344; Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841.

3. In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. Garfield v. United States, supra.

4. But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

5. Although the petition for the writ alleged that relators were freedmen, duly enrolled, and denied the truth of the testimony on which their names were stricken off, yet, where the answer of the Secretary referred to that testimony, and alleged, "on information and belief, that the relators were not freedmen members or members by blood or marriage of the Creek Nation, and that their enrolment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. United States ex rel. Redfield v. Windom, 137 U. S. 636, 646, 34 L. ed. 811, 815, 11 Sup. Ct. Rep. 197; Re Sanford Fork & Tool Co. 160 U. S. 257, 40 L. ed. 417, 16 Sup. Ct. Rep. 291.

6. Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. Re Sanford Fork & Tool Co. supra.

7. To have issued the writ would have involved the useless thing of requiring relators' names to be re-entered, and in other proceedings having their names stricken because the original enrolment had been procured by fraud, thus admitted by the demurrer.

Affirmed.

*BANKER BROTHERS COMPANY,[210
Plff. in Err.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 210-214.)

Commerce — state license tax — retail vendors — goods made outside state.

A state does not tax interstate transactions by imposing a tax upon a domestic

NOTE.—On license or occupation tax upon hawkers and peddlers, and persons engaged in soliciting orders by sample or otherwise,

corporation selling within a designated territory in the state automobiles built by a foreign corporation under an arrangement by which the latter agreed to build for and sell to the former, for cash, at a specified less than list price, deliveries to be made as soon as practicable after orders should be received, the domestic corporation customarily making payment through drafts attached to the bills of lading, and there being nothing connecting the ultimate buyer with the manufacturer other than a warranty direct from manufacturer to buyer, and such buyer's agreement "to pay the list price f. o. b. factory," since such sales are not interstate ones, the relation of principal and agent between the foreign and domestic corporations not existing so far as the buyer is concerned.

[For other cases, see *Commerce*, 384-401, 438-462, in *Digest Sup. Ct.* 1908.]

[No. 72.]

Argued November 17, 1911. Decided December 4, 1911.

IN ERROR to the Superior Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Allegheny County, in that state, imposing a retail vendor's tax upon a domestic corporation selling automobiles built by a foreign corporation, leave to appeal to the Supreme Court of the state having been refused. Affirmed.

See same case below, 38 Pa. Super. Ct. 101.

The facts are stated in the opinion.

Messrs. **Edward J. Kent** and **Henry A. Miller** argued the cause and filed a brief for plaintiff in error:

The plaintiff in error is clearly engaged in interstate commerce, and is therefore not liable to taxation.

Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

Property from another state only becomes

liable to taxation when it has reached its destination, and becomes mingled with the other property of the state, and enjoys the protection of its laws.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

Mr. George H. Calvert argued the cause, and, with Messrs. **James M. Magee**, **Donald Thompson**, **Murdoch Kendrick**, and **Mr. John C. Bell**, Attorney General of Pennsylvania, filed a brief for defendant in error:

The fact that, upon receipt of an order from its customer, Banker Brothers Company orders the automobile from the manufacturer, outside the state, in no way affects the question.

Kehrer v. Stewart, 197 U. S. 65, 49 L. ed. 666, 25 Sup. Ct. Rep. 403.

Merchandise, even though an article of interstate commerce, is subject to state taxation, provided the act imposing such tax does not attempt to regulate interstate commerce, or discriminate against it.

Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 684; *American Steel & Wire Co. v. Speed*, 192 U. S. 520, 48 L. ed. 546, 24 Sup. Ct. Rep. 365; *American Exp. Co. v. Iowa*, 196 U. S. 146, 49 L. ed. 423, 25 Sup. Ct. Rep. 182; *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 119, 52 L. ed. 417, 28 Sup. Ct. Rep. 247; *Phillips v. Mobile*, 208 U. S. 479, 52 L. ed. 581, 28 Sup. Ct. Rep. 370; *Emert v. Missouri*, 156 U. S. 320, 39 L. ed. 437, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

Upon receipt of the automobile by Banker Brothers Company, it had reached its destination, and was at rest in the state, within the meaning of this rule.

General Oil Co. v. Crain, 209 U. S. 228, 52 L. ed. 764, 28 Sup. Ct. Rep. 475; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 578, 39 L. ed. 540, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Diamond Match Co. v. Ontonagon*, 188 U. S. 96, 47 L. ed. 399, 23 Sup. Ct. Rep. 266; *American Steel & Wire Co. v. Speed*, 192 U. S. 521, 48 L. ed. 546, 24 Sup. Ct. Rep. 365.

The act levying the tax does not attempt to regulate interstate commerce, and does not discriminate against it.

Robbins v. Taxing Dist. 120 U. S. 501, 30 L. ed. 698, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The right of the state to tax trades, pro-

as a violation of the commerce clause—see notes to *State v. Bayer*, 19 L.R.A.(N.S.) 297, and *Dozier v. State*, 28 L.R.A.(N.S.) 265.

56 L. ed.

On peddlers and drummers as related to interstate commerce—see notes to *Re Spain*, 14 L.R.A. 97, and *Stockard v. Morgan*, 46 L. ed. U. S. 785.

fessions, and occupations cannot be questioned by the Federal government.

Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Brennan v. Titusville*, 153 U. S. 289, 306, 38 L. ed. 719, 724, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Hopkins v. United States*, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; *Stockard v. Morgan*, 185 U. S. 35, 46 L. ed. 793, 22 Sup. Ct. Rep. 576.

Mr. Justice **Lamar** delivered the opinion of the court:

The Banker Brothers Company, a corporation doing business in Pittsburg, was charged, as retail vendors, with a tax of 1 per cent on \$351,000 on sales of automobiles to persons in Pennsylvania, under a statute of that state. It denied liability on the ground that the sales were interstate transactions. A decision of that point involves the question as to whether Banker Brothers Company acted as principal or as agent of a New York manufacturer.

It appears that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo, and in 1905 made a contract by which it agreed "to build for and sell automobiles to Banker Brothers Company at 20 per cent less than list prices. Deliveries to be f. o. b. Buffalo as soon as practicable after order for deliveries are received. Payments to be made in cash."

The Banker Brothers Company kept no machines in stock except those used for demonstration, and were allowed to sell only within a restricted territory on terms stipulated by the manufacturer. The purchaser of the machine was to pay at least 10 per cent when he signed a printed form addressed to Banker Brothers Company, requesting it "to enter my order for—motor car, for which I agree to pay the list price, f. o. b. factory, as follows: \$——upon signing this order, and the balance upon delivery of the car to me."

The name of the Pierce Company did not appear anywhere on this printed form furnished by it, but when the Banker Brothers Company accepted the order, it remitted the cash to the Pierce Company. If the latter 213] accepted the order, it agreed thereupon to make the automobile and ship it, drawing on Banker Brothers Company for the balance of the list price, less 20 per cent, with bill of lading attached. The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which, though shipped in interstate commerce, had become at rest in the state of Pennsyl-

vania. Banker Brothers Company had the title, and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier v. Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649. The written contract was silent on the subject, but it was stipulated that the Pierce Company warranted the machine direct to the purchaser.

It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.

This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.

The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the *contract. The fact that he was liable 214 for the freight by virtue of the agreement to "pay the list price f. o. b. factory" did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.

These were mere incidents of the interstate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *American Exp. Co.*

v. Iowa, 196 U. S. 146, 49 L. ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania.

Affirmed.

215]*UNION PACIFIC RAILROAD COMPANY, Plff. in Err.,

v.

UPDIKE GRAIN COMPANY and Crowell Lumber & Grain Company.

(See S. C. Reporter's ed. 215-221.)

Carriers — allowance to shippers — discrimination.

1. A carrier cannot refuse the allowance for elevator service on through grain in carloads at terminal points to elevator owners who, through ownership of the grain, derive an incidental advantage by using the opportunity afforded during the process of elevation to weigh, store, inspect, clean, mix, or otherwise treat the grain, in view of the provisions of the act of June 29, 1906 (34 Stat. at L. 584, 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Carriers — discrimination — elevator charges.

2. A carrier cannot enforce a rule making its allowance for elevator service on through grain in carloads at terminal points conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, so as to defeat the right to compensation for elevator service rendered at elevators located on the lines of other railroads, where the return of the cars to the carrier was made impossible by the rules of a railway association of which the carrier was a member, and over which the elevator owners had no control, no such impossibility existing if the elevator was one of those located along the carrier's tracks.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Carriers — discrimination — elevator charges.

3. A carrier may make its allowance for elevator service on through grain in carloads at terminal points at elevators located on the lines of other carriers, as well as those located along its own tracks, conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, where such car can

be unloaded and returned in a much shorter time.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[Nos. 353, 354, 355, 356.]

Argued October 18, 1911. Decided December 4, 1911.

FOUR WRITS OF ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment modifying, and affirming as modified, a judgment of the Circuit Court for the District of Nebraska, directing a verdict in favor of plaintiffs in an action by elevator owners to recover from the carrier compensation for elevator service. Affirmed.

See same case below, 101 C. C. A. 583, 178 Fed. 223.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause, and, with Messrs. F. C. Dillard and Henry W. Clark, filed a brief for plaintiff in error.

Mr. Edward P. Smith argued the cause, and, with Mr. Constantine J. Smyth, filed a brief for defendants in error:

The great purpose of the act to regulate commerce was to secure equality of rates and to destroy favoritism.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

The fact that discrimination is accomplished by published tariffs and published rules and regulations does not relieve it of its odium.

Carr v. Northern P. R. Co. 9 Inters. Com. Rep. 1; Koch Secret Service v. Louisville & N. R. Co. 13 Inters. Com. Rep. 523.

Rebates, preferences, and illegal discriminations cannot be granted under the disguise of a rate or regulation.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

The existence of an outstanding contract, even though made prior to the amendment to the interstate commerce law, cannot justify the granting of illegal preferences.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

Mr. Justice Lamar delivered the opinion of the court:

In 1899, the Union Pacific found it desirable to have grain unloaded at its terminals in Council Bluffs in order that cars might be promptly returned for use on its line. In consideration that Peavey would there erect and maintain an elevator, it agreed to pay him 1½ cents per hundred for elevating grain. It subsequently made simi-

NOTE.—As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations—see note to Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 94 C. C. A. 230. 56 L. ed.

lar contracts with what are called "Peavey Companies," which had elevators along its tracks in the cities of Omaha, South Omaha, and Kansas City, terminal points of the Union Pacific. Thereafter it agreed, on certain conditions, to pay for similar service by elevator companies in the same cities, even though the elevators were not located immediately on the railroad tracks. It thereupon filed a tariff circular with the Commission, in which the Union Pacific recited that "to expedite the movement and to secure the prompt release and return of equipment, an allowance will be made" to elevators performing the service on through grain in carloads, transferred by the elevators at the points named:

"No allowance will be made when more than forty-eight hours elapse between the time of delivery to the elevator or connecting line and the release and return of the empty car to the Union Pacific."

217] *That company was and is a member of a railway association, which regulated the switching, loading, and unloading of cars. One of its rules provided that "cars received loaded in switching service must be confined to switching territory, and when emptied must be returned to the owner, if a direct connection within that territory, or to the road from which received, or may be loaded in accordance with rule 2 a, b, c."

Rule 2 a, "loaded *via* any road, so that the home road will participate in the freight rate; (b) loaded to the road from which originally received, if such loading is in the direction of the home road, but not otherwise; (c) loaded to an intermediate road, if in the direction of the home road."

As the Peavey elevators were located alongside the tracks of the Union Pacific, these rules did not affect their right to recover for elevation service. But, as the elevators of the defendants in error were located on the lines of other railroads in Omaha and South Omaha, it frequently happened that cars, after being unloaded at their elevators, were not returned to the Union Pacific, and that others were not returned within forty-eight hours. In those cases the Union Pacific refused to make payment for unloading these cars. The defendants in error filed a complaint with the Commission, asking for reparation. An order to that effect having been granted, they brought a joint suit for reparation.

Most of the allegations in the complaint were denied by the Union Pacific in its answer, which claimed that nothing was due, because the plaintiffs had not returned the cars within forty-eight hours stipulated in the tariff on file. It also alleged that the grain had been unloaded through plain-

tiffs' private elevators, which were not operated in the exercise of any public duty, but for the purpose of private gain; that the handling of the grain was for the *pur-[218 pose of having it weighed, stored, inspected, cleaned, mixed, or otherwise treated in the elevator, and that the tariff allowing for elevator charges in their elevator was unlawful.

After hearing evidence showing the amount of grain elevated for which payment had not been made, and considering the tariff and rules of the switching company, the court directed a verdict in favor of each of the plaintiffs for the amount shown to be due them. The judgment as modified was affirmed by the circuit court of appeals (101 C. C. A. 583, 178 Fed. 230), and the railroad brought the case here. There are forty assignments of error, but they need not be separately considered, as the case must be determined by a few controlling principles:

1. The Union Pacific's contention that payment for reparation cannot be made to the owner who stores and mixes the grain must first be considered.

The long-mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission was answered by the act of June 29, 1906 (34 Stat. at L. 584, 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), in which Congress declared that the term "transportation" shall include . . . all . . . facilities of shipment, . . . irrespective of ownership, . . . and all services in connection with the . . . elevation and transfer in transit . . . and handling of property transported." Carriers were required "to provide and furnish such transportation upon reasonable request therefor."

The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. at L. 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1159) provides that "if the owner . . . renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable," *the Commission[219 being authorized to determine what was reasonable.

This act was passed after the decision by the Commission in 1904 (10 Inters. Com. Rep. 309) that the Peavey contract was valid, and after the recommendation in its report for 1905 (p. 11), that it should be given authority to determine whether the allowance paid to the owner was just. The statute must be taken as a legislative recog-

dition of the long-continued practice, and a declaration that the incidental advantage derived by the owner was not undue.

In pursuance of the authority thus expressly conferred, the Interstate Commerce Commission, in April, 1907 (12 Inters. Com. Rep. 86), fixed the allowance for elevating grain at $\frac{3}{4}$ of a cent per hundred pounds, being actual cost, with no allowance whatever for profit. Its final order (14 Inters. Com. Rep. 315), prohibiting any payment to the owner who performed this transportation service, was reversed, as being beyond the jurisdiction of the Commission, because Congress had expressly permitted such payment to be made (Interstate Commerce Commission v. Peavey, 222 U. S. 42, ante, 22, 32 Sup. Ct. Rep. 22). The language of the statute and this decision answer the Union Pacific's contention that it was unlawful to pay these companies for transportation services.

2. The Union Pacific's desire to have cars promptly unloaded so that they might be returned to its own line may have been the principal motive which induced it to agree to pay elevator charges. But the consideration moving between the carrier and the elevator was the service performed by the latter in unloading grain at terminal points. This relieved the carrier of the expense of building similar structures, and avoided the delay of having the grain transferred from one car to another by the slow process of shoveling. When the service was rendered, the carrier received value for which it was bound to pay, whether performed 220] by the owner of the grain or * some other person hired for the same purpose. Having earned the compensation, the elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association of which the Union Pacific was a member, and over which the elevator companies had no control.

3. For elevating grain from like foreign cars the Peavey Companies were paid because their elevators happened to be located on the Union Pacific tracks. But if the rule is valid against the plaintiffs, it would put it in the power of the carrier to say which elevator should be paid, and which not paid, for performing the same transportation service. It could load grain belonging to the plaintiffs into foreign cars, and, in spite of the service rendered by them to the carrier in unloading, no payment would be made, because these foreign cars, under the rule, were not returned to the Union Pacific. It is not necessary that any such improper purpose should be shown to exist. It might have existed, and if so, could not be proved by the injured party. 56 L. ed.

The power to make such a discrimination would prevent the enforcement of any regulation frequently having such operation.

The carrier cannot pay one shipper for transportation service, and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This cannot be directly done, nor indirectly by means of regulation. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another, similarly situated, cannot avail himself.

*4. The trial court was right in hold-[221 ing that the railroad company must make reparation by paying for the elevation of grain in those cars not returned in forty-eight hours, because they belonged to the switching company, or to a road which had a direct connection in the switching territory (2 a), and in those which, when emptied, were routed so that the home road participated in the freight rate (2 b).

But while elevators off the tracks of the Union Pacific cannot be affected by unreasonable rules tending to deprive them of just compensation, neither can they disregard the obligation promptly to unload, so that the cars might be put in service as soon as practicable. This was conceded by the defendants in error, and they accepted the ruling that they were not entitled to recover for elevating grain out of some 200 cars, which could have been unloaded and returned in a much shorter time, but which they detained beyond the forty-eight hours.

Judgments affirmed.

Mr. Justice McKenna and Mr. Justice Hughes concur in the result, in view of the decision in Interstate Commerce Commission v. Peavey, 222 U. S. 42, ante, 83 32 Sup. Ct. Rep. 22.

*CHICAGO JUNCTION RAILWAY[222 COMPANY, Plff. in Err.,

v.

WILLIAM R. KING.

(See S. C. Reporter's ed. 222-225.)

Error to circuit court of appeals — Federal question.

1. A constitutional question first ad-

vanced on the trial of a cause cannot serve as the basis for a writ of error from the Federal Supreme Court to a circuit court of appeals.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — Federal question.

2. An action to recover damages for personal injuries, based upon the Federal safety-appliance act, is one in which the judgment of a circuit court of appeals may be reviewed in the Federal Supreme Court.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — scope of review.

3. The Federal Supreme Court, when reviewing a judgment of a circuit court of appeals, affirming a judgment of a circuit court in an action to recover damages for personal injuries, discharges its whole duty, with reference to the contention that the plaintiff was so clearly guilty of contributory negligence that it was the duty of the court to have directed a verdict for defendant, by giving to the record such examination and consideration as may be necessary in order to determine whether plain error was committed by the court below, and is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw inferences therefrom which may possibly conflict with the conclusions below as to the tendencies of the proof.

[For other cases, see Appeal and Error, 4206-4300, in Digest Sup. Ct. 1908.]

[No. 34.]

Argued and submitted November 2 and 3, 1911. Decided December 11, 1911.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court of the United States for the Northern District of Illinois in favor of plaintiff in an action to recover damages for personal injuries, based upon the Federal safety-appliance act. Affirmed.

See same case below, 94 C. C. A. 652, 169 Fed. 372.

The facts are stated in the opinion.

Mr. John D. Black argued the cause, and, with Mr. John Barton Payne, filed a brief for plaintiff in error.

Mr. James C. McShane submitted the cause for defendant in error.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

Mr. Chief Justice White delivered the opinion of the court:

This action to recover for personal injuries, begun in a *state court, was re-[223 moved to a circuit court and there decided for the plaintiff. To obtain a reversal of a judgment affirming, the case is here upon an assumption that a constitutional question is involved which gives jurisdiction. It is admitted that such question, that is, the repugnancy of the safety appliance law to the Constitution, is now not open to controversy because of a recent decision. *Southern R. Co. v. United States.* [222 U. S. 20, ante, 2, 32 Sup. Ct. Rep. 2.] Yet, as the case is here, other errors relied upon, it is urged, must be decided. But even conceding that the constitutional question was not wholly frivolous when first advanced, as it arose only at the trial, it does not give jurisdiction. *Macfadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. But this is negligible, since, by the pleadings, the cause of action was based on a statute of the United States—the safety appliance law—which gives jurisdiction. *Macfadden v. United States*, supra. The damage thus arose: After cutting out some cars from an interstate freight train at the Union Stock Yards in Chicago, the train could not be re-coupled because of a broken knuckle on the coupler of one of the cars. The plaintiff, a switchman, secured a new knuckle, and going between the cars to put it in place of the broken one, was crushed by a backward movement of the train, which brought the uncoupled cars together. The movement was ordered by the train conductor with the purpose of shoving the train back several city blocks to where it was proposed to repair the coupler.

Coming to consider the contentions, although they seemingly involve many propositions, they all are reducible to the assertion that the plaintiff was so clearly guilty of contributory negligence, in one aspect or the other, that it was the duty of the court to instruct a verdict for the defendant. Indeed, this is expressly stated in the argument to be the result of all the propositions except two, relating to an instruction given and to one refused. But these *two instructions, when rightly con-[224 sidered, are of the same character, as they also rest ultimately upon the contention that the proof on particular subjects was such as to necessitate a binding instruction for the railway company.

The following, therefore, as to all the contentions, is clearly apparent: First. That while they may in a general sense involve the safety appliance law, none of them directly invoked the interpretation of

that law. Second. That while the contentions, from an ultimate point of view, present a question of law—that is, Was there any substantial evidence to go to the jury?—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. Third. That although we have jurisdiction to review, because the cause of action, as stated in the pleadings, rested upon the safety appliance law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], to submit to the final jurisdiction of the circuit court of appeals.

Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof. We are of this opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the court below in any of the particulars complained of. In the discharge of such duty in this case, in view of the full opinion of the circuit court of appeals, and in the light of the adequate examination which 225] we have made of the *record, as we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below, it follows that the judgment of the Circuit Court of Appeals must be and it is affirmed.

Affirmed.

MUTUAL LOAN COMPANY, Plff. in Err.,
v.
GEORGE J. MARTELL.

(See S. C. Reporter's ed. 225-236.)

Constitutional law — due process of law — regulating assignments of future earnings.

1. Making invalid against the employer

Constitutionality of statute restricting right to assign salary or wages.

A statute absolutely prohibiting the assignment of future wages by employees was upheld in *International Text-Book Co. v. 56 L. ed.*

assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employee, as is done by Mass. Laws 1908, chap. 605, §§ 7, 8, is a valid exercise of the police power, and does not deny the assignee due process of law.

[For other cases, see Constitutional Law, 591-695, 870-876, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — regulating assignments of future earnings.

2. Exempting national banks, and banks under the supervision of the bank commissioner, and certain loan companies, from the provisions of Mass. Laws 1908, chap. 605, §§ 7, 8, making invalid against the employer assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employee, does not deny the equal protection of the laws to an assignee not falling within one of the excepted classes.

[For other cases, see Const. Law, IV. a, in Dig. Sup. Ct. 1908.]

[No. 29.]

Submitted October 27, 1911. Decided December 11, 1911.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment affirmed by the Supreme Judicial Court of that state, upholding the validity of a statute regulating assignments of future earnings. Affirmed.

See same case below in Supreme Judicial Court, 200 Mass. 482, — L.R.A.(N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916.

The facts are stated in the opinion.

Mr. Lee M. Friedman submitted the cause for plaintiff in error:

An assignment of future earnings which many accrue under an existing employment is a valid contract, and creates rights which may be enforced both at law and in equity.

Tripp v. Brownell, 12 Cush. 376.

The employee has an actual and real interest in wages to be earned in the future by virtue of his contract. Profitable employment is a realty, and wages to accrue thereunder constitute a present existing right of property which may be sold or assigned, as any other property.

Citizens' Loan Asso. v. Boston & M. R. Co. 196 Mass. 528, 14 L.R.A.(N.S.) 1025,

Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521, and declared not to be an unreasonable restraint upon the liberty of the citizen, nor to deprive him of his property without due process of law. And this decision was followed

124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365.

The holder of an assignment of wages stands upon a firmer plane than a mortgagee of future-acquired property. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no further action on his part.

Ibid.

The liberty mentioned in the 14th Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to impress the right of the person to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Lochner v. New York*, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257.

It is the duty of the government to exercise, whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing

civilization of a highly complex character requires. The power to exercise such is police power. The legislature cannot, under the guise of such regulations, invade personal rights or private property.

Com. v. Alger, 7 Cush. 84; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Ex parte Sohneke*, 148 Cal. 262, 2 L.R.A. (N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475.

The general right to make a contract in relation to his business is part of the liberty of the individual provided by the 14th Amendment of the Federal Constitution.

Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Lochner v. New York*, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Kuhn v. Detroit*, 70 Mich. 534, 38 N. W. 470; *State v. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *People v. Steele*, 231 Ill. 341, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; *People v. Marcus*, 185 N. Y. 257, 7 L.R.A. (N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

To place all employees of the whole commonwealth under the guardianship of the

in *Chicago & E. R. Co. v. Ebersole*, — Ind. —, 87 N. E. 1090.

And the court in *McCallum v. Simplex Electrical Co.* 197 Mass. 388, 83 N. E. 1108, expressed its entire confidence in the constitutionality of a statute limiting the right to make assignments of future earnings to a period not exceeding two years.

These decisions, like that of the Massachusetts court in the principal case, all rest upon the theory that the wage earner is peculiarly susceptible to wrongs and imposition which it is the proper office of the police power to prevent.

And because the statute applies not only to "wages," but to "salary," which, in the court's opinion, makes it too broad in its terms to be justified as an exercise of the police power for the purpose of mitigating or remedying the wrong at which it is aimed, the supreme court of Illinois held unconstitutional in *Massie v. Cessna*, 239 Ill. 352, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152, the Illinois statute which makes invalid the assignment of the

"wages" or "salary" of any person unless it is in writing, signed and acknowledged by the assignor and his or her husband or wife, and is entered on the justice's docket and a copy served upon the employer. The court pointed out that the statute made no classification of salaried employees, but included them all; and said that there was nothing in the public policy of the state requiring or warranting such an abridgment of the right of persons earning the higher salaries to assign or transfer them as they choose, and nothing requiring or warranting a statute giving to such persons the benefit that might with entire propriety be given to wage earners by an act in reference to the assignment of wages.

The court also found unconstitutional the provision of the statute making void assignments of wages or salary when given as security for loans tainted with usury, because the law of the state makes no such provision with reference to other instruments or other conveyances given to secure usurious debts.

legislature, and by one sweeping provision, as exhibited in § 7, take away the liberty of every one of them by depriving them of the freedom of disposing of what the supreme court of Massachusetts (*Citizens' Loan Asso. v. Boston & M. R. Co.* 196 Mass. 528, 14 L.R.A. (N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365) has recognized as an absolute property right, is surely such an abuse of legislative power as to require little argument to demonstrate its unconstitutionality.

Property does not consist merely of the title and possession, but includes the right to make any legal use of it, and the right to pledge or mortgage or to sell and transfer it. The right to contract a debt or other obligation is included in the right to liberty, and is also a right of property.

Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470; *Lochner v. New York*, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

If § 7 is considered simply from the standpoint of an unlawful interference with liberty of contract and the taking of property without due process of law, it is and must be declared unconstitutional.

Massie v. Cessna, 239 Ill. 355, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152; *State v. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *People v. Steele*, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. W. 236; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Toney v. State*, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 Ann. Cas. 319; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 S. E. 1007; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *State v. Missouri Tie & Timber Co.* 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 32 N. E. 62; *Republic Iron & Steele Co. v. State*, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; *Com. v. Perry*, 155

Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126.

To defend § 7 as a proper police regulation, it must be made clear that in some way the public generally must be affected either in health, morals, or in its general welfare.

Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

If the business of assigning wages is a regulation required in the interests of the general welfare of the public, there is no reason for making the law apply only to cases where a loan of money is the debt to be secured, and such a classification is arbitrary and unreasonable, and the legislation for that reason is unconstitutional and void.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Sutton v. State*, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *State v. Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

In *Gladney v. Sydnor*, 172 Mo. 318, 60 L.R.A. 880, 85 Am. St. Rep. 517, 72 S. W. 554, it was held that a vested right of a man to convey his homestead without the co-operation of his wife was impaired by a statute making him incapable of conveying it unless his wife joined in the conveyance.

In *Hubbard v. Hubbard* 77 Vt. 73, 67 L.R.A. 969, 107 Am. St. Rep. 749, 58 Atl. 969, 2 Ann. Cas. 315, an act which authorized a court of chancery "in its discretion," on a wife's petition, to empower her to convey real estate by her separate deed, was held unconstitutional, in that it undertook to clothe a court with power to deprive a husband of his property without due process of law.

Any exemption that passes the line of regulation, and leaves in certain corporations and persons property rights greater than are accorded to others in the same general line of business, as § 6 of this act clearly does, makes the act unconstitutional.

Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Re Home Discount Co.* 147 Fed. 538; *Vanzant v. Waddel*, 2 Yerg. 270; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 156, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385.

The character of police regulations, whether reasonable, impartial, and consist-

ent with the Constitution, is a question for this court; for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity, and to nullify the legislative attempt to invade the citizen's right,—to hold that every act of the general assembly passed under the guise of an exercise of the police power, or sought to be defended upon that ground, was beyond judicial control, would render every guaranty of personal rights found in the Constitution of little or no value.

Ex parte Whitewell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Taylor v. Pine Bluff, 34 Ark. 603; Platte & D. Canal & Mill Co. v. Dowell, 17 Colo. 376, 30 Pac. 68.

Where there is no justifiable ground under the Constitution for discrimination, such discrimination is unconstitutional.

Com v. Hana, 195 Mass. 262, 11 L.R.A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514.

No counsel appeared for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the validity, under the 14th Amendment of the Constitution of the United States, of a statute of the state of Massachusetts, which (§ 7) makes invalid against the employer of a person any assignment of or order for wages to be earned in the future, to secure a loan of less than \$200, until the assignment or order be accepted in writing by the employer, and the assignment or order and acceptance be filed and recorded with the clerk of the city or town in the place of residence or employment, according as the person making the assignment be or be not a resident of the commonwealth. If such person be married, the written consent of his wife must be attached to the assignment or order. Section 8. National banks and banks which are under the supervision of the bank commissioner, and certain loan companies, are exempt from the provisions of the act. Section 6.

*The action is in contract on two[232 promissory notes given by two different persons, with an assignment by each of wages to be earned in the future in the defendant's service (defendant in error here, and we will so designate him, and the plaintiff in error as plaintiff). The assignments were duly recorded, but were not accepted in writing by defendant. The assignor in the second assignment was a married man whose wife did not consent to the assignment.

Judgment was entered in the superior court for the defendant, which was affirmed by the supreme judicial court of Massachusetts. 200 Mass. 482, — L.R.A. (N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916.

The contention of plaintiff is (1) that the provisions of §§ 7 and 8 deprive it of due process of law, and (2) that § 6 deprives it of the equal protection of the laws.

(1) To sustain this contention it is urged that the statute being an exercise of the police power of the state, its purpose must have "some clear, real, and substantial connection" with the preservation of the public health, safety, morals, or general welfare; and it is insisted that the statute of Massachusetts has not such connection and is therefore invalid.

This court has had many occasions to define, in general terms, the police power, and to give particularity to the definitions by special applications. In Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175, it was said that "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety;" and that the validity of a police regulation "must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

In Bacon v. Walker, 204 U. S. 311, 318, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289, it was decided that the police power is not confined "to the suppression of what is offensive, disorderly, or unsanitary," but "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people."

In a sense, the police power is but another name for the power of government; and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the prov-

ince of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it; and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review.

The court hesitated to say, as at least one court has said, that a total prohibition of the assignment of wages would be valid, but justified the partial restriction of the statute on the ground that the extravagance or improvidence of the wage earner might tempt to the disposition of wages to be earned, and he and his family, deprived of the means of support, might become a public charge. It was pointed out, besides, that his need might be taken advantage of by the unscrupulous. The purposes of the statute are certainly assisted by the formalities which it prescribes as requisite to the validity of an assignment. The requirement that it (the assignment) be accepted in writing by the employer, it was pointed out, protects him and secures the assignment from dispute; and the requirement that the acceptance and the assignment be recorded checks an attempt of the wage earner to procure a dishonest credit.

234]*The court found more difficulty with the provision which requires the consent of the wage earner's wife to the assignment, but justified it on the general considerations we have mentioned, and on the ground of her interest in the right use of his wages, though she have no legal title in them.

We cannot say, therefore, that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed "the propriety of deferring to the tribunals on the spot." *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301.

There are other grounds upon which the statute may be sustained than those expressed by the supreme judicial court of the state. As we have seen, it does not prohibit assignments of wages to be earned. It prescribes conditions to the validity of such assignments, and in this it has many examples in legislation. It has the same general foundation that laws have which prescribe the evidence of transactions and the manner of the execution and authentication of legal instruments. The laws of the

states exhibit in their diversities the power of the legislature over property, its devolution and transfer. It is rather late in the day to question that power. See *Arnett v. Reade*, 220 U. S. 311, 55 L. ed. 477, 36 L.R.A.(N.S.) 1040, 31 Sup. Ct. Rep. 425.

But if we consider the Massachusetts statute strictly as a limitation upon the power of contract, it still must be held valid. A statute not unlike it came before this court in *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1. It was a statute of the state of Tennessee, and required the redemption in cash of any store orders or other evidence of indebtedness issued by employers in payment of wages due to employees. It was assailed as an arbitrary interference with the right of contract. It was sustained as a proper exercise of the power of the state.

*There, must, indeed, be a certain[235 freedom of contract, and, as there cannot be a precise, verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, yet many legal restrictions have been and must be put upon such freedom in adapting human laws to human conduct and necessities. A too precise reasoning should not be exercised, and before this court may interfere there must be a clear case of abuse of power. See *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, where the right of contract and its limitation by the legislature are fully discussed.

(2) This contention attacks § 6 of the statute, which exempts from its provisions certain banks, banking institutions, and loan companies. It is urged that the provision is discriminatory, and therefore denies to plaintiff the equal protection of the laws.

We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the supreme judicial court took, and, we think, rightly took. The court said that the legislature might have decided that the dangers which the statute was intended to prevent would not exist in any considerable degree in loans made by institu-

tions which were under the supervision of bank commissioners, and "believed rightly that the business done by them would not 236] need regulation in the interest *of employees or employers," citing *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273, a decision by the supreme court of Delaware. See *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190.

But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal-protection provision of the 14th Amendment to the Constitution of the United States. *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

This court sustained a classification like that of the Massachusetts statute in *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132, where a statute of Connecticut, which fixed maximum rates of interest upon money loaned within the state to persons subject to its jurisdiction, was upheld as a valid exercise of the police power of the state; and a provision of the statute which exempted from its operation "any national bank or trust company duly incorporated under the laws of the state, and pawnbrokers," was decided to be a legal classification.

Judgment affirmed.

237]*UNION PACIFIC RAILROAD COMPANY, A. L. Mohler, J. M. Henry, and Henry Swagtek, Apts.,
v.

MASON CITY & FORT DODGE RAILROAD COMPANY.

(See S. C. Reporter's ed. 237-251.)

Railroads — joint use of tracks — effect of judgment.

The use of the tracks of the Union Pacific Railroad Company as accessory only to the use of that company's bridge over the Missouri river at Omaha, and not for purposes which, like local switching are wholly independent of any use of the bridge, was what was authorized by a decree based upon the bridge acts of July 25, 1866 (14 Stat. at L. 244, chap. 246), and February 24, 1871 (16 Stat. at L. 430, chap. 67), adjudging to the Mason City & Fort Dodge Railroad Company and its lessee the right to the equal and joint use of the main and passing tracks of the Union Pacific Railroad Company from their eastern terminus

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at Council Bluffs to a connection with the Union Stock Yards Railroad and the other railroads connecting with the Union Pacific Railroad at South Omaha, including the bridge across the Missouri river at that point, and of the connections with the Union Stock Yards tracks and with the tracks of all other railway companies connecting at or near South Omaha with the tracks of the Union Pacific Railroad Company, to the same extent and upon the same terms as defined in certain existing contracts between the Union Pacific Railroad Company and other railways, the common object of both statutes being the more perfect connection of the roads running to the bridge on either side of the river.

[For other cases, see *Railroads*, VI., in *Digest Sup. Ct.* 1908.]

[No. 31.]

Argued November 2, 1911. Decided December 11, 1911.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska, adjudging appellants in contempt of a decree giving the Mason City & Fort Dodge Railroad Company and its lessee the right to use the tracks of the Union Pacific Railroad company. Reversed.

See same case below, 91 C. C. A. 530, 165 Fed. 844.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause, and, with Mr. N. H. Loomis, filed a brief for appellants.

Mr. John Barton Payne argued the cause and filed a brief for appellee.

*Mr. Justice McKenna delivered [238 the opinion of the court:

The question in the case is whether the decree of the United States circuit court for the district of Nebraska, rendered in a suit brought by appellee against the Union Pacific Railroad Company in 1903, which adjudged to appellee and to its lessee, the Chicago Great Western Railway Company, the equal and joint use of the main and passing tracks of the Union Pacific, means the use of such tracks in connection with the bridge of that company over the Missouri river between Omaha and Council Bluffs, or the tracks independently of such use; or, in other words, a general use of the tracks for business having no connection with the bridge or use of it; or, to be more specific and to bring forward the particular use claimed, whether, as facilities for elevators established by appellee in Omaha "and generally for a grain terminal," or as shall be necessary or convenient in its

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business as a common carrier, it may operate its own motive power and use the tracks of the Union Pacific to deliver cars to the Chicago, Rock Island, & Pacific Railroad, which has connection with the tracks of the Union Pacific. The appellee contends that such right is given by the decree. The appellants assert that the Union Pacific alone has the right to deliver cars to appellee's property, or take them from it to connecting carriers, as it does, it is contended, for all other railroads, according to contracts which have obtained for many years.

The circuit court decided that the decree gave the use contended for by the appellee, and adjudged appellants guilty of contempt for obstructing such use. The decision was affirmed by the circuit court of appeals. 91 C. C. A. 530, 165 Fed. 844.

239]*The decree adjudged that appellee and its lessee, the Chicago Great Western Railway Company, were "admitted into the full, equal, and joint use of the main and passing tracks of the Union Pacific Railroad Company, now located and established, or which may hereafter be located and established, from the eastern terminus of said tracks in Council Bluffs, in the state of Iowa, to a connection with the Union Stock Yards Railroad and the other railroads connecting with the Union Pacific Railroad at South Omaha, in the state of Nebraska, including the bridge over which said tracks extend across the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Nebraska; also the connection with, and the tracks pertaining thereto, of the general passenger station of the said Union Pacific Railroad in Omaha, and said passenger station and all tracks and facilities connected therewith; also a connection with the side or spur tracks leading from the main line to the lower grade of the sidings and spur tracks in Omaha, and such extensions as may be hereafter made; also a connection with the side tracks in Omaha on which to receive from and deliver to said Union Pacific Railroad Company freight which may be handled through the warehouses, or many be switched by the said Union Pacific Railroad Company; also the connections with the Union Stock Yards tracks in South Omaha, and with the tracks of all other railway companies which now or may hereafter connect at or near South Omaha, with the tracks of the Union Pacific Railroad Company, hereinbefore described, each and all, to the same extent and upon the same terms and conditions stated in the contracts between the Union Pacific Railroad Company and the Chicago & Northwestern Railway Company, the Chicago, Milwaukee, & St. Paul Railway Com-

pany, and the Chicago, Rock Island, & Pacific Railway Company, as appears by the contracts in evidence in this case, and the depot contract, and the supplemental contract *between the same parties, be-[240 ing Exhibits 6 and 7, attached to the bill of complaint herein, without preference or discrimination."

"It is manifest that the rights of appellee and its lessee company, which were adjudged by the decree, are measured by the rights of the other railroads mentioned in the decree, and what they were is defined in certain cases in which they came up for consideration.

The first of the cases was Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173. It was brought by the Chicago, Rock Island, & Pacific Railway Company against the Union Pacific Railroad Company to compel specific performance of a contract in regard to the use of the tracks of the latter. The following is a summary of the facts: The Union Pacific Company controlled and operated more than 5,000 miles of railroad, and, among others, a main line extending from Council Bluffs, Iowa, by way of Omaha and Valley Station, Nebraska, to Ogden, Utah, a distance of about 1,100 miles, and other roads not necessary to mention.

The Rock Island Company owned and operated a line of railway extending from Chicago, by way of Davenport, Iowa, to St. Joseph, Missouri, and thence, through certain points, to Colorado Springs and Denver. It also operated other lines, amounting in the aggregate to more than 3,000 miles. The St. Paul Company was operating more than 6,000 miles of railroad, and one of its lines extended from Chicago to Council Bluffs.

The Rock Island Company determined to connect its lines from Chicago to Council Bluffs with its southerly line to Colorado Springs by constructing a bridge across the Missouri river at Council Bluffs, and a railroad from that terminus, by way of Omaha and South Omaha and other points, thereby shortening its line from Chicago to Denver. The St. Paul Company joined in the undertaking *in order to extend its line[241 from Council Bluffs on to Omaha and South Omaha. The two companies, to execute their purpose, caused a corporation to be created under the laws of Iowa, with power to build a bridge across the river at Omaha, Congress granting to the corporation the necessary franchise. 23 Stat. at L. 43, chap. 82. Pending the making of the surveys and other preparations, the Union Pacific Company proposed to the companies to make with them a trackage arrangement by which they could use the bridge and

tracks of the Union Pacific Company between Council Bluffs and South Omaha for their terminal facilities in Omaha and South Omaha, and the continuous line desired by the Rock Island Company could be completed. The proposal was accepted and the contracts subsequently drawn. The preamble to the Rock Island Company contract recited that that company had become a domestic corporation of Nebraska, and proposed to extend its railway from its terminus at Council Bluffs to a connection with its leased line, the Chicago, Kansas, & Nebraska Railway, at the city of Beatrice; that the parties to the contract believed that the interests of all would be promoted by using for a part of said extension the main tracks of the Union Pacific Railway Company in the cities of Council Bluffs and Omaha, the bridge over the Missouri river, and portions of certain other roads not necessary to mention.

The specific and material provision was as follows, the italics being ours: "The Pacific Company hereby lets the Rock Island Company into the full, equal, and joint possession and use of its *main and passing tracks*, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the state of Iowa, and a line drawn at a right angle across said tracks within one and one-half (1½) miles southerly from the present passenger station of South Omaha, in the state of Nebraska, including *the *bridge* on which said tracks extend across the Missouri river, between said cities of Council Bluffs and Omaha; *connections* with Union Depot tracks in Omaha, the side or spur track leading from its main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses, or switched by the Pacific Company; *the connections* with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain, and exclusively use a track or tracks, aggregating three thousand (3,000) feet in length, for the storage of cars and other purposes, for the term of nine hundred and ninety-nine (999) years." The consideration is expressed, and it is provided, "that the Pacific Company lets the Rock Island Company into the full, joint, and equal possession and use of its tracks, stations, and appurtenances along the line of the railway of the Republican Valley Company," the Pacific Company re-

serving the right to admit any other company to the joint use and possession of the same tracks and property upon substantially the same terms.

Performance of the contract was entered into. Subsequently a change of management of the Pacific Company took place, and that company forcibly prevented the Rock Island Company and the St. Paul Company from using the tracks at Omaha which they were entitled to use under the contracts, and absolutely refused to perform the contracts.

Suit was then brought by those companies to compel specific performance of the contracts, and the Pacific Company set up as a defense that the contracts were *ultra vires*, and that the use of its road, as claimed, would deprive it of the means granted to it by the act of Congress, *of [243 earning money with which to maintain its corporate existence, perform the duties of a common carrier, and meet the demands of the government. The defenses were not sustained, and it was decreed that the contract was "the valid obligation of the parties thereto, and should be performed in good faith by each of them;" that it secured the several rights embraced therein, all of which were specifically set forth, subject to certain limitations which need not be given. 47 Fed. 15. The decree was affirmed by the circuit court of appeals. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309.

The case in this court was considered on the appeal of the Rock Island Company, the court saying that if the decree in favor of that company be affirmed, a like result must follow in the case of the St. Paul Company, and stated the questions to be "whether these contracts are within the corporate powers of the parties; were duly authorized as respects the Union Pacific Company; were such contracts as a court of equity can specifically enforce; and were properly enforceable on the merits." More specifically, it was said that it could be remarked "in the outset that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge." This, then, we must accept as the subject of the controversy to which the court addressed itself and by which the decision must be explained.

It was decided that the contracts were not *ultra vires*, the court basing its decision upon the general powers of the Pacific Company in relation to the subject-matter and its duties as a common carrier, and decided that there was no reasonable ground upon which it could "be held invalid as an unlawful assumption of power." But the

court, going beyond such general operation and relation, said: "But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations," and based its 244]decision "as well upon the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, and its construction and operation, holding that those acts "imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and tracks between Council Bluffs and Omaha." And the court said "that South Omaha was included."

These propositions were announced: The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it. The implication was made express by the amendatory act of 1864 [13 Stat. at L. 356, chap. 216], and the company given authority "to construct a bridge over said Missouri river." The bridge was for the company's road, and no provision was made for other roads, nor were special means provided for the construction of the bridge. By 1871, several roads had been built from the East to Council Bluffs, and others were in process of construction in Nebraska, with Omaha as their terminus. On February 24th of that year the Omaha bridge act was passed (16 Stat. at L. 430, chap. 67), in which it was provided that "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the company was authorized to issue bonds not exceeding two and one-half million dollars, and to "secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful, to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress."

The act further provided that for the use and protection of the bridge and property the company should be governed and limited by the act of Congress of 1866 (14 Stat. at L. 244, chap. 246), in regard to the construction of certain *bridges and to establish them as post roads. Nine bridges were authorized by that act to be constructed, eight over the Mississippi river and one over the Missouri river, and it was provided in § 1 of the act which authorized the construction of the bridge across the Mississippi at Quincy, Illinois, that, when constructed, the trains of all railroads terminating at the river should be allowed to cross, for reasonable compensation to be made to the owners of the bridge. This

provision was made applicable to the other bridges.

The court said: "The common object of both these act plainly was the more perfect connection of roads running to the bridges on either side of the river;" and this, it was further said, was in harmony with the numerous acts of Congress referred to in the opinion of the circuit court of appeals.

Answering the objection that if these acts justified the granting of the use of the bridge, it did not justify the granting of the use of the tracks, the court remarked that the authority was given to place a mortgage "on the bridge and approaches and appurtenances," and that it would seem clear that the approaches on both sides of the river must be regarded as a part of the structure. And it was further said: "Moreover, the act refers to 'the tracks and depots required to perfect the same.' A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots, and other facilities for the public accommodation. And we consider Council Bluffs, Omaha, and South Omaha, under the facts, as necessarily embraced in the intention of Congress. It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected, is about 4 miles; but the scheme of Congress was to accomplish the more perfect connection 'at or near Council Bluffs, Iowa, and Omaha, Nebraska,' and we think this distance reasonably within the terms *of the act of 1871, liberal-246 ly construed, as the act should be."

The next case which came to this court was Union P. R. Co. v. Mason City & Ft. D. R. Co. 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. Rep. 19. The Mason City Company was complainant in the suit in the circuit court, and operated a railroad having its western terminus at Council Bluffs, and sought in that suit to connect with and use the bridge, approaches, and tracks of the Union Pacific Company upon the same terms and conditions as the roads which were parties to the suit in 163 U. S., supra. It based its claim upon the acts therein set out and considered, it having no contract with the Union Pacific, as the other railroads had. The circuit court and the circuit court of appeals sustained its claim. 124 Fed. 409, 64 C. C. A. 348, 128 Fed. 230.

In this court, the Mason City Company contended that its right to the use of the bridge and approaches was determined by the decision in 163 U. S., and, further, that, if mistaken in that, it had such right under the statutes of the United States and by the terms of the contract between the city of Omaha and county of Douglass, with

which contract we are not concerned. To the contention the Union Pacific replied that so much of the opinion as dealt with the statutory obligation was *obiter dictum*. It also urged that the statutes were misconstrued, and that the status of the present Union Pacific Company differed so much from that of the then defendant as to make them inapplicable.

Disposing of the contention that the reference to the statutory obligation of the Union Pacific was *obiter*, the court said:

"While the claim of the plaintiffs in that case was founded directly upon contracts, yet, if there were a statutory duty to let them into the joint use of the bridge and its approaches, that was enough to sustain a decree in their favor, and the contracts [247] might be regarded as *simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, and the duties to the government and the public imposed thereby on the railroad company."

To the contention that the statutes had been misconstrued, the court replied that "we see no reason to question the conclusion announced in the former opinion." The other contentions were also held untenable. The decree against the Union Pacific was affirmed, with some minor reservations which it is unnecessary to notice.

It was this decree that the Union Pacific Company was, in the present case, adjudged guilty of contempt for violating. The decree we have already set out.

The parties are in sharp controversy as to its meaning, but, necessarily, whatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute,—in other words, that the bridge act of 1871 is the measure of the rights given by decree in connection with the act of 1866, providing for a bridge across the Mississippi river at Quincy, Illinois, and other bridges. 14 Stat. at L. 244, chap. 246. The latter act, as we have seen, provided that "all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation." And, as we have also seen, the act of 1871 was passed "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river at or near Council Bluffs, Iowa, and Omaha, Nebraska." And the powers conferred and the use and protection of the bridge that should be erected were "governed and limited" by the provisions of the act of 1866. The two acts, therefore, ex-

press the powers conferred and the obligations imposed on the Union Pacific Company. And this court so construed them, saying, as we have seen, that "the [248 common object of both these acts was the more perfect connection of roads running to the bridge on either side of the river." A right to the "approaches and appurtenances" was given as necessary to the connection and to make it effective. It did not otherwise subject the property of the Union Pacific Company to the use of other companies. It bridged the river—"the transportation gap"—between Council Bluffs and Omaha, the country east of the river and the country west of it. It did no more. It did not intend to give to other roads a right in the terminal of the Union Pacific Company beyond what was necessary for a right of passage over the "gap," giving the same continuity to other roads which the Union Pacific Company had. That the act of Congress had this object the circuit court of appeals did not deny. The court said:

"It is true that the object of the requirement of the acts of Congress was to bridge the transportation gap, and to facilitate the transfer of cars passing between railroads east and railroads west of the Missouri river, but this fact did not deprive the court, which was called upon to enforce this legislation, of its jurisdiction to prescribe the limits and the terms of the use which the Pacific Company should allow, nor of its power and duty to exercise a wide and wise judicial discretion in fixing those limits and terms."

Of course, the court had power to pass on the issues presented to it, and we might have to yield to its decision as *res judicata* if its decree was as broad as asserted, but we do not so understand its decree. It gave only what the chief justice, in 163 U. S., called "running rights." As we have already pointed out, the original charter of the Pacific road only impliedly authorized the building of a bridge across the river. The act of 1864 expressly authorized it, but the bridge contemplated was for the use of the Pacific Company only. No provision was made for other roads. The act of 1871 enlarged the powers of the *company, [249 giving it means to construct the bridge, but at the same time put the obligation on the company of permitting its use by other roads, as we have seen, "indicating [we quote from 163 U. S. 587] a settled policy that all structures of this character should allow connecting roads to cross them with their cars, trains, and engines." And this was the right which was given over the tracks, such right over the tracks being necessary, to the right over the bridge. *Id.* 587, 588. The right to cross them, bridge and tracks, it will be observed, and thereby pro-

vide "for the more perfect connection of the roads east of the river with those west of it." That this was the purpose is expressed in many places in the opinion. The bridge was decided to be the principal and dominating thing, to which the rights in the tracks were accessory and only given as appurtenant and necessary as a means to avail of its use.

The Mason City Company would upset this order and make paramount the use of the tracks; indeed, make the use of the tracks independent of any use of the bridge, though the only rights it possesses are given by the act authorizing the construction of the bridge. It was because its railroad connected with the Union Pacific at Council Bluffs that it was enabled to invoke the provisions of that act. It now claims a right on the west side of the river to the use of tracks in connection with what it terms "a grain terminal" in Omaha, for which purpose it has purchased certain real estate. And it represents "that, in order to provide the necessary elevators and other special facilities, it has purchased other real estate, the title to which it has caused to be conveyed to the Omaha Grain Terminals, a corporation of the state of Nebraska, every share of the capital stock of said corporation being owned by" it. It sets forth, in detail, length of tracks and their connection with those of the Union Pacific, and the number and capacity of the elevators which are necessary to accommodate "the 250] grain business naturally tributary *to the city of Omaha." It also sets forth that, as a carrier of live stock and live stock products, it must have facilities "in close proximity to the South Omaha stock yards." We quote these averments to illustrate the extent of the rights claimed. It is to accommodate the business thus described and its business as a common carrier that the Mason City Company asserts the right to use the tracks of the Union Pacific Company which connect with the tracks of other companies,—specifically, in this case, with the Chicago, Rock Island, & Pacific Railway Company. It was a prevention of the use of the latter tracks in order to deliver a car of stucco hauled by an engine of the Mason City Company to the Rock Island Company that was held to condemn the decree. If the Mason City Company had the right to deliver that car, it had the right to deliver all cars, and the court so decreed, finding that there was a physical connection between the tracks of the Rock Island and the main tracks of the Union Pacific at South Omaha, and that, by the terms of the decree, the Mason City Company had "the right to run its engines, cars, or trains" over such tracks, and from them

"over and through the said connection onto the tracks of the Union Pacific Company at South Omaha."

The court, therefore, decided that the decree authorized the use of the Union Pacific track for local switching purposes, and enjoined the prevention of such use. As we have pointed out, we do not think the decree justified the conclusion of the court. The rights asserted transcend anything given by the bridge act. The tracks of the Union Pacific Company, as urged by its counsel, are its property, and the supervision and control thereof cannot be taken from it and given to its connections except to the extent expressed in the bridge act, which gave, as we have seen, the use of the bridge and of the main and passing tracks as necessary approaches to the bridge. And it is of special significance that none of the "tenant companies" (parties *in[251 163 U. S.) ever claimed such right except in one attempt by the Rock Island, after these proceedings, to punish the Union Pacific officers for contempt.

We are therefore of opinion that the decree admitted appellee to the use of the "main and passing tracks" of the Union Pacific Company from their eastern terminus at Council Bluffs, only to a physical connection with the roads and at the places mentioned therein, including the bridge over which the tracks extend across the Missouri river between Council Bluffs and Omaha. And that such use was all that was necessary to constitute the road's continuous lines from east to west or from west to east.

The decree of the Circuit Court of Appeals, affirming the order of the Circuit Court, adjudging the appellants guilty of contempt of the decree entered August 12, 1903, is reversed, and the cause remanded to the Circuit Court for further proceedings in accordance with this opinion.

ALUMINUM COMPANY OF AMERICA,
Plff. in Err.,
v.
GEORGE H. RAMSEY.

(See S. C. Reporter's ed. 251-256.)

Constitutional law — equal protection of the laws — classification — abolishing fellow servant rule.
1. Abolishing the fellow servant rule as

NOTE.—On the validity of statute abrogating fellow-servant rule—see note to Bradford Constr. Co. v. Heflin, 12 L.R.A. (N.S.) 1040.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A. (N.S.) 954.

to corporations operating railroads within the state, as is done by Ark. act of March 8, 1907, does not deny such a corporation the equal protection of the laws because the statute does not apply to individual employers.

[For other cases, see Constitutional Law, 286-291, in Digest Sup. Ct. 1908.]

Statutes— who may assail validity.

2. A corporation operating a railroad in the state cannot challenge the validity of Ark. act of March 8, 1907, abolishing the fellow servant rule, because such statute may make an unconstitutional discrimination between individuals and corporations engaged in mining, but not operating railroads.

[For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

[No. 56.]

Submitted November 8, 1911. Decided December 11, 1911.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Saline Circuit Court, upholding a state statute abolishing the fellow servant rule. Affirmed.

See same case below, 89 Ark. 522, 117 S. W. 568.

The facts are stated in the opinion.

Messrs. **Uriah M. Rose, George B. Rose, Wilson E. Hemingway, and J. F. Loughborough** submitted the cause for plaintiff in error:

Corporations are persons within the 14th Amendment to the Federal Constitution, and are entitled to all the protection of this Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

This court has consistently held from the beginning of its decisions involving this question that equal protection of the laws did not mean that the same law should apply to everyone; that different conditions require and authorize different laws, and that special legislation was not therefore unequal. The court has as consistently held that wherever there is special legislation, the warrant for it must be found in differing situations; that classification of subjects for special legislation shall not be arbitrary and without reason, but must rest upon some real basis of classification.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Barbier v. Connolly* 113 U. S. 27,

28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 30, 25 L. ed. 992; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Lowe v. Kansas*, 163 U. S. 88, 41 L. ed. 80, 16 Sup. Ct. Rep. 1031; *Jones v. Brim*, 165 U. S. 184, 41 L. ed. 679, 17 Sup. Ct. Rep. 282; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 633, 41 L. ed. 854, 17 Sup. Ct. Rep. 418; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 469, 45 L. ed. 627, 21 Sup. Ct. Rep. 423; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 211, 39 L. ed. 676, 15 Sup. Ct. Rep. 585; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Southern R. Co. v. Greene*, 216 U. S. 400, 412, 417, 54 L. ed. 536, 539, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 112, 46 L. ed. 109, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

In the nature of things, a wide discretion in the matter of classification must be vested in the state, and this court has always held that if the classification is observed to rest upon any real basis or difference in circumstances or conditions, and is not merely arbitrary, it will be sustained.

Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560.

In whatever guise legislation may be couched, if its practical effect and operation are to deny the equal protection of the law, the court will disregard fancied refinements, and will uphold the supremacy of the United States Constitution by giving it a sensible and practical operation.

Brimmer v. Rebman, 138 U. S. 78, 81, 34 L. ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The reason assigned for the classification does not depend upon any difference in circumstances or conditions, but is purely arbitrary.

Ballard v. Mississippi Cotton Oil Co. 81 Miss. 557, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533.

The right of the state to impose terms upon corporations must be always exercised

with due regard to the Constitution and laws of the United States.

Ducat v. Chicago, 10 Wall. 415, 19 L. ed. 973; *Lafayette Ins. Co. v. French*, 18 How. 407, 15 L. ed. 452; *Duluth & I. Range R. Co. v. St. Louis County*, 179 U. S. 302, 305, 45 L. ed. 201, 202, 21 Sup. Ct. Rep. 124; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Doyle v. Continental Ins. Co.* 94 U. S. 540, 24 L. ed. 151; *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809.

Statutes abolishing the fellow-servant doctrine as to railroads and other classes of business have been before the court with the argument that such statutes deny the equal protection of the laws; but in all of these cases the court has sustained the legislation only on the ground that they made a classification applying equally to all that were in the same situation.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; *Chicago & N. W. R. Co. v. McLaughlin*, 119 U. S. 566, 30 L. ed. 477, 7 Sup. Ct. Rep. 1366; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585. See also *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645.

Plaintiff in error is not a railroad company.

Bridwell v. Gate City Terminal Co. 127 Ga. 520, 10 L.R.A.(N.S.) 909, 56 S. E. 624; *Union Trust Co. v. Kendall*, 20 Kan. 517; *Bloxham v. Consumers' Electric Light & Street R. Co.* 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; *State v. Duluth Gas & Water Co.* 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 219; *Manhattan Trust Co. v. Sioux* 56 L. ed.

City Cable R. Co. 68 Fed. 82; *Riley v. Galveston City R. Co.* 13 Tex. Civ. App. 247, 35 S. W. 826; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 175; *Williams v. City Electric Street R. Co.* 41 Fed. 556; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Bonner v. Franklin Co-op. Asso.* 4 Tex. Civ. App. 166, 23 S. W. 317; *Turner v. Cross*, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578.

The term "railroad company" is so well understood by all persons as not to merit an effort to construe its meaning.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Goldenberg*, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; *United States v. Gooding*, 12 Wheat. 460, 478, 6 L. ed. 693, 699; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

It is not a question of construing the scope of a remedy provided by the statute, but it is a question of who are included within the burdens of a statute that is in derogation of the common law.

Thompson v. Baxter, 92 Tenn. 305, 36 Am. St. Rep. 85, 21 S. W. 668; *Lewis's Sutherland, Stat. Constr. § 575*; *Northern P. R. Co. v. Whalen*, 149 U. S. 157, 37 L. ed. 686, 13 Sup. Ct. Rep. 822; *Beeson v. Busenbark*, 44 Kan. 669, 10 L.R.A. 839, 25 Pac. 48; *Re Swan*, 150 U. S. 649, 37 L. ed. 1210, 14 Sup. Ct. Rep. 225.

Messrs. **Henry M. Armistead** and **T. M. Mehaffy** submitted the cause for defendant in error. Mr. J. E. Williams was on the brief:

This court is without jurisdiction because:

(a) No Federal question is involved in the state court's construction of the statute.

(b) If there is a Federal question, it is foreclosed by repeated decisions of this court.

Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796; *Hoadley v. San Francisco (Clark v. San Francisco)* 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322-345, 53 L. ed. 530-542, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; *Berea College v. Kentucky*, 211 U. S. 45-54, 53 L. ed. 81-85, 29 Sup. Ct. Rep. 33; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 353, 46 L. ed. 944, 22 Sup. Ct. Rep. 691; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L.

ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 211, 32 L. ed. 110, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 210, 39 L. ed. 676, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 351, 44 L. ed. 194, 20 Sup. Ct. Rep. 136; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Wilmington Star Min. Co. v. Fulton, 205 U. S. 74, 51 L. ed. 716, 27 Sup. Ct. Rep. 412; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Austin v. Boston, 7 Wall. 694, 19 L. ed. 224.

Even though there be color of jurisdiction, the case should be affirmed as an appeal taken for delay.

Chanute v. Trader, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; Richardson v. Louisville & N. R. Co. 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Stephenson Iron Min. Co. v. Kibble, 205 U. S. 537, 51 L. ed. 920, 27 Sup. Ct. Rep. 790; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

Messrs. Henry M. Armistead and T. M. Mehaffy also filed a separate brief for defendant in error:

The act of the legislature of Arkansas, adopted in 1907, is constitutional under the power reserved in the Arkansas Constitution of 1874, to alter or amend corporate charters.

Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Holyoke Water Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Close v. Greenwood Cemetery, 107 U. S. 466, 27 L. ed.

408, 2 Sup. Ct. Rep. 267; Sperry & H. Co. v. Rhodes, 220 U. S. 502, 55 L. ed. 561, 31 Sup. Ct. Rep. 490; Knoxville Iron Co. v. Harbison, 183 U. S. 17, 46 L. ed. 57, 22 Sup. Ct. Rep. 1; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 565, 55 L. ed. 337, 31 Sup. Ct. Rep. 259; Shields v. Ohio, 95 U. S. 324, 24 L. ed. 359; Hamilton Gas-light & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

The adoption of the act is a legitimate exercise of the right of classification of corporations as artificial persons, subject to special rules, independently of the reserved power to amend charters.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 211, 32 L. ed. 110, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 210, 39 L. ed. 676, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 351, 44 L. ed. 194, 20 Sup. Ct. Rep. 136; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 555, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342; Atehison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

The hazard incurred by the defendant in error was a risk of railroading, as to which the legislature might make a special rule.

Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

Mr. Justice McKenna delivered the opinion of the court:

The defendant in error brought this action against the plaintiff in error in the Saline circuit court of the state of Arkansas to recover for personal injuries alleged to have been received by him while in the employment of the company, which main-

tained a railroad to its mines, on account of the negligence of a fellow servant.

The action was based upon a statute of the state called by the parties "the fellow servant law." The statute makes railroad corporations operating within the state, and every company, whether incorporated or not, engaged in the mining of coal, "liable to respond in damages for injuries or death sustained" by agents, employees, or servants, "resulting from a careless omission of duty or negligence of such employer," or "any authorized agent, servant, or employee of the said employer," in the same manner as though the carelessness, omission of duty, or negligence was that of the employer.

The company assailed the constitutionality of the statute by the request for the following instruction, which was refused by the trial court. "You are instructed that the act of the legislature, approved March 8th, 1907, known as 'the fellow servant law,' in providing it shall apply to all corporations, but shall not apply to individuals, persons, or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the 14th Amendment to the Constitution of the United States."

255]*There was a verdict for the plaintiff, defendant in error here, upon which judgment was duly entered. It was sustained by the supreme court of Arkansas, 89 Ark. 522, 117 S. W. 568.

The supreme court sustained the action of the trial court in refusing the instruction, on the authority of *Ozan Lumber Co. v. Biddle*, which had been previously decided, and which is reported in 87 Ark. 587, 113 S. W. 796. This action of the court is assigned as error, and is the Federal question relied on.

A motion is made to dismiss, and, alternately, to affirm, respectively, on the ground that there is no Federal question in the state court's construction of the statute, and that if there be such a question, it is foreclosed by repeated decisions of this court. In support of the motion to dismiss, it is contended that the state court decided that the act assailed is an amendment to the charter of the corporation under the reserved right to amend, alter, or repeal the charter, and of this the corporation cannot complain, the exertion of such right being a condition of its existence.

In *Ozan Lumber Co. v. Biddle*, supra, the court decided that "the fellow servant law" was an amendment to the charters of corporations, made under the right reserved in the Constitution of the state to repeal, al-

ter, or amend such charters. The *Ozan Lumber Company*, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits.

On the merits the case is in a very narrow compass and does not demand much discussion, though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies to all corporations, but does not apply to individuals or partnerships. Whether *that exact[256 distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a legislature to make, under its power of classifying objects, we are not called upon to decide. The distinction made by the statute is broader. The distinction (among others) it makes is between railroads operating in the state and individuals, and such distinction has been maintained by this court as not offending the Constitution of the United States. *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159. See also *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 504, 52 L. ed. 307, 28 Sup. Ct. Rep. 141, and *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

What grievance plaintiff in error might have if it were not operating a railroad, we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it, and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads, may have on account of the distinction made between them and individuals.

It is true that the supreme court of the state, following *Ozan Lumber Co. v. Biddle*, supra, decided the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads, are covered by the statute.

We think, therefore, that the statute of Arkansas is not repugnant to the 14th Amendment, and the judgment is affirmed.

257] *UNITED STATES, Plff. in Err.,

v.

HERMAN F. GARBISH.

(See S. C. Reporter's ed. 257-261.)

Master and servant — regulating hours of labor — extraordinary emergency.

The building of a public levee on the Mississippi river in the eastern district of Louisiana cannot be said to present at all times an extraordinary emergency, within the meaning of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), regulating the hours of labor of laborers and mechanics on public works, and making it unlawful to require or permit such employees to work a longer time except in cases of extraordinary emergency.

[For other cases, see Master and Servant, I. b, in Digest Sup. Ct. 1908.]

[No. 362.]

Argued November 7, 1911. Decided December 11, 1911.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment sustaining a demurrer to an indictment for violating a Federal statute regulating the hours of labor on public works. Reversed and remanded with directions to overrule the demurrer.

See same case below, 180 Fed. 502.

The facts are stated in the opinion.

NOTE.—What constitutes extraordinary emergency within the meaning of a statute regulating hours of labor.

Statutes limiting hours of labor frequently make an exception in favor of cases of extraordinary emergency. Definitions of the phrase as used in this connection are not numerous, but it is defined in *United States v. Sheridan-Kirk Contract Co.* 149 Fed. 809, as "something unforeseen, sudden, unexpected, which would call for immediate action or remedy." It imports a sudden and unexpected happening; an unforeseen occurrence or condition calling for immediate action to avert imminent danger to health or life or property; an unusual peril, actual, and not imaginary, suddenly creating a situation so different from the usual or ordinary course in the prosecution of the work that the court may and must conclude that the legislators contemplated excepting from the operation of the law such an occurrence so sudden, rare, and unforeseen. *Penn Bridge Co. v. United States*, 29 App. D. C. 452, 10 Ann. Cas. 719. This is in accord with the words of Mr. Justice McKenna in the principal case: "It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden

Solicitor General Lehmann argued the cause and filed a brief for plaintiff in error.

Mr. E. D. Saunders argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Defendant in error was indicted for violation of the act *of Congress of August [258 1, 1892, chapter 352, 27 Stat. at L. 340, U. S. Comp. Stat. 1901, p. 2521, which restricts the service and employment of all laborers and mechanics who are now or may hereafter be employed by the government or by any contractor or subcontractor, upon any of the public works of the United States, to eight hours in any one calendar day, and makes it unlawful for any officer of the government or any such contractor to require or permit any such laborer to work a longer time "except in cases of extraordinary emergency."

The indictment set out in proper form that defendant in error had violated the law by permitting and requiring his employees engaged in building a public levee on the Mississippi river, which was part of the public works of the United States, to work more than eight hours "on the 17th day of August, 1908, at a time and under circumstances when there was no extraordinary emergency, for the reason that at that season of the year, to wit, during the months of August, September, October, and November and December, the waters of the Mississippi river annually fall below the

and unexpected, but an extraordinary one,—one exceeding the common degree." The phrase cannot contemplate conditions of danger which necessarily exist and inhere in the work to be done, and which will always be present from the beginning to the end of the work. *United States v. Sheridan-Kirk Contract Co.* supra.

A change by public officials in the specifications of a contract for the erection of a concrete bridge, made after the date of the contract, by which the contractor was required to put in a certain amount of concrete masonry within a limited time, which was impossible if only eight hours' service was required, because if the work was stopped at the end of eight hours the concrete would harden and might be cleft, causing cracks and perhaps disintegration of the arch, and because the scarcity of workmen forbade working in shifts, does not present a case of "extraordinary emergency" with in the meaning of D. C. Code, § 892 [31 Stat. at L. 1334, chap. 854], limiting to eight hours the daily labor of workmen on public works, except in cases of such emergency. *Penn Bridge Co. v. United States*, supra. The court said that both the District and the contractor should have known that concrete in an arch may not harden in

level of the surrounding land and are retained within the banks of said river without the necessity of any artificial levees, as was true on August 17, 1908." It is further charged that the levees were being constructed in the usual and ordinary course of levee building, done annually for the increase in size and strength of such levees, in preparation for the high waters that come down the river, the levees being of standard size and sufficient to resist usual high water, but not unusual high waters that occasionally, although not every year, come down the river, it being the policy, rule, and custom of the government to increase the standard of levees by destroying inferior levees, and replacing them with stronger and higher ones year by year until the levees shall all be brought to a standard able to withstand any unusual floods. And it is further charged that the 259] particular *work which the defendant in error was constructing was nothing unusual or out of the ordinary, but was being done in pursuance of the policy indicated and at the usual time, so as to allow the levee time to settle and pack, and become ready and able to serve the purposes for which it was constructed; that is, to withstand and retain the high waters of the Mississippi river before their usual annual rise, and the time of construction being the usual and customary time to so complete and perfect the levee, before the annual rise of the waters, as would exist in the construction of any levee on the river "any year, and at any place, and by any con-

tractor, all of whom know, as did the said Garbish, that the waters of the Mississippi river annually fall and are retained within the natural banks thereof during the period or season aforesaid, and begin to rise above the natural banks thereof, and therefore to need artificial levees to retain them, in the month of January each year."

Defendant demurred to the indictment, on the ground that it did not set forth any offense against the laws of the United States, or any violation of the laws of the United States. The demurrer was sustained.

In passing upon the demurrer the court said that the defendant rested his case upon the proposition "that the building of levees on the Mississippi river, in the eastern district of Louisiana, at all times presents an extraordinary emergency," and hence that the work on the river is exempt from the operation of the law. The court took judicial notice of the fact asserted and sustained the conclusion from it. The court said that certain facts were within the common knowledge of the people of the district, which, taken in connection with the specific allegations of the indictment, overcame the mere conclusion of the pleader that no extraordinary emergency existed, and instanced the following: The work on the levees was absolutely necessary for the preservation of property *and the [260 cultivation of the land; therefore it has always been usual for levee work to proceed with the utmost despatch, and the labor of the day has never been restricted to eight

a given part of eight hours, and that since the contract permitted the District engineers to make changes in the plan, the contractor might have contemplated that the excavation would need greater depth to support the arch of the bridge than an earlier examination had shown likely to be required.

But the installation of a new pump by the commissioners of a city, in order to increase the pumping capacity of the waterworks system and to guard against the disastrous consequences which might probably result from any breakage or impairment of the single pump which had theretofore been the sole reliance of the city, and had been in almost continuous operation, presented a case of extraordinary emergency within the meaning of a statute providing that eight hours shall constitute a legal day's work for all classes of employees in the state, except in cases of "extraordinary emergency caused by fire, flood, or danger to life or property." *People ex rel. Usoy v. Waring*, 52 App. Div. 36, 64 N. Y. Supp. 865.

A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston Navy Yard, does not create an "extraordinary emergency," within the meaning of the exception

in the act of Congress of August 1, 1892, forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589.

The building of a dam across the Ohio river is not, in its nature, emergency work, so as to present, during the entire life of the contract for its construction, a case of extraordinary emergency within the meaning of this statute. *United States v. Sheridan-Kirk Contract Co.* 149 Fed. 809.

And the extraordinary emergency presented by a flood which will justify the builder of such dam in requiring or permitting his workmen to work more than eight hours a day does not continue during the time required to repair the injuries and remove the obstacles caused by the flood. *Ibid.*

On the general question of limitation of hours of labor by statute or ordinance—see note to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33. And as to the constitutionality of such statutes—see note to *Atkin v. Kansas*, 48 L. ed. U. S. 148.

hours. "It is necessary, the court said, that the levees be built in as short a time as possible, that they may settle and that the grass may become well rooted on them before they are called upon to bear the strain of the high river.

From these facts the court assumed the existence of others, as follows:

"It is true that the months of August, September, October, November, and December are the most favorable for levee building, but there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank full, necessarily no levees can be built. Statistics of the river's height at New Orleans show that during the past twenty-five years the river has been bank full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An unprecedented rain or an early freeze, followed by a thaw anywhere in the valley of the Mississippi river or its tributaries, might unexpectedly cause the river to rise at New Orleans. No one can foresee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might significantly fail?" [180 Fed. 503].

The government insists that the court assumed too extensive a judicial knowledge, and urges that the most important of the assumed facts, that the river has been bank full almost every day in the year, and the extension of the fact to the locality where defendant was working, is contradicted by the official hydrographs, 1871 to 1907, and 1907 to 1911, attached to the government's brief, from which it appears that at Carrollton, which is a few miles above New Orleans and a few miles below St. James parish, the river, from 1872 to 1910, had never been above the stage at which it begins to interfere with the construction of levees, in August, September, October, and November, and only a few days in August, 1875, touched that stage; and the government further contends that it was not a matter to be judicially taken notice of that the work could not be properly expedited unless the laborers be employed more than eight hours a day. But, aside from these considerations, it has been decided that no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of the act. *Ellis v. United States*, 206 U. S. 246, 256, 257, 51 L. ed. 1047, 1052, 1053, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589. And, besides, the extraordinary emergency

which relieves from the act is not one that is contemplated and inheres necessarily in the work. *United States v. Sheridan-Kirk Contract Co.* 149 Fed. 809. It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, —one exceeding the common degree. We must assume that the phrase was used with a consciousness of its meaning and with the intention of conveying such meaning. As said by the Solicitor General, "the phrase 'continuing extraordinary emergency' is self-contradictory."

The building and repair of levees on the Mississippi river is one of the most important and conspicuous of the public works of the United States, and if it had been intended to exempt it from the provisions of the act of August 1, 1892, which declared a public policy in regard to labor, it would have been expressed. There is no hardship in this to a contractor. He has before him the law and the conditions affecting the work which he may undertake, and can govern himself accordingly.

Judgment reversed and cause remanded with directions to overrule the demurrer.

*CHARLES F. CONSAUL and Ida M. Moyers, Administrators of the Estate of Gilbert Moyers, Deceased, Apts.,
v.

HORACE S. CUMMINGS, Administrator of the Estate of George B. Edmonds, Deceased.

(See S. C. Reporter's ed. 262-274.)

Partnership — accounting by surviving partner.

1. The surviving member of a special

NOTE.—On the rights of the estate of a law partner in the compensation for business unfinished at the time of his death—see note to *Clifton v. Clark*, 66 L.R.A. 821.

On the effect of dissolution of partnership generally—see note to *Mason v. Pewabic Min. Co.* 33 L. ed. U. S. 524.

As to the right of partner to compensation for services on winding up firm business—see note to *Ruggles v. Buckley*, 101 C. C. A. 549.

As to the allowance of interest in partnership accounting—see note to *Winchester v. Glazier*, 9 L.R.A. 425.

As to laches as a defense—see notes to *Middletown v. Newport Hospital*, 1 L.R.A. 191; *Calhoun v. Delhi & M. R. Co.* 8 L.R.A. 248; *Coffey v. Emigh*, 10 L.R.A. 125; *Pratt v. Carroll*, 3 L. ed. U. S. 627; *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720 and *Abraham v. Ordway*, 39 L. ed. U. S. 1037.

partnership between lawyers for the prosecution of a number of claims against the United States in Congress and before the court of claims, the compensation for which service was contingent on success, and was to be paid *in solido* and divided between the partners in the same manner, cannot claim, on an accounting, to be entitled to compensation for such services rendered by him after the dissolution, in the prosecution and collection of the claims, as he had agreed in the partnership agreement to render.

[For other cases, see Partnership, VI. 1, in Digest Sup. Ct. 1908.]

Partnership — rights of personal representative of deceased partner.

2. The interest of the estate of a deceased member of a special partnership between lawyers for the prosecution of certain claims against the United States in Congress and before the court of claims, in the fees earned under the partnership agreement, cannot be diminished on the theory that the contract of employment by the clients was revoked by his insanity or death, where they made no such objection, and apparently acquiesced in the arrangement by which the claims were put in the hands of the other partner.

[For other cases, see Partnership, 187-190, in Digest Sup. Ct. 1908.]

Interest — on accounting — from what time.

3. The surviving partner is properly charged with interest on the balance found, on an accounting, to be due to the personal representatives of the deceased partner, from the date when the bill was filed, where, in response to a demand for settlement, he at first promised to make a statement, and then contended, without substantial support, that the partnership was dissolved because the deceased partner had transferred his interest in the fees, and also resisted the accounting, and failed to produce the proper books, vouchers, and statements,—especially, where he did not except to this method of calculating interest, but, on the contrary, obtained a ruling that, on the same basis, he should be allowed interest on advances made by him to the deceased partner.

[For other cases, see Interest, I. 1, in Digest Sup. Ct. 1908.]

Laches — suit for accounting — delay.

4. The delay in filing the bill will not bar a suit for an accounting from the surviving partner in a special partnership between lawyers for the prosecution of a number of claims against the United States in Congress and before the court of claims, the fees for which services were contingent upon success, and were to be paid *in solido*, and divided between the partners in the same manner, where such bill, though not filed until eight years after the other partner had been adjudged a lunatic, and three years after his death, was filed within four months after the fees were collected.

[For other cases, see Limitation of Actions, I. b, in Digest Sup. Ct. 1908.]

[No. 38.]

Argued November 6, 1911. Decided December 11, 1911.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, on a third appeal, affirmed a decree of the Supreme Court of the District for an accounting by a surviving partner. Affirmed.

See same case below on 1st appeal, 24 App. D. C. 36; 2d appeal, 30 App. D. C. 540; 3d appeal, 33 App. D. C. 132.

Statement by Mr. Justice Lamar:

The facts in these cases are fully set out in the decisions in the various appeals reported in 17 App. D. C. 269, 24 App. D. C. 36, 30 App. D. C. 540, 33 App. D. C. 132. Only what is material to an understanding of the assignments of error need be now stated.

George B. Edmonds was an attorney in Washington, practising in the court of claims. Under agreements to pay contingent fees, and giving him power of substitution, he represented a large number of clients, who had claims pending in that court and before Congress. A schedule was attached to a contract made in 1888 by Edmonds with Gilbert Moyers, also an attorney, in which they agreed "as special partners to prosecute these claims in Congress and before the court. The fees and expenses were to be equally divided. Edmonds also stipulated therein that said "Moyers shall represent and be associated with me in the prosecution of the said claims as joint attorney of record."

Edmonds was adjudged a lunatic in 1891, and Cummings was appointed his committee. There had only been a few collections, and most of the claims were still pending at the time of Edmonds's death, in 1896. By virtue of appropriations made in March, 1899, Moyers collected a large amount in May, 1899. Cummings made a demand on him for a settlement, and Moyers several times promised to make a statement, explaining that the delay was caused by [264] bad health. Nothing having been done, Cummings was appointed administrator of Edmonds on August 22, 1899, and on September 16, 1899, filed a bill for an accounting. Among other things Moyers, in his answer, claimed that Edmonds, in consideration of money advanced by him in ignorance of the lunacy proceedings, had conveyed to Moyers all his interest in the fees that might be collected. This transfer he claimed operated as a dissolution of the firm. The court ordered an accounting; Moyers appealed. That decree having been affirmed, the case was referred to a master. He found that Edmonds had not sold his inter-

est in the fees and that the partnership had not been dissolved, but allowed Moyers credit for the amount advanced in 1892. He found that the fees earned aggregated about \$26,000, and after deducting the expenses and allowing Moyers credit for the advances, found balance in favor of complainant, with interest thereon, from September 16, 1899, the date Moyers should have accounted. Moyers, on the appeal, offered no objection to this award of interest, but claimed that, under the same rule, interest should have been allowed him on the advances made in 1892. The court of appeals sustained this view, and directed that, in restating the account, interest should be allowed Moyers on these advances from, say, January, 1893, to September 16, 1899. On a subsequent hearing the account was thus restated. On a later appeal the court held that, as Moyers had taken no exception, this ruling was conclusive. The court also held that Moyers was entitled to credit for expenses advanced in claims which were finally disallowed by the court.

During the litigation other claims were pending in the court of claims. But in view of the controversy over the fees, Moyers abandoned some of them, and on his advice a few of the claims were put in the hands of attorneys associated with Moyers in business. They made collection, but the master charged Moyers with the proportion 265] of the *fees thereon due Edmonds under the original contract. Other claims were withdrawn by clients and placed with attorneys not connected with Moyers in business. Congress passed additional acts of appropriation, by virtue of which some of the other claims in the schedule were collected. These items were included in the master's final statement of account. This was approved by the chancellor and affirmed on appeal. The case is here on numerous assignments of error, all of which have been abandoned except those in which Moyers's administrators claim that (1) he should have been allowed compensation for services after the dissolution of the firm; (2) that he should not have been charged with interest from September 16, 1899, but only from the final decree of November, 1908, when for the first time the amount due was made certain; and (3) the refusal to dismiss the bill on the ground of complainant's laches.

Messrs. Charles F. Consaul and A. S. Worthington argued the cause, and, with Miss Ida May Moyers, filed a brief for appellants:

This special partnership, like any other partnership, ceased and terminated at latest with the death of Edmonds.

Scholefield v. Eichelberger, 7 Pet. 586, 8 L. ed. 793; Burwell v. Cawood, 2 How. 560-576, 11 L. ed. 378-384; Davis v. Christian, 15 Gratt. 11; Gratz v. Bayard, 11 Serg. & R. 41; Knapp v. McBride, 7 Ala. 19; Goodburn v. Stevens, 5 Gall. 1; Williamson v. Wilson, 1 Bland, Ch. 418; Griswold v. Waddington, 15 Johns. 82; White v. Union Ins. Co. 1 Nott, & M'C. 559, 9 Am. Dec. 726; Story, Partn. 7th ed. § 317; Parsons, Partn. 4th ed. § 342; Ames v. Downing, 1 Bradf. 321.

The partnership having thus been dissolved by operation of law, upon the death of Edmonds, his estate would, at most, have a right to recover from Moyers or his estate, only one half of the reasonable value of partnership services rendered during the existence of the partnership, *viz.*, prior to the death of Edmonds, and even this distribution should be made only after deduction in favor of Moyers of his expenses incurred in the prosecution of the partnership claims or business.

Babbitt v. Riddell, 1 Grant, Cas. 161; Justice v. Lairy, 19 Ind. App. 277, 65 Am. St. Rep. 405, 49 N. E. 459; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Starr v. Case, 59 Iowa, 491, 13 N. W. 645; Rowell v. Rowell, 122 Wis. 24, 99 N. W. 473; Lamb v. Wilson, 3 Neb. (Unof.) 496, 92 N. W. 167, 3 Neb. (Unof.) 505, 97 N. W. 325, 70 Neb. 729, 98 N. W. 37; Vanduzer v. McMillan, 37 Ga. 299; Royster v. Johnson, 73 N. C. 475; Newell v. Humphrey, 37 Vt. 270; Zell's Appeal, 126 Pa. 333, 17 Atl. 647; Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; Schenkl v. Dana, 118 Mass. 238; Cameron v. Francisco, 26 Ohio St. 190; Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; Turnbull v. Pomeroy, 140 Mass. 117, 3 N. E. 15; Robinson v. Simmons, 146 Mass. 176, 4 Am. St. Rep. 299, 15 N. E. 558; Condon v. Callahan, 115 Tenn. 291, 1 L.R.A. (N.S.) 643, 112 Am. St. Rep. 833, 89 S. W. 400, 5 Ann. Cas. 659; Brown v. De Tastet, Jacob, 284, 23 Revised Rep. 59; Sterne v. Goep, 20 Hun, 397; Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731.

A power of attorney dies with the death of the attorney.

Hunt v. Rousmanier, 8 Wheat, 174, 5 L. ed. 589.

Any relation of employer and employee existing between Edmonds and Gilbert Moyers at the time of the death of Edmonds terminated with the death of the employer.

Mechem, Agency, § 249; Gage v. Allison, 1 Brev. 495, 2 Am. Dec. 682; Merrick's Estate, 8 Watts & S. 402; Adriance v. Rutherford, 57 Mich. 170, 23 N. W. 718.

Interest is not properly allowable on running or open accounts, or on accounts which

are unliquidated, or concerning which there is an honest dispute between the parties, and is not usually allowable on partnership accountings until a balance has been struck.

Gyger's Appeal, 62 Pa. 73, 1 Am. Rep. 382; Clark v. Clark, 46 Conn. 590; Imperial Hotel Co. v. H. B. Claflin Co. 175 Ill. 124, 51 N. E. 610; Pieser v. Minkota Mill. Co. 94 Ill. App. 597; Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142; Sweeney v. Neely, 53 Mich. 424, 19 N. W. 127; Houston v. Crutcher, 31 Miss. 51; Holden v. Peace, 39 N. C. (4 Ired. Eq.) 223, 45 Am. Dec. 514; Pengra v. Wheeler, 24 Or. 532, 21 L.R.A. 726, 34 Pac. 354; Grubb's Appeal, 66 Pa. 117, 3 Mor. Min. Rep. 416; Stearns v. Mason, 24 Gratt. 484; South Carolina v. Port Royal & A. R. Co. 89 Fed. 565; Haskell v. Vaughan, 5 Sneed, 618; Rogers v. Yarnell, 51 Ark. 198, 10 S. W. 622; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Raymond Bros. v. Williams, 40 Iowa, 117; Williams v. Hersey, 17 Kan. 18; Ory v. Winter, 6 Mart. N. S. 606; Flannery v. Anderson, 4 Nev. 437; Edwards v. Dargan 30 S. C. 177, 8 S. E. 858; Stamps v. Tennessee Producers' Marble Co. — Tenn. —, 59 S. W. 769.

In some cases, it is true, interest has been allowed in suits for partnership accounting, or on open accounts, but in every one of those cases there were peculiar circumstances which led the courts to believe that the party held chargeable with interest had been guilty of misconduct.

Freeman v. Freeman, 142 Mass. 98, 7 N. E. 710; Banner v. May, 2 Wash. 221, 26 Pac. 248; Ryan Drug Co. v. Hvamsahl, 92 Wis. 62, 65 N. W. 873.

The bill should have been dismissed for lack of equity in view of the obvious laches of the complainant.

Abraham v. Ordway, 158 U. S. 416, 421, 39 L. ed. 1036, 1039, 15 Sup. Ct. Rep. 894; McKnight v. Taylor, 1 How. 161, 11 L. ed. 86; Piatt v. Vattier, 9 Pet. 405, 416, 9 L. ed. 173, 177; Cholmondeley v. Clinton, 2 Jac. & W. 1, 22 Revised Rep. 99; Kane v. Bloodgood, 7 Johns. Ch. 93, 11 Am. Dec. 417; Decouche v. Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478; Prevost v. Gratz, 6 Wheat. 481, 5 L. ed. 311; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Willison v. Watkins, 3 Pet. 44, 7 L. ed. 596; Miller v. M'Intyre, 6 Pet. 61, 66, 8 L. ed. 320, 322; Bowman v. Wathen, 1 How. 189, 11 L. ed. 97; Badger v. Badger, 2 Wall. 87, 96, 17 L. ed. 836, 839; Norris v. Haggin, 136 U. S. 386, 34 L. ed. 424, 10 Sup. Ct. Rep. 942; Harwood v. Cincinnati & C. Air-Line R. Co. 17 Wall. 78, 21 L. ed. 558; Godden v. Kimmell, 99 U. S. 201-211, 25 L. ed. 431-434; Wollensak v. Reiher, 115 U. S. 96-102, 29 L. ed. 350-352, 5 Sup. Ct. Rep. 1137; 56 L. ed.

Wagner v. Baird, 7 How. 234-258, 12 L. ed. 681-691; Upton v. Tribilcock, 91 U. S. 45-56, 23 L. ed. 203-207; Brown v. Buena Vista County, 95 U. S. 161, 24 L. ed. 423; Richards v. Mackall, 124 U. S. 183-187, 31 L. ed. 396-399, 8 Sup. Ct. Rep. 437; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Willard v. Wood, 1 App. D. C. 44; Sis v. Boarman, 11 App. D. C. 116; Gildersleeve v. New Mexico Min. Co. 161 U. S. 578, 40 L. ed. 814, 16 Sup. Ct. Rep. 663; Galliher v. Cadwell, 145 U. S. 368-372, 36 L. ed. 738-740, 12 Sup. Ct. Rep. 873; Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Stearns v. Page, 7 How. 819, 12 L. ed. 928; Ware v. Galveston City Co. 146 U. S. 102, 36 L. ed. 904, 13 Sup. Ct. Rep. 33; Moore v. Greene, 19 How. 69, 15 L. ed. 533; Beaubien v. Beaubien, 23 How. 190, 16 L. ed. 484; New Albany v. Burke, 11 Wall. 107, 20 L. ed. 159; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Hardt v. Heidweyer, 152 U. S. 547, 38 L. ed. 548, 14 Sup. Ct. Rep. 671; Marsh v. Whitmore, 21 Wall. 178-185, 22 L. ed. 482-485; Felix v. Patrick, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862.

In an ordinary professional partnership, and especially in the special partnership of Moyers and Edmonds, the adjudged insanity of Edmonds operated, under the well-recognized law of agency, to do three things, to-wit:

First. His adjudged insanity abrogated all Edmonds's contracts with claimants, and all powers of attorney held by him.

Second. It operated to remove from the special partnership, therefore, both his contribution or capital represented by his control of claims or business, and also made it impossible for him longer to render personal services in partnership business.

Third. It annulled Edmonds's authority as agent or attorney for the claimants, and hence necessarily annulled the authority of Moyers as subagent, thereby dissolving the partnership relation just as effectually and just as necessarily as though by death of Edmonds, or as by one partner accepting a judicial position, which precluded him from practising law.

Parsons, Partn. §§ 362, 363.

The distinction between professional partnerships and those formed for commercial purposes is not a matter of mere recent recognition.

Farr v. Pearce, 3 Madd. Ch. 74; 1 Parsons, Contr. *198; Weeks, Attorneys at Law, p. 505, §§ 246, 256; Ratcliff v. Baird, 14 Tex. 43; Isler v. Baker, 6 Humph. 85; Story, Agency, 9th ed. § 487; Mechem, Agency,

§§ 258, 262; *Clark & S. Agency*, §§ 188 (a), 188 (d).

The employment was that of Edmonds, and not of Moyers and Edmonds, either jointly or jointly and severally.

Baxter v. Billings, 28 C. C. A. 85, 49 U. S. App. 767, 83 Fed. 790.

Mr. Charles Cowles Tucker argued the cause, and, with Mr. J. Miller Kenyon, filed a brief for appellee:

A bill in equity may be maintained by personal representatives of a deceased partner, against survivors, for all accounting and discovery.

Denver v. Roane, 99 U. S. 355-361, 25 L. ed. 476-479; *Dye v. Bowling*, 82 Mo. App. 592; *Brew v. Cochran*, 141 Fed. 462; *Bowdish v. Metzger*, 71 Kan. 754, 81 Pac. 484.

A surviving partner is entitled to no allowance for winding up the business, unless otherwise stipulated; and this rule applies to partnerships between attorneys.

Denver v. Roane, 99 U. S. 355-361, 25 L. ed. 476-479; *Little v. Caldwell*, 101 Cal. 560, 40 Am. St. Rep. 89, 36 Pac. 107; *Osment v. McElrath*, 68 Cal. 471, 58 Am. Rep. 17, 9 Pac. 731; *Justice v. Lairy*, 19 Ind. App. 279, 65 Am. St. Rep. 405, 49 N. E. 459; *Porter v. Long*, 124 Mich. 592, 83 N. W. 601.

Where an attorney at law refuses to act as a partner, and repudiates his obligation to aid in the prosecution of one of the firm's cases, he is not entitled to fees subsequently earned in the cause.

Denver v. Roane, 99 U. S. 355-361, 25 L. ed. 476-479; *Shaeffer v. Blair*, 149 U. S. 258, 37 L. ed. 725, 13 Sup. Ct. Rep. 856; *Blair v. Shaeffer*, 33 Fed. 224; *Gilmore v. Ham*, 40 Am. St. Rep. 570, note; *Breaux v. Le Blanc*, 69 Am. St. Rep. 422, note; *Miller v. Hale*, 96 Mo. App. 430, 70 S. W. 258.

Under the circumstances of this particular case, it would be inequitable to allow compensation to the surviving partner.

Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; *Robinson v. Simmons*, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558; *Clifton v. Clark*, 66 L.R.A. 821, note; *Williams v. Pedersen*, 17 L.R.A.(N.S.) 396, note; *Condon v. Callahan*, 5 Ann. Cas. 664, note.

As to executory contracts only partly fulfilled, the death of one partner does not absolve the other from rendering the services contracted for, and the active functions of the partnership are continued in existence until the full performance by the surviving partner.

Clifton v. Clark, 1 Ann. Cas. 401, note, 83 Miss. 446, 66 L.R.A. 821, 102 Am. St.

Rep. 458, 36 So. 251; *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107.

As to liability of a surviving partner for interest on the share of his deceased partner, see the note to *Porter v. Long*, 4 Ann. Cas. 180.

Laches, of course, means an inexcusable delay in asserting a right, or a neglect to do what in the law one should have done, for an unreasonable, unexplained, or inexcusable length of time, under circumstances permitting diligence.

24 Cyc. 840; 16 Cyc. 252.

There is no room to apply the doctrine of laches to the instant case.

McIntire v. Pryor, 173 U. S. 38, 53-59, 43 L. ed. 606, 611-613, 19 Sup. Ct. Rep. 352.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

In this accounting of the affairs of a special partnership between attorneys at law, the survivor claims compensation for services rendered after dissolution of the firm.

Claims of this sort are not favored. They lead to efforts to prove a disparity between the partners, when the law implies equality. They necessitate a balancing of the value of the work of each in securing the business and earning the profits, as well as a comparison of the time they may spend on the matters under consideration. Each partner is bound to devote himself to the firm's business, and there is no implied obligation that, for performing this duty, he should be paid more than his proportionate share of the gains. Neglect by one to do his part may be of such character as to justify a dissolution. But as long as the firm continues, there is usually no deduction because one partner has not been as active as the other. The same is true where death prevents either of the partners *from[270 performing his contract. The law did not permit him to appoint a substitute, nor can his personal representative, no matter how well qualified, assist in winding up the affairs of the firm. Whether that be considered a right or duty, it is in either event cast on the survivor. In performing it he only carries out an obligation implied in the partnership relation, and is therefore entitled to no compensation for thus doing what he was bound to do, and what would have been imposed on the other had the order of their death been different. To allow the survivor compensation wherever he continues the business would be to offer an inducement to delay the settlement, which ought to be made as soon as possible.

To this general rule there are exceptions, where, under peculiar circumstances, the

principles of equity entitle the survivor to compensation. *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541. Thus, where, by authority of law, or under a power in the will, the personal representative consents that the business may be continued by the survivor, the estate must pay for such additional services. Or where, without such consent, and at his own risk, the survivor continues the business and makes a profit, the estate is bound to allow reasonable compensation if it elects to share in the gains thus made.

So, where a member of a firm, by his voluntary act, dissolved the partnership, the partner who continued the business was allowed compensation for performing services in which he had the right to have expected the continued assistance of the other. Extra compensation has also been allowed in a few cases where, in order to realize on the assets, it was absolutely necessary for the survivor to continue the business beyond the reasonable time allowed for winding up its affairs. See *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459; *Zell's Appeal*, 126 Pa. 329, 17 Atl. 647; *Schenkl v. Dana*, 118 Mass. 236; *Gray v. Hamil*, 82 Ga. 375, 6 L.R.A. 72, 10 S. E. 205; *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Cameron v. 271] Francisco*, 26 Ohio St. 190; **Robinson v. Simmon*, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558; *Holmes v. Higgins*, 1 Barn. & C. 74, 2 Dowl. & R. 196, 1 L. J. K. B. 47. Then, too, there is a suggestion in *Denver v. Roane*, 99 U. S. 359, 25 L. ed. 478, that there may be "a different rule in cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor."

This point is not involved, and on it no ruling is made, because we are not dealing with questions between the administrator of the deceased and the surviving member of an ordinary law partnership, where the latter conducts to a conclusion the business of the firm, under circumstances where there may be a right from time to time to call on the client for compensation for the value of services rendered, and even though the case is finally lost. Here the agreement related solely to litigation in which compensation was for success, and not for the value of services rendered. Such payment was to be *in solido*, and the partners agreed that the fees should be divided *in solido*.

Moyers insists, however, that the peculiar facts of this case bring him within the other exceptions pointed out above; that when Edmonds was adjudged a lunatic, in 1891, the firm was dissolved; that with the

knowledge of Cummings, who was acting as Edmonds's committee, Moyers continued to prosecute the claims, paid out large sums for necessary expenses, and, in spite of probable failure, rendered valuable services, which finally earned the fees now to be divided. He claims that in equity and good conscience he should be paid reasonable compensation for this work, in which Edmonds rendered no assistance.

Moyers put in his services against the claims turned over to the firm by Edmonds, who stipulated that Moyers should *represent* him, and to that end "be associated in the prosecution of the claims as joint attorney of record." Edmonds rendered little or no assistance, and apparently was not expected to do so, for Moyers himself testified that "the contract was 'an em-[272 ployment of me to attend to certain business for him in the court of claims in regard to certain cases. It might be styled a limited partnership. It was not a general partnership.'" In prosecuting the claims and collecting the money Moyers, therefore, only did what he contracted to do, and is not entitled to compensation beyond that set out in the agreement. That these services extended over a long period does not increase his share nor lessen Edmonds's interest in the profits. Under the contract, Moyers agreed to prosecute the claims, and could neither abandon them without just cause nor advise clients to put them in the hands of others. If he did so, he is chargeable with the fees which should have been earned by him under the articles of partnership. Neither can Edmonds's interest be diminished on the ground that the contract of employment by the client was revoked by his insanity or death. They made no such objection, and apparently acquiesced in Edmonds's arrangement by which they were put in the hands of Moyers. The survivor cannot retain the business thus coming to him by virtue of a contract with Edmonds without accounting for his share of the fees.

Moyers was charged with interest on the balance due from September 16, 1899, when the suit was filed, being the date on which the master found he should have accounted with the complainant. Moyers contends that what, if anything, was due, was uncertain; that it required numerous references in order to properly side the account; that it was not liquidated until the final decree in November, 1908, when, for the first time, the true balance was ascertained; and hence that interest should only run from that date. Interest is allowed by way of damages for failure to pay money when it is due, and frequently is not allowed except from the time the amount to

be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date. Here the defendant *at first promised to make a statement, then contended, without substantial support, that the partnership was dissolved because Edmonds had transferred his interest in the fees. He resisted the accounting, failed to produce books, vouchers, and statements proper to be kept by a surviving partner. As the court of appeals said, the delay and difficulty in reaching a conclusion were largely due to his failure to keep proper books. Under the circumstances the master properly allowed interest from the date the bill was filed. *Spalding v. Mason*, 161 U. S. 395, 40 L. ed. 745, 16 Sup. Ct. Rep. 592; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237, 247. Moyers did not except to this method of calculating interest; on the contrary, he obtained a ruling that, on the same basis, he should be allowed interest from 1892 on advances then made by him to Edmonds. He cannot now complain that the account was stated in accordance with a rule in which he acquiesced, and the benefit of which he invoked.

In the last assignment, it is alleged that the court erred in not dismissing the bill because of complainant's laches in filing it. It is contended that after Cummings was appointed committee of Edmonds, in 1891, he knew of the contract of special partnership and that Moyers was prosecuting these claims, and not only made no demand for a settlement, but permitted Moyers to do all the work, incur all of the expenses, and run all of the risks, without notifying him that Edmonds's representative would claim one half of the profits. It is urged that such conduct was inequitable, and that to wait until eight years before filing proceedings constituted laches which requires a dismissal of the bill. We find nothing in the facts or in the relation of the parties that made it incumbent on Cummings to warn Moyers of Edmonds's claim, even if Cummings had the full knowledge of all the facts which is necessary to raise any such obligation. Edmonds's right was rooted in the contract, and has only been enforced in pursuance *of its terms. Cummings had no title to Edmonds's property, but was a mere curator, with limited powers. He could not have sold Edmonds's interest in these claims to Moyers or anyone else without an order of court. For a much stronger reason he could not accomplish the same result and destroy Edmonds's right therein by a mere nonaction. The fees were not collected until the spring of

1899, and within four months thereafter the bill for an accounting was filed.

The decree is affirmed.

UNITED STATES, Plff. in Err.,
v.

JOHN MORGAN and Alfred Y. Morgan.

(See S. C. Reporter's ed. 274-282.)

Food and drugs — prosecution — notice and hearing.

The notice and preliminary hearing by the Department of Agriculture which must be given under the pure food and drug act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1187), to the person from whom the sample was obtained, when, upon examination by the board of chemistry, an article is found to be adulterated or misbranded, is not a condition precedent to the prosecution of a manufacturer, instituted by the Department of Agriculture or its agent, for shipping misbranded goods in interstate commerce.

[No. 463.]

Argued and submitted October 19, 1911.
Decided December 11, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, sustaining a motion in arrest of judgment in a prosecution for shipping misbranded goods in interstate commerce. Reversed.

See same case below, 181 Fed. 587.

Statement by Mr. Justice Lamar:

*The defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts, and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce.

NOTE.—As to what constitutes a violation of pure food regulations—see note to *Brina v. United States*, 105 C. C. A. 559.

They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. 587), and from a later order sustaining the motion in arrest, the government brought the case here under criminal appeals act.

Solicitor General **Lehmann** argued the cause, and, with Messrs. Jesse C. Adkins and Loring C. Christie, filed a brief for plaintiff in error:

It is uniformly held, in construing statutes imposing upon certain public officers the duty of their enforcement, that such duty is not exclusive, but proceedings for violations of the statute may be begun in the usual way.

Com. v. Carroll, 145 Mass. 403, 14 N. E. 618; *Com. v. Murphy*, 147 Mass. 577, 18 N. E. 418; *Com. v. Mullen*, 176 Mass. 132, 57 N. E. 331; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 223, 62 N. E. 40; *Com. v. Spencer*, 28 Pa. Super. Ct. 301; *Com. v. Arow*, 32 Pa. Super. Ct. 1; *People v. Beaman*, 102 App. Div. 155, 92 N. Y. Supp. 295; *Com. v. Bowers*, 140 Mass. 483, 5 N. E. 469; *Atty. Gen. v. Great Northern R. Co.* 1 Drew. & S. 154, 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556.

Mr. **Alexander Thain** submitted the cause for defendants in error:

The courts have already had occasion to comment upon the fact that the usefulness of this act is threatened by the unreasonable zeal sometimes shown in its enforcement.

Re Wilson, 168 Fed. 566; *French Silver Dragée Co. v. United States*, 103 C. C. A. 316, 179 Fed. 824.

When an act, not before subject to punishment, is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued.

Wharton, *Crim. Pl. & Pr.* 9th ed. § 230.

The rules governing statutory construction sustain the construction put upon this statute by the court below.

Beal, *Cardinal Rules of Legal Interpretation*, 2d ed. 443; *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 557, 565, 25 L. ed. 892, 894; *Todd v. United States*, 158 U. S. 278, 288, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *Harrison v. Vose*, 9 How. 373, 378, 13 L. ed. 179, 181; 1 Wharton, *Precedents*, p. 28; Wharton, *Crim. Pl. & Pr.* 9th ed. § 166.

56 L. ed.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The Federal courts have not agreed as to the effect of the provision for notice and hearing, found in § 4 of the pure food and drug act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1187). *United States v. Nine Barrels of Olives*, 179 Fed. 984; *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the pure food law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce, is guilty of a misdemeanor. In aid of enforcement of the statute, it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vender that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made "amenable to the prosecutions, fines, and penalties."

*The act, therefore, declares (§ 4)[280] that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (§ 5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (§ 5) that complaints may be made to the district attorney by state health officials. In that class of cases, no doubt because the state agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such state officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act, in providing for proceedings against such guarantor, contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labeled as of domestic manufacture and *vice versa*, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The 281]Bureau of Chemistry is *equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends, he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the Department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the Department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law, its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stat. §§ 771, 1022, U. S. Comp. Stat. 1901, pp. 601, 720. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to

their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest *of the public health was to hamper district attorneys, curtail the powers of grand juries, or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense, the 4th Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors,—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the government or prompted by private malice. There is nothing in the nature of the offense under the pure food law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime. The judgment is reversed.

*UNITED STATES OF AMERICA AT[283
THE RELATION AND TO THE USE OF
ROBERT D. KINNEY, Plff. in Err.,

v.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

(See S. C. Reporter's ed. 283, 284.)

Appeal — reversible error — denying motion for judgment on pleadings.

1. The denial of a motion for judgment because of the insufficiency of an affidavit of defense, without passing upon the merits of the motion, cannot possibly constitute reversible error, where the defendant afterwards filed formal pleas to the statement of plaintiff's claim, and joined issue thereon, the effect of the ruling being simply to

postpone consideration of the subject until the trial.

[For other cases, see Appeal and Error, 4997-5019, in Digest Sup. Ct. 1908.]

Appeal — bill of exceptions — what constitutes.

2. A paper in the record on writ of error, styled "Exceptions to the Charge to Jury," initialed "J. B. McP., Trial Judge," and signed by the plaintiff, is not a bill of exceptions.

[For other cases, see Appeal and Error, 3484-3499, in Digest Sup. Ct. 1908.]

Appeal — bill of exceptions — matters as to evidence.

3. An appellate court has no means of determining whether reversible error arose from the action of the trial court on any of the subjects referred to in the bill of exceptions, where all such matters depend for their solution upon an examination of the evidence, which is not in the record.

[For other cases, see Appeal and Error, 3528-3546, in Digest Sup. Ct. 1908.]

[No. 664.]

Submitted December 4, 1911. Decided December 18, 1911.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania, entered upon a directed verdict in favor of defendant in a suit to recover upon the bond of a clerk of a Federal circuit court. Affirmed.

See same case below, 108 C. C. A. 455, 186 Fed. 477.

Mr. Robert D. Kinney *in propria persona* submitted the cause for plaintiff in error:

Counsel for the defendant in error moves that the writ of error be dismissed because none of the evidence given at the trial, nor the charge of the court, has been made a part of the record. The learned counsel mistakes his remedy for the case he alleges. He should suggest a specific diminution of the record in matter necessary to the hearing in this court, and ask for certiorari, when the question as to the necessity of additional matter will be determined by the appellate court.

Nashua & L. R. Corp. v. Boston & L. R. Corp. 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237; Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 170.

The certificate of the clerk of the trial court to the transcript of record is in proper form, and made according to the plaintiff's *præcipe* authorizing it. A writ of error will not be dismissed for omission in 56 L. ed.

the transcript, where the clerk's certificate states that it is according to *præcipe*.

Burnham v. North Chicago Street R. Co. supra; United States v. Davenport, 142 U. S. 704, 35 L. ed. 1174, 12 Sup. Ct. Rep. 992; Gregory v. Pike, 12 C. C. A. 202, 21 U. S. App. 474, 64 Fed. 415; United States v. Gomez, 1 Wall. 690, 17 L. ed. 677; Missouri, K. & T. R. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640, 2 Sup. Ct. Rep. 9.

It is plaintiff's right to have its review of the judgment of the circuit court of appeals on the process in error, which has been duly sued out and prosecuted in the case.

United States v. American Bell Teleph. Co. 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

Messrs. Bayard Henry and Thomas Stokes submitted the cause for defendant in error:

This court will be unable to consider the case upon its merits because none of the evidence given at the trial, nor the trial, nor the charge of the court, has been made a part of the record.

Suydam v. Williamson, 20 How. 427, 433, 15 L. ed. 978, 980; Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117, 7 Sup. Ct. Rep. 1035; Bank of New Orleans v. Caldwell, 154 U. S. 592, 21 L. ed. 305, 14 Sup. Ct. Rep. 1171; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298, 36 L. ed. 162, 163, 12 Sup. Ct. Rep. 450; Lee Won Jeong v. United States, 76 C. C. A. 190, 145 Fed. 512; Rodgers v. United States, 81 C. C. A. 568, 152 Fed. 426; Reader v. Haggin, 88 C. C. A. 91, 160 Fed. 909.

The affidavit of defense is not a pleading, and its purpose is merely to show a defense sufficient to prevent a summary judgment; when this purpose has been accomplished, it has performed its whole duty. It does not in any way limit the defense to be made at the trial, and in the present case a complete defense may have been proved at the trial, so far as the court can tell, in the absence of the evidence, although not even suggested in the affidavit of defense.

Flegal v. Hoover, 156 Pa. 281, 27 Atl. 162.

Memorandum opinion by direction of the court. By Mr. Chief Justice White:

The trial court instructed a verdict for the defendant, *and the court below[284 affirmed its action. The suit was to recover upon the bond of a clerk of a circuit court. 108 C. C. A. 455, 186 Fed. 477. We think a motion to affirm must prevail.

All the errors relied upon complain of a refusal to grant a motion of the plaintiff

for judgment because of the insufficiency of "an affidavit of defense" and of various rulings made at the trial. Although the motion for judgment was denied, its merits were not passed upon, since the effect of the ruling was simply to postpone consideration of the subject until the trial, and therefore the exception, which was formally allowed, was simply "to the refusal by the court to decide the issue of law raised by plaintiff's motion for judgment," etc. But afterwards the defendant filed formal pleas to the statement of plaintiff's claim and joined issue thereon. As the ruling left it open to raise the question presented by the motion, it follows that the mere order of postponement did not prejudice and cannot possibly constitute reversible error. As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled "Exceptions to the Charge to Jury," initialed "J. B. McP., Trial Judge," and signed by the plaintiff, is not a bill of exceptions (*Origet v. United States*, 125 U. S. 243, 31 L. ed. 745, 8 Sup. Ct. Rep. 846), but if it were to be treated as a bill of exceptions, as all the matters therein referred to depend for their solution upon an examination of the evidence, which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm.

Affirmed.

285]*LEWERS & COOKE, Limited, Appt.,
v.

MARY H. ATCHERLY.

(See S. C. Reporter's ed. 285-295.)

Federal courts — following territorial decisions — conclusiveness of judgment.

1. The holding of the Hawaiian supreme court that a person seeking the registration and confirmation in the court of land registration of a title which depends upon an unexecuted decree is, as against the holder of the outstanding legal title, in the same position as a party asking the aid of a court of chancery in executing a former

decree, and takes the risk of opening up such decree for re-examination, will be followed by the Federal Supreme Court.

[For other cases, see Courts, VII. d, in Digest Sup. Ct. 1908.]

Federal courts — following territorial decisions — conclusiveness of judgment of Hawaiian Land Commission.

2. The Federal Supreme Court will follow a decision of the Hawaiian supreme court, that a judgment of the land commission of 1845, adjudging a parcel of land to a specified person in fee simple, cannot be attacked except by a direct appeal to the supreme court provided by law.

[For other cases, see Courts, VII. d, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — probate matters.

3. A decree establishing a will does not determine that any particular property belongs to the decedent's estate.

[For other cases, see Judgment, 666-684, in Digest Sup. Ct. 1908.]

Lis pendens — purchaser pending suit.

4. A purchaser of real property *pendente lite* stands in no better position than its vendor, the complainant in such suit.

[For other cases, see Lis Pendens, II., in Digest Sup. Ct. 1908.]

Appeal — law of case — stare decisis.

5. A decree of the Hawaiian supreme court overruling a demurrer to the bill in a suit over the title to real property does not preclude that court from adopting a contrary principle when the controversy again comes before it.

[For other cases, see Appeal and Error, IX. o, 2; Courts, VII. b, in Digest Sup. Ct. 1908.]

[No. 69.]

Argued December 4, 1911. Decided December 18, 1911.

A PPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Court of Land Registration, refusing the registration and confirmation of a title to land. Affirmed.

See same case below, 19 Haw. 334.

The facts are stated in the opinion.

Mr. David L. Worthington argued the cause, and, with Messrs. William R. Castle, W. A. Greenwell, and Alfred L. Castle, filed a brief for appellant:

It was error to overrule the discretion of the court of land registration in declining to reopen the decree of 1858.

Darling v. Westmoreland, 52 N. H. 401,

Street Co. v. Wharton, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

On conclusiveness of probate as *res judicata*—see note to *Sly v. Hunt*, 21 L.R.A. 680.

As to conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy*, 34 L.R.A. 321.

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L.R.A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L.R.A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 577; *Morrill v. Morrill*, 11 L.R.A. 155; *Shores v. Hooper*, 11 L.R.A. 308; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel*

13 Am. Rep. 55; 14 Cyc. 384; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97, 10 Sup. Ct. Rep. 736; Davis v. Braden, 10 Pet. 286, 9 L. ed. 427; Early v. Rogers, 16 How. 599, 14 L. ed. 1074; Slicer v. Bank of Pittsburg, 16 How. 571, 14 L. ed. 1063; McAllister v. Kuhn, 96 U. S. 87, 24 L. ed. 615; United States v. Estudillo, 1 Wall. 710, 17 L. ed. 702; Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 603, 43 L. ed. 1103, 19 Sup. Ct. Rep. 761.

The decree of Judge Robertson, admitting the will of Kaniū to probate, is a binding adjudication that Kalakaua was, after the death of Kaniū, beneficially entitled to the premises in question.

Keliipalapela v. Pamano, 1 How. 281.

The decree of November 2, 1858, is a conclusive adjudication between the parties, and is complete and final.

Kapiolani v. Atcherly, 14 Haw. 651; Kuala v. Kuapahi, 15 Haw. 300; McChesney v. Kona Sugar Co. 15 Haw. 710; United States use of Hine v. Morse, 218 U. S. 493, 505, 54 L. ed. 1123, 1127, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781.

If the decision of 1903 is not the law of the case, then the question should be regarded as foreclosed on the ground of *stare decisis*.

Vail v. Arizona, 207 U. S. 201, 52 L. ed. 169, 28 Sup. Ct. Rep. 107.

A single decision of the Hawaiian supreme court has been held to establish a rule of property.

Kealoha v. Castle, 210 U. S. 149, 52 L. ed. 998, 28 Sup. Ct. Rep. 684.

It is not only a rule of property, but is a rule of this particular property, which the purchaser had a right to rely on, and which is binding on every court until reversed.

Grignon v. Astor, 2 How. 343, 11 L. ed. 292; The Genesee Chief v. Fitzhugh, 12 How. 451, 458, 13 L. ed. 1062, 1065; Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79; Minnesota Min. Co. v. National Min. Co. 3 Wall. 332, 18 L. ed. 42; Bibb v. Bibb, 79 Ala. 437; Hihn v. Courtis, 31 Cal. 398; Schori v. Stephens, 62 Ind. 441; Frank v. Evansville & I. R. Co. 111 Ind. 132, 12 N. E. 105; Dunklin County v. Chouteau, 120 Mo. 577, 25 S. W. 553; White v. Kyle, 1 Serg. & R. 15; Bright v. Easterly, 199 Pa. 88, 48 Atl. 810; Henderson v. Rost, 11 La. Ann. 541; Wilkins v. Chicago, St. L. & N. O. R. Co. 110 Tenn. 442, 75 S. W. 1026; Union R. Co. v. Chickasaw Cooperage Co. 116 Tenn. 598, 95 S. W. 171; O'Rourke v. Clopper, 22 Tex. Civ. App. 377, 54 S. W. 930.

Every person is presumed to know the
56 L. ed..

law, and an innocent person who acts in accordance with the law as then declared is entitled to its protection.

State v. Comptoir National D'Escompte, 51 La. Ann. 1272, 26 So. 91.

Whatever doubt the court of Hawaii had in this case about the power of the court in 1858, that decision declared the power of the court, and construed the statutes which gave the supreme court jurisdiction, and the statute which gave the land court jurisdiction. That construction, and the construction by the court in 1903, becomes a part of the law, and whatever doubt the court now may have, so far as the rights acquired thereunder, they cannot be reversed.

1 Kent, Com. 476; Sutherland, Stat. Constr. § 319; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

The rule is the same in regard to a conveyance as to any other contract. Its validity and effect are determined by the laws then in force.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Stephenson v. Boody, 139 Ind. 66, 38 N. E. 331; Haskett v. Maxey, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; Levy v. Hitsche, 40 La. Ann. 508, 4 So. 476; Fisher v. Lott, 33 Ky. L. Rep. 609, 110 S. W. 822; Myers v. Boyd, 144 Ind. 496, 43 N. E. 567.

Nor is it material in this case that the change is by judicial decision, and not by statute.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The rule applies where the question involved is the jurisdiction of a court with reference to land.

Levy v. Hitsche, 40 La. Ann. 508, 4 So. 476; Herndon v. Moore, 18 S. C. 355; Hall v. Wells, 54 Miss. 301.

A decision, until it is reversed, makes the law of a jurisdiction as much as a statute unrepealed.

Kuhn v. Fairmont Coal Co. 215 U. S. 372, 54 L. ed. 239, 30 Sup. Ct. Rep. 140.

Mr. Lyle A. Dickey argued the cause, and, with Mr. E. M. Watson, filed a brief for appellee:

The supreme court was not bound to follow its own prior decision in Kapiolani v. Atcherly, 14 Haw. 651, as *stare decisis*.

Hertz v. Woodman, 218 U. S. 205, 212, 54 L. ed. 1001, 1005, 30 Sup. Ct. Rep. 621;

King v. West Virginia, 216 U. S. 92, 100, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225.

A ruling on a demurrer is not such a final adjudication that the court may not reconsider its action and enter a contrary order, nor decide the same matter differently when subsequently presented again in the same case.

31 Cyc. 350; Hamilton v. Marks, 63 Mo. 172; Jungk v. Reed, 12 Utah, 202, 42 Pac. 294; Reeves v. Petty, 44 Tex. 254; Meyers v. Dittmar, 47 Tex. 373; Norton v. Knapp, 64 Iowa, 112, 19 N. W. 867; Hastings v. Foxworthy, 45 Neb. 697, 34 L.R.A. 321, 63 N. W. 955; Pennsylvania Co. v. Platt, 47 Ohio St. 379, 25 N. E. 1028; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 341, 40 L. ed. 991, 992, 16 Sup. Ct. Rep. 850.

Appellant, as a purchaser, bought *pendente lite*, with notice of the pending litigation and the claims of Mary H. Atch-erley, and so has no right to rely on any rule of law, there being no final decree.

Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 370, 33 L. ed. 178, 184, 9 Sup. Ct. Rep. 781; Gay v. Parpart, 106 U. S. 679, 696, 27 L. ed. 256, 262, 1 Sup. Ct. Rep. 456; Wm. W. Bierce v. Waterhouse, 219 U. S. 320, 337, 55 L. ed. 237, 243, 31 Sup. Ct. Rep. 241.

As appellant is in the position of one suing in equity to enforce the decree of 1858 against appellee, the court had a right to refuse to enforce that decree if found erroneous, and not worthy of enforcement.

O'Connell v. M'Namara, 3 Drury & War. 411, 2 Connor & L. 266, note; Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 561, 34 L. ed. 1005, 1008, 11 Sup. Ct. Rep. 402; O'Brien v. Wheelock, 184 U. S. 450, 483, 46 L. ed. 636, 652, 22 Sup. Ct. Rep. 354; Gay v. Parpart, 106 U. S. 679, 699, 27 L. ed. 256, 263, 1 Sup. Ct. Rep. 456; West v. Skip, 1 Ves. Sr. 240, 19 Eng. Rul. Cas. 618; Lancaster v. Snow, 184 Ill. 537, 56 N. E. 813; Wadhams v. Gay, 73 Ill. 430; German-American Title & T. Co. v. Shallcross, 147 Pa. 490, 30 Am. St. Rep. 751, 23 Atl. 770; Wheeler v. Eldred, 121 Cal. 29, 66 Am. St. Rep. 20, 53 Pac. 431; Hamilton v. Houghton, 2 Bligh, 193, 21 Revised Rep. 65; Johnson v. Northey, Prec. in Ch. 134; Lawrence v. Berney, 2 Rep. in Ch. 127.

Practice in the courts of a territory is based upon local statutes and procedure; and the Supreme Court of the United States is not disposed to review the decision of the territorial supreme court in such cases.

Santa Fe County v. New Mexico, 215 U. S. 296, 307, 54 L. ed. 202, 208, 30 Sup. Ct. Rep. 111; Sweeney v. Lomme, 22 Wall. 208, 213, 22 L. ed. 727, 728; Copper Queen Consol. Min. Co. v. Territorial Bd. of

Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695; Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; Maytin v. Vela, 216 U. S. 598, 602, 54 L. ed. 632, 634, 30 Sup. Ct. Rep. 439; Armijo v. Armijo, 181 U. S. 558, 561, 45 L. ed. 1000, 1002, 21 Sup. Ct. Rep. 707; English v. Arizona, 214 U. S. 359, 363, 53 L. ed. 1030, 1033, 29 Sup. Ct. Rep. 658.

The subject-matter is a local one, in which this court should give the greatest weight to the local decisions, and uphold the decision of the local court, if possible. The decision below should be regarded as if it were that of a state rather than a territory.

Arndt v. Griggs, 134 U. S. 316, 321, 33 L. ed. 918, 919, 10 Sup. Ct. Rep. 557; American Land Co. v. Zeiss, 219 U. S. 47, 60, 55 L. ed. 82, 94, 31 Sup. Ct. Rep. 200; Bucher v. Cheshire R. Co. 125 U. S. 555, 584, 31 L. ed. 795, 799; 8 Sup. Ct. Rep. 974; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 359, 54 L. ed. 228, 233, 30 Sup. Ct. Rep. 140; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 194, 54 L. ed. 725, 726, 30 Sup. Ct. Rep. 459; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; Kealoha v. Castle, 210 U. S. 149, 153, 52 L. ed. 998, 1001, 28 Sup. Ct. Rep. 684.

The awards of the board of commissioners to quiet land titles gave fee-simple titles for the first time; did away with feudal tenure, and settled forever all claims to lands, arising prior to December 10, 1845.

Kekiekie v. Dennis, 1 Haw. 42; Kukilahu v. Gill, 1 Haw. 54; Bishop v. Namakalaa, 2 Haw. 240; Keelikolani v. Robinson, 2 Haw. 514, 539; Kanaina v. Long, 3 Haw. 332; Kahoomana v. Moehonua, 3 Haw. 635; Kalakaua v. Keaweamahi, 4 Haw. 579; Kaai v. Mahuka, 5 Haw. 354; Kenoa v. Meek, 6 Haw. 67; Kekauluohi's Estate, 6 Haw. 178; Thurston v. Bishop, 7 Haw. 428.

Probate of a will does not determine the legal effect of the will on any property, or that the testator owns any property.

Black, Judgm. § 635.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree refusing to the appellant the registration and confirmation of its title to a parcel of land, described as lot 1 of land commission award 129, royal patent 1602. 18 Haw. 625. 19 Haw. 47. The appellant claims through mesne conveyances from David Kalakaua. Kalakaua was adopted by one Kaniu as her child. She had certain rights, not fully defined, in the land, and left all her property to Kalakaua by an oral will in 1844. Her husband, Kinimaka, seems to

have reported this to the King, as required in those days, and there is evidence that the King disapproved it on account of Kalakaua's youth. The fact is not found or admitted, however, and the judge who established the will denied the power of the King. Later the King gave the land to Kinimaka, and in 1849 the land commission 293]adjudged it *to him in fee simple. In 1856, on or shortly before his coming of age, Kalakaua filed a bill in equity in the court of land registration to establish a trust against Kinimaka, but this suit was not carried to final decree. In 1858 he proved the will of Kaniū, 2 Haw. 82, and thereafter in the same year brought another bill against the widow and guardian of the minor children of Kinimaka, who had died, which ended in a decree that the guardian convey the premises to Kalakaua. This was in 1858. There was no conveyance in accordance with the decree, but Kalakaua occupied the land before and after he became King, conveyed it to his wife, Kapiolani, in 1868, and after his death she occupied it until her death in 1898.

The respondent claims by virtue of a remainder limited in the will of Kinimaka. In 1901 she brought an action of ejectment, whereupon the Kapiolani Estate, Limited, brought a suit in equity to restrain her, on the ground of the foregoing facts. There was a demurrer, which was overruled (14 Haw. 651), and in that stage of the case the appellant bought from the Kapiolani Estate. The cause is still pending, the parties having agreed to try their rights in the present suit.

When the demurrer to the bill of the Kapiolani Estate was overruled the subject mainly discussed was whether the decree of 1858 against the guardian of Kinimaka's children bound the children, they not having been made parties to the bill, as it was admitted that they should have been. But the decision now appealed from, while hinting at a possible difference upon that point, in view of "the many indications that the decree of 1858 was substantially a consent decree," placed itself upon a different ground. It held that the appellant, "in seeking to register a title depending upon the unexecuted decree in *Kalakaua v. Pai and Armstrong*, is, as against the holder of the outstanding legal title, in the same position as a party asking 294]the aid of a court of chancery *in executing a former decree, and it is well established that he must take the risk of opening up such decree for re-examination. *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402." Acting on this rule, as to the application of which in practice we see 56 L. ed.

no sufficient reason for not following the local court, the supreme court came to the conclusion that the adjudication of the land commission in 1849 bound all interests, and that the decree of 1858 was wrong.

On this point also there is every reason for attributing great weight to the decision of the court on the spot. It concerns the powers of another earlier local tribunal, and involves obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when translated into English legal speech. Thus Kaniū is spoken of as the owner of the land; yet a few years before the King would have done with it as he liked, and that the tradition and fact had not wholly disappeared after his grant of the Constitution of 1839 is indicated by his alleged conduct touching the will. The precariousness of titles is emphasized by the laws of 1842. So it is said that Kinimaka was the natural guardian of Kalakaua; we presume on the evidence that Kaniū assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age. But it would be going rather far to apply the refined rules of the English chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846, on the strength of such a fact. The real foundation of settled titles seems to have been the establishment of the land commission in 1845. *Thurston v. Bishop*, 7 Haw. 421, 428. When the supreme court of Hawaii repeats what it has been saying for many years, that the decisions of that board could not be attacked except by a direct appeal to the supreme court provided by law, no imperfect analogy, *such as that of patents issued by [295 our Land Department, is sufficient to overthrow the tradition, fortified as it is by logic and good sense.

Of course, the later decree establishing the will does not affect the case. That determined only that Kaniū left all her property to Kalakaua, but not that any particular property belonged to the inheritance. The decree overruling the demurrer of the defendant to the bill of the Kapiolani Estate also is relied upon. But as that case has not passed to a final decree, and the appellant bought the land in controversy *pendente lite*, it can stand no better than its vendor, the party to the suit. *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 370, 33 L. ed. 178, 184, 9 Sup. Ct. Rep. 781. If that case, instead of this, had been prosecuted to final decree, there was nothing in its former action to hinder the su-

preme court from adopting the principle now laid down, even though it thereby should overrule an interlocutory decision previously reached. *King v. West Virginia*, 216 U. S. 92, 100, 101, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225. Other details were mentioned in argument, but nothing more seems to us to need remark.

Decree affirmed.

THEODORE ALBERT MAYER, Appt.,
v.

AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, Washington Loan & Trust Company, Trustee, and George Washington University.

(See S. C. Reporter's ed. 295-300.)

Wills — residuary clause — estate upon condition.

An equitable estate which can be defeated only by performance of the conditions remains in the grantor, and passes under the residuary clause in his will, where the grantee executes a declaration of trust by which it is to convey the premises to a specified educational institution "when and at such times as" such institution shall perform certain conditions, and, in case of nonperformance within a reasonable time, is to reconvey the premises to the grantor, his heirs and assigns.

[For other cases, see Wills, III. e; III. g, 4, in Digest Sup. Ct. 1908.]

[No. 77.]

Argued December 5, 1911. Decided December 18, 1911.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing a bill in a suit for a conveyance to the complainant of a parcel of land to which he claims a right under a trust deed. Affirmed.

See same case below, 33 App. D. C. 391.

The facts are stated in the opinion.

Messrs. A. S. Worthington and Edwin C. Brandenburg argued the cause, and, with Messrs. Clarence A. Brandenburg and F. Walter Brandenburg, filed a brief for appellant:

The grant was a condition subsequent.

Devlin, Deeds, § 958; *Hayden v. Stoughton*, 5 Pick. 528; *Wilson v. Galt*, 18 Ill. 431; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Finlay v. King*, 3 Pet. 346, 374, 7 L. ed. 701, 711.

A possibility of reverter is not an inter-

est or estate in land that can be devised or assigned.

Vail v. Long Island R. Co. 106 N. Y. 287, 60 Am. Rep. 449, 12 N. E. 607; *Towle v. Remsen*, 70 N. Y. 309; *De Peyster v. Michael*, 6 N. Y. 506, 57 Am. Dec. 470; *Nicoll v. New York & E. R. Co.* 12 N. Y. 131; *Locke v. Hale*, 165 Mass. 20, 42 N. E. 331; *Bouvier v. Baltimore & N. Y. R. Co.* 67 N. J. L. 281, 60 L.R.A. 750, 51 Atl. 781; *Helms v. Helms*, 137 N. C. 206, 49 S. E. 110; *Ohio Iron Co. v. Auburn Iron Co.* 64 Minn. 407, 67 N. W. 221; *Warner v. Bennett*, 31 Conn. 469; *Higbee v. Rodeman*, 129 Ind. 247, 28 N. E. 442; *Brenbroick v. St. Luke's Hospital*, 23 App. Div. 339, 48 N. Y. Supp. 363; *Tiedeman, Real Prop.* § 277; *Sexton v. Chicago Storage Co.* 129 Ill. 331, 16 Am. St. Rep. 274, 21 N. E. 920; *Denver & S. F. R. Co. v. School Dist. No. 22*, 14 Colo. 327, 23 Pac. 978; *Bouvier v. Baltimore & N. Y. R. Co.* 60 L.R.A. 762, note; *First Presby. Church v. Elliott*, 65 S. C. 251, 43 S. E. 674; *Upington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359; *Methodist Protestant Church v. Young*, 130 N. C. 8, 40 S. E. 691; *Goodright ex dem. Fowler v. Forrester*, 8 East, 566, 1 Taunt. 578; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101; *Dawson v. Western Maryland R. Co.* 107 Md. 70, 14 L.R.A. (N.S.) 809, 126 Am. St. Rep. 337, 68 Atl. 301, 15 Ann. Cas. 678.

There is no presumption in favor of an intention on the part of the testator to deprive his heir at law of his real estate. Such an intent must be clear and free from doubt.

Rizer v. Perry, 58 Md. 121; *Bourke v. Boone*, 94 Md. 477, 51 Atl. 396.

By the residuary clause of the will the testator did not intend to dispose of this property.

Hambleton v. Darrington, 36 Md. 446; *Doe ex dem. Morris v. Underdown, Willes*, Rep. 293; *Wright v. Hall, Fortescue*, 182.

The words used in the agreement regarding a reconveyance are practically a direction to reconvey to the heir, inasmuch as the interest of the testator, before breach, was not assignable.

Locke v. Hale, 165 Mass. 20, 42 N. E. 331.

Moreover, to sustain the decision of the lower court and tie up the property here involved until appellant reaches forty-eight years of age does violence to the rule of law so frequently laid down by the highest court of the state of Maryland, and as so clearly stated in the case of *Mercer v. Safe Deposit & T. Co.* 91 Md. 114, 45 Atl. 865, that "the law favors the early vesting of estates. This is a familiar rule of law

which has been frequently recognized and enforced in the decisions of this court."

Mr. William F. Mattingly argued the cause and filed a brief for appellees:

The cases where the donor conveys directly to the donee upon condition, and cases of mere possibility of reverter, have no application to the case at bar; yet, if the testator's estate in this property was a contingency coupled with an interest, or a possibility coupled with an interest, and it was all that and more, then it was devisable, and passed to the residuary legatee.

4 Kent, Com. *261; *Purefoy v. Rogers*, 2 Wm's Saund. 388k; *Doe ex dem. Cholmondeley v. Weatherby*, 11 East, 322; *William v. Thomas*, 12 East, 141; *Hayden v. Stoughton*, 5 Pick. 528; *Clapp v. Stoughton*, 10 Pick. 463; *Austin v. Cambridgeport*, 21 Pick. 215; *Jones v. Roe*, 3 T. R. 88.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill for a conveyance to the plaintiff of a parcel of land to which he claims a right under a trust deed of his father, Theodore J. Mayer. The case was heard on bill and answer, the supreme court dismissed the bill, and its decree was affirmed by the court of appeals. 33 App. D. C. 391. The facts are these: On February 5, 1907, Mayer conveyed the premises to the Washington Loan & Trust Company and the latter executed a declaration of trust by which it was to convey them to the George Washington University "when and at such times as" the University should comply with certain conditions, by the purchase of certain other specified land, etc. "In the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the trustee, when said property, so as aforesaid conveyed to the trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs and assigns." The word "when" in the sentence is superfluous, but the meaning is plain. The reasonable time was determined and has elapsed, as is agreed by the University as well as by the trustee, and the conditions have not been performed, but in March, 1907, before the breach of condition, Mayer died.

Mayer made his will on February 15, 1907, a few days after the trust deed and a month before his death. After pecuniary legacies and a specific devise to the plaintiff of his residence, its contents, etc., he gave the residue of his estate to the American Security & Trust Company "in trust to make various payments to the plain-

tiff at different stated times, and upon his attaining the age of forty-eight years to convey all of the trust fund remaining in its hands to the plaintiff in fee. Then followed gifts to the plaintiff's children in the event of his dying before the testator or before reaching the age of forty-eight, and alternative legacies if he left no children surviving him. The question is whether the property covered by the trust deed should be conveyed to the plaintiff now or falls into the residue to be held upon the trusts created by the will.

The argument for the appellant is that that the grantor, Mayer, retained a mere possibility of reverter, which was not devisable, and that if he had more than that, still he did not devise it by his will. But the answer is plain. Of course the grantee, the Washington Loan & Trust Company, got the legal title in fee, but by its declaration of trust and its answer it disavowed any beneficial interest, and if the equitable title was in Mayer, it was subject to devise by him. But it necessarily was either in Mayer or in the George Washington University, and the courts below were quite right in holding that all rights of the University were subject to a condition precedent that never was fulfilled. The beginning of its rights was to be by conveyance "when and at such time as" the University should have made the required purchase. Or, as stated in another clause not yet quoted, "This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said George Washington University." That it was not given until those terms and conditions were complied with could not be said more plainly. We should add that the University by its answer makes no claim either to the land or to the profits between the date of the deed and the loss of its rights.

Mayer, then, at his death, had a present equitable right to *the land, subject[300 only to be defeated by an event that has not happened; and we see as little ground for doubting that he disposed of it as there is for denying that he had it. The residuary clause is in the usual form, "All the rest and residue of my estate, real, personal, and mixed, which I now possess or which may hereafter be acquired by me,"—amply sufficient to carry the equitable estate. No doubt Mayer thought that the Chevy Chase property would go another way, but it manifestly was not certain, and moreover, one of the objects of a residuary clause is to gather up unremembered as well as uncertain rights.

Decree affirmed.

ACME HARVESTER COMPANY,
Plff. in Err.,

v.

BEEKMAN LUMBER COMPANY.

(See S. C. Reporter's ed. 300-312.)

Error to state court — Federal question — finding of fact.

1. The right to have a review in the Federal Supreme Court of a judgment of a state court in which the defeated party set up the pendency of bankruptcy proceedings as a bar to the action, and further relied upon an injunction issued out of the bankruptcy court, undertaking to stay the proceedings in the state court, and also contended that the proper construction of the bankruptcy act precluded the state court from taking jurisdiction, cannot be defeated by the finding of the state court as a matter of fact that the bankruptcy proceedings had been concluded by denial of the adjudication in bankruptcy and an abandonment of the proceedings

[For other cases, see Appeal and Error, 1595-1600, 2175-2208, in Digest Sup. Ct. 1908.]

Bankruptcy — conflicting jurisdiction — state and Federal courts.

2. The pendency of bankruptcy proceedings in a Federal court when an attachment suit of a single creditor was begun in a state court precludes that court, when that fact is made to appear, from proceeding in such suit to judgment and appropriation of the property.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

Bankruptcy — conflicting jurisdiction — state and Federal courts.

3. A state court is justified in proceeding to judgment on the attachment suit of a single creditor, notwithstanding the suggestion of the pendency of bankruptcy proceedings, where the bankruptcy court, finding an outstanding creditors' committee under which it was proposed to administer and distribute the debtor's estate, declined to appoint a receiver, recognizing the propriety of the proceedings of the creditors' committee, and received the reports of such committee, and allowed it for years to operate the property and to mature a plan for

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On review of decisions of state courts in

the settlement of the debts outside of the court, and not contemplated in the bankruptcy act, the creditors in large numbers having signified a purpose to take stock in a reorganization, and for more than five years after the filing of the petition in bankruptcy, having made no attempt to adjudicate the debtor a bankrupt, or proceed to the settlement of the estate under the requirements of the act, since, under the circumstances, the state court was justified in determining that the bankruptcy court had lost its jurisdiction.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

Bankruptcy — enjoining proceedings in state court — territorial jurisdiction.

4. A Federal district court sitting as a court of bankruptcy has no power to issue an *ex parte* injunction without notice or service of process, attempting to restrain a creditor from suing in a state outside the jurisdiction of the district court, but such proceeding could only have binding force upon the creditor if jurisdiction were obtained over it by ancillary proceedings in a court having jurisdiction, and upon service of process upon such creditor.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 9.]

Argued and submitted April 25, 1911. Decided December 18, 1911.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Jackson County Circuit Court in that state in favor of plaintiff in an action in which the pendency of bankruptcy proceedings was set up as a bar. Affirmed.

See same case below 215 Mo. 221, 114 S. W. 1087.

The facts are stated in the opinion.

Messrs. Alexander New and Edwin A. Krauthoff submitted the cause for plaintiff in error. Mr. Arthur Miller was on the brief:

The filing of the petition in bankruptcy

cases involving questions of bankruptcy—see note to *Thompson v. Fairbanks*, 49 L. ed. U. S. 577.

As to conflict of jurisdiction between Federal and state courts—see notes to *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 356, and *J. I. Case Plow Works v. Finks*, 26 C. C. A. 50.

On enjoining proceedings in Federal courts—see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; and *Copeland v. Bruning*, 63 C. C. A. 437.

On pendency of action in state or Federal court as ground for abatement of action in the other—see notes to *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 205; and *Barnsdall v. Waltemeyer*, 73 C. C. A. 521.

is a *caveat* to all the world, and in effect an attachment and injunction.

Mueller v. Nugent, 184 U. S. 14, 46 L. ed. 411, 22 Sup. Ct. Rep. 269; Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818; Markson v. Heaney, 1 Dill. 497, Fed. Cas. No. 9,098; Ex parte City Bank, 3 How. 321, 11 L. ed. 616; Re Richardson, 2 Ben. 517, Fed. Cas. No. 11,774; Re Weinger, 126 Fed. 876; Re Jersey Island Packing Co. 2 L.R.A.(N.S.) 560, 71 C. C. A. 75, 138 Fed. 625; Re Union Trust Co. 59 C. C. A. 461, 122 Fed. 937; Re Kleinhaus, 113 Fed. 109; Re Emslie, 42 C. C. A. 350, 102 Fed. 292; Bear v. Chase, 40 C. C. A. 182, 99 Fed. 924; Morgan v. Campbell, 22 Wall. 381, 22 L. ed. 796; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Cruchet v. Red Rover Min. Co. 155 Fed. 486; State Bank v. Cox, 74 C. C. A. 285, 143 Fed. 91; 62 Cent. L. J. 264.

The object of a Bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt,—not among some of the creditors, but among all of them.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 449, 45 L. ed. 1171, 1178, 21 Sup. Ct. Rep. 906.

The duty of the courts is to carry this intention of Congress into effect to the extent which the language of the act justifies. Mere schemes and artifices to avoid the letter and spirit of the law will not be tolerated.

Re Blount, 142 Fed. 263.

The district court in Illinois had the power to enjoin proceedings pending outside of its district.

Loveland, Bankr. 3d ed. p. 105; Markson v. Heaney, 1 Dill. 497, Fed. Cas. No. 9,098; Re Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046, 28 Sup. Ct. Rep. 621; Re Williams, 120 Fed. 34.

A district court of the United States, in exercising jurisdiction in a proceeding in bankruptcy, is administering a law which has for its basis a constitutional grant of power to enact such a law; consequently, the jurisdiction of the court is coexistent with the Constitution. That is to say, the power of a Federal court in bankruptcy follows the Constitution, and so the rule has been stated.

Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818.

If it be contended that the remedy is to be found in the filing of an ancillary petition in bankruptcy in Missouri, and by calling on the bankruptcy court for the western district of Missouri to protect the situation, then we are met with the ruling that there is no such thing as an ancillary proceeding in bankruptcy.

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Re Williams, 123 Fed. 321; Re Williams, 120 Fed. 38; Ross-Mecham Foundry Co. v. Southern Car & Foundry Co. 124 Fed. 403; Re Tybo Min. & Reduction Co. 132 Fed. 697; Re Von Hartz, 74 C. C. A. 58, 142 Fed. 726; Hull v. Burr, 83 C. C. A. 61, 153 Fed. 945; Remington, Bankr. § 1705; Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818.

The court of bankruptcy itself has the power to stay a proceeding begun after the filing of the petition in bankruptcy.

Paine v. Caldwell, 1 Haskell, 452, Fed. Cas. No. 10,674; Re Litchfield, 13 Fed. 863; Re Schrom, 97 Fed. 760; Re Williams, 120 Fed. 38.

The bankrupt itself had such an interest in the controversy that it could have instituted a suit on the equity side of a court having jurisdiction of the parties, or have applied to the bankruptcy court to enjoin the prosecution of the action in attachment brought by the Beekman Company against the Acme Company.

Blake v. Francis-Valentine Co. 89 Fed. 691; Jones v. Leach, Fed. Cas. No. 7,475; Re Klein, 97 Fed. 31; Re Mallory, 1 Sawy. 88, Fed. Cas. No. 8,991; Re Bowie, 15 Pittsb. L. J. 448, Fed. Cas. No. 1,728; Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4,960; Re Hufnagel, Fed. Cas. No. 6,837; Re Uirich, 6 Ben. 483, Fed. Cas. No. 14,328; Re Schnepf, 2 Ben. 72, Fed. Cas. No. 12,471; Re Wallace, Deady, 433, Fed. Cas. No. 17,094; Re Vogel, Fed. Cas. No. 16,983; Loveland, Bankr. p. 107; Re Wollock, 120 Fed. 516.

Under the facts pleaded in the answer in the case, it was the duty of the circuit court of Jackson County, Missouri, at Kansas City, itself to have enjoined the prosecution of the action of the Beekman Company against the Acme Company, or, what is to the same effect, should have ordered the action stayed.

Sachleben v. Heintze, 117 Mo. 526, 24 S. W. 54; Swope v. Weller, 119 Mo. 565, 25 S. W. 204; Martin v. Turnbaugh, 153 Mo. 186, 54 S. W. 515; Wendover v. Baker, 121 Mo. 273, 25 S. W. 918.

The authorities with respect to the staying of a suit are found collected in the textbooks on the subject.

2 Remington, Bankr. pp. 1596, et seq.; Loveland, Bankr. 3d ed. pp. 107 et seq.

The power to appoint a receiver should be invoked with caution, and only when absolutely necessary to preserve assets.

Re Rosenthal, 144 Fed. 549; Collier, Bankr. 6th ed. pp. 19, 20.

If it be contended that the failure to appoint a receiver is a dismissal of the petition, then it must follow that the converse of the proposition is equally true,

--the appointment of a receiver is an adjudication in bankruptcy. But this is not true.

Re John A. Etheridge Furniture Co. 92 Fed. 329; Re Seivers, 91 Fed. 366; Selkregg v. Hamilton Bros. 144 Fed. 557; 1 Remington, Bankr. pp. 234 et seq.

The mere fact that the petition remained on file from October, 1903, until June, 1905, where the case was tried in the circuit court, or even until October, 1908, when the case was argued in the supreme court of Missouri, does not operate as a dismissal or a discontinuance of the proceeding in bankruptcy.

St. Francis Mill Co. v. Sugg, 142 Mo. 358, 44 S. W. 247; Nicholls-Shepard Co. v. Donovan, 67 Mo. App. 286; Sublette v. St. Louis, I. M. & S. R. Co. 66 Mo. App. 331; Wernse v. McPike, 76 Mo. 249, 86 Mo. 565, 100 Mo. 476, 13 S. W. 809; St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 S. W. 359; Ex parte Driver, 51 Ala. 41; Gilbert v. Hardwick, 11 Ga. 599; Peirce v. Bank of Tennessee, 1 Swan, 265.

The trial court having disposed of the question as a matter of law, and the evidence relied upon by the supreme court of Missouri to sustain the conclusion said to have been reached by that court being wholly insufficient for that purpose, a question of law arises which this court has the jurisdiction to examine.

Knorpp v. Wagner, 195 Mo. 662, 93 S. W. 961; Nolan v. Shickle, 3 Mo. App. 300; Pawling v. United States, 4 Cranch, 221, 2 L. ed. 602; Parks v. Ross, 11 How. 362, 13 L. ed. 730; Boland v. Missouri R. Co. 36 Mo. 491; Ward v. Joslin, 186 U. S. 142, 147, 46 L. ed. 1093, 1095, 22 Sup. Ct. Rep. 807; Dooley v. Pease, 180 U. S. 126, 131, 132, 45 L. ed. 457, 460, 21 Sup. Ct. Rep. 329, 12 Am. Crim. Rep. 408; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. ed. 694, 697, 14 Sup. Ct. Rep. 837; United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 151; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 96, 37 L. ed. 380, 382, 13 Sup. Ct. Rep. 485; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

The right of the Acme Company to have a pending action abated depended upon a law of the United States, and hence this court has jurisdiction to review the action of the court below.

Taylor, Jurisdiction, § 211; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527; 26 Sup. Ct. Rep. 289; Lytle v. Arkansas, 22 How. 202, 16 L. ed. 309; Mackay v. Dillon, 4 How. 445, 447, 11 L. ed. 1049, 1050; Pollard v. Kibbe, 14 Pet. 360, 10 L. ed. 493; Berthold v. McDonald, 22 How. 334, 16 L. ed. 318.

The Supreme Court of the United States has frequently exercised jurisdiction to review on writ of error actions of state courts in bankruptcy cases.

Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623; Sharpe v. Doyle, 102 U. S. 686, 26 L. ed. 277; Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 741, 28 L. ed. 582, 583, 4 Sup. Ct. Rep. 679; Mays v. Fritton, 131 U. S. CXIV, Appx. and 21 L. ed. 127; Dushane v. Beall, 161 U. S. 513, 518, 40 L. ed. 791, 793, 16 Sup. Ct. Rep. 637; Williams v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; Traer v. Clews, 115 U. S. 528, 533, 534, 29 L. ed. 467, 468, 469, 6 Sup. Ct. Rep. 155; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 506, 29 L. ed. 244, 246, 5 Sup. Ct. Rep. 1009; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576.

In the case of an appeal from a circuit court of appeals to the Supreme Court of the United States, the jurisdiction of this court is the same as on a writ of error issued to the highest court of a state.

Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases coming to this court under the provisions of the section cited, from a circuit court of appeals:

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. Rep. 78; Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; Whitney v. Dresser, 200 U. S. 532, 50 L. ed. 584, 26 Sup. Ct. Rep. 316; Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50; New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687.

And the following cases under the bankruptcy law of 1898 have been reviewed by this court on writ of error to a state court:

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Kean v.

Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Tinker v. Colwell, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33; Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38; Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; Bullis v. O'Beirne, 195 U. S. 606, 49 L. ed. 340, 25 Sup. Ct. Rep. 118; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. Rep. 206; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493; Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911, 27 Sup. Ct. Rep. 596; Blunthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192.

Mr. Hannis Taylor argued the cause and filed a brief for defendant in error:

Findings of fact are accepted as conclusive by this court on writ of error to a state court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 53 L. ed. 702, 29 Sup. Ct. Rep. 413; Merced Min. Co. v. Boggs, 3 Wall. 310, 18 L. ed. 247; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

Broad and sweeping as the provisions of the bankrupt act are in conferring jurisdiction to grant injunctions to stay suits in other courts, both state and Federal, in order to preserve the estate of the bankrupt and distribute it *pari passu* between and among his creditors, it is confined by the terms of the act itself to the territorial limits of the jurisdiction of the district court.

Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104; Re Waukesha Water Co. 116 Fed. 1009; Paine v. Caldwell, 1 Haskell, 452, Fed. Cas. No. 10,674; Jobbins v. 56 L. ed.

Montague, 5 Ben. 425, Fed. Cas. No. 7,329; Re Litchfield, 13 Fed. 863.

Mr. Justice Day delivered the opinion of the court:†

This case is here upon writ of error to the supreme court of the state of Missouri. The facts stated in the record disclose that on October 19, 1903, an agreement was formulated, having for its purpose the placing of the affairs of the Acme Harvester Company, plaintiff in error, in the hands of a committee of creditors. With this purpose in view an agreement for the signature of the creditors was circulated, naming a committee of five, and calling upon the stockholders of the Acme Harvester Company to deposit their shares with the committee, the directors and officers of the company to resign their respective offices, and the committee to have power to elect a board of directors, who should act until the debts of the company were paid in full, and, when so paid, the shares of stock to be redelivered to the owners. In the circular accompanying the agreement for the signature of the creditors it was set forth that the affairs of the company were in such shape that, if kept a going concern, the debts could be paid, and deprecating a resort to legal proceedings in court.

On October 22, 1903, certain creditors filed a petition in involuntary bankruptcy against the Acme Harvester Company in the district court of the United States for the Northern district of Illinois, seeking to have the company adjudicated a bankrupt, charging that it was insolvent and had made certain preferential transfers of property. On October 24, 1903, the creditors' committee issued a circular in which they recited that one half the creditors in number and two thirds in amount had already signed the creditors' agreement; that a petition in bankruptcy had been filed by a law firm claiming to represent three claims, for the purpose of throwing the company into bankruptcy; that one of the creditors had already withdrawn from the proceedings, and setting forth that the success of such proceedings would wreck the company, destroy its business, and sacrifice the value of its assets. The committee added an expression of its confidence that the court would deny an application for a receiver, and leave the business in the hands of the creditors. On October 26, 1903, the creditors' committee issued another circular, in which it was said that the United States district court in Chicago had refused to ap-

†Announced by Mr. Chief Justice White, Mr. Justice Day being absent.

point a receiver, and in so doing the judge had said:

"This estate is a very large one, and is in the hands of a committee of reputable creditors. It is my judgment that the creditors ought to manage and control the estate. The creditors can produce results 303] much better than any *receiver in handling a large manufacturing concern like the Acme Harvester Company."

The circular further said that the court had referred the matter to the referee in bankruptcy to inquire into the truth of the allegations of the petition, and to ascertain whether the petitioning creditors had any standing or right to file the petition, adding that there was really only one creditor left in the bankruptcy proceeding. On November 2, 1903, a circular was issued in which it was stated that an overwhelming majority of the creditors had signified their approval of the plan, and had executed and forwarded the agreement to the creditors' committee. On December 2, 1903, the Acme Harvester Company, by its vice president, wrote to the Beekman Lumber Company, calling attention to the fact that the lumber company had not yet signed the creditors' agreement, and saying:

"You may not be aware that U. S. Judge Kohlsaat has stopped the matter of anyone bringing suit against this company, or endeavoring to throw it into bankruptcy, he having decided that we are solvent, and that the only reasonable and fair way to handle the business, paying its debts, etc., is through the medium of the credit committee, elected by our heaviest creditors. This being the case, the only basis on which your claim will receive recognition is by joining with the balance of our creditors, signing the agreement, thus putting yourselves on record that you are a creditor, and are entitled to such dividends as from time to time the committee might declare."

The Beekman Lumber Company, it appears, did not sign the creditors' agreement, nor, so far as the record discloses, prove its claim in bankruptcy, and on December 7, 1903, filed a petition in the circuit court of Jackson county, Missouri, for the purpose of recovering a judgment against the Acme Harvester Company upon 304] an account *for lumber sold and delivered prior to the institution of the proceedings in bankruptcy. No trustee having been selected in the bankruptcy proceedings, the Acme Harvester Company appeared in the state court to file a motion to stay the proceedings, setting up the pending proceedings in bankruptcy. This motion was sustained on January 11, 1904. On May 14, 1904, motion to stay was overruled, and the former order set aside. On Octo-

ber 3, 1904, a petition was filed in the district court of the United States at Chicago, where the bankruptcy proceedings were pending, for an injunction against the Beekman Lumber Company to restrain it from further pursuing its action in the state court. An injunction was granted, without notice to the Beekman Lumber Company, on *ex parte* hearing the same day. From reports in the record it appears that the creditors' committee took charge of the company's property, and, as such committee, made reports to the United States district judge at Chicago of the doings of the committee in the management of the property, purchases, sales, etc. The creditors' committee also issued a statement to the creditors, showing the results of the business, inclosing copies of the reports made to the Federal district court, and commending a reorganization of the company on the basis of stock issued to creditors, at par, for their claims, and 50 cents on the dollar to creditors who did not go into the reorganization. A circular letter, issued by the committee on April 1, 1905, states that two thirds of the creditors had already been heard from, about eighty per cent (80%) of them desired stock, and the rest preferred fifty per cent (50%) in cash.

On October 12, 1904, the Acme Harvester Company answered in the state court, setting up the pendency of the bankruptcy proceeding and the issuing of the injunction in the district court of Chicago. Replication was filed by the plaintiff, and, upon trial, judgment on the *account was di- 305] rected and rendered on June 20, 1905, in favor of the plaintiff for the amount of its account. Thereafter proceedings in review were prosecuted to the supreme court of Missouri, and that court held that the district court of the United States had no authority to issue the injunction against proceedings in the state court, and held further that the facts disclosed that the district court of the United States had declined to adjudicate the Acme Harvester Company a bankrupt, and left the property to be administered outside of the bankruptcy law, and that the prosecution in bankruptcy had been abandoned. 215 Mo. 221, 114 S. W. 1087.

A motion to dismiss the proceedings for want of jurisdiction was made in this court and passed for consideration to the merits. The contention is that, inasmuch as the supreme court of the state found, as a matter of fact, that the bankruptcy proceedings had been concluded, by denial of the adjudication and an abandonment of the proceedings, that this finding of fact is binding upon this court upon writ of error

to the state court, and therefore there is no substantial basis for the writ of error. We are of the opinion that the contention in this respect is not well founded. The defendant below set up a proceeding in a Federal court as a protection against further prosecution in the state court. It further set up the issuing of an injunction in the Federal court, undertaking to stay proceedings in the state court. Thereby the defendant claimed the benefit of a Federal right, which brought the case within § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). The denial of a right claimed under the judgment of a court of the United States lays the foundation for a review in this court. *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

The alleged finding of fact that the jurisdiction of the Federal court had ended cannot conclude this court in reviewing a question of this character. The defendant asserted the power and jurisdiction of the Federal court, invoked before the beginning of the state proceedings, and alleged its sufficiency to protect it against further proceedings in the state court. The right of ultimate determination of a contention of that character in this court cannot be defeated by the finding of the state court that the Federal court had exceeded or ended its jurisdiction. The determination of a question of that kind is not a finding upon a disputed question of fact, nor within that class of cases in which this court has repeatedly held that the facts as found in the state court would be regarded as conclusive here. Moreover, the case involved a construction of the bankruptcy act. As the plaintiff in error contended that the proper construction of the act would defeat the jurisdiction of the state court, the adverse ruling gave this court jurisdiction. *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

Proceeding, then, to the determination of the case upon its merits, the first question is. Should the state court have declined to exercise its jurisdiction when the pending proceeding in bankruptcy was set up in denial of the right to entertain further proceedings in the state tribunal? It appears from the facts already stated that the petition in bankruptcy had been filed some time before the attempt to attach the property of the bankrupt in the hands of the garnishee in the state court. There is no dispute upon this record that the money attached was owing to the bankrupt, and was unquestionably its property.

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Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller v. Nugent*, 184 U. S. 1, 14, 43 L. ed. 405, 411, 22 Sup. Ct. Rep. 269, where it is said: "It is as true of the present law [1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418)] as it was of that of 1867 [14 Stat. at L. 517, chap. 176], that the filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction. *International Bank v. Sherman*, 101 U. S. 403, 25 L. ed. 866. And on adjudication, title to the bankrupt's property became vested in the trustee * (§§ 70, [307 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court,"—it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. It is true that under § 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, § 70a, in reciting the property which vests in the trustee, says there shall vest "property which, prior to the filing of the petition [the bankrupt] . . . could by any means have transferred or which might have been levied upon and sold under judicial process against . . . [the bankrupt]." Under § 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if their enforcement would work a preference. Provision is made *for the [308

prompt taking possession of the bankrupt's property, before adjudication, if necessary (§ 69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, show the policy and purpose of the bankruptcy act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the question of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class, which is the policy of the law. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits, which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered cases of *State Bank v. Cox*, 74 C. C. A. 285, 143 Fed. 91 (C. C. A. Seventh C.); *Shawnee County v. Hurley* (C. C. A. Eighth C.) 94 C. C. A. 362, 169 Fed. 92, 94.

It follows that, if the bankruptcy proceedings were pending, so that the bankruptcy court acquired jurisdiction over the estate, it was error for the state court to proceed to a judgment and appropriation of the property on the attachment suit of a single creditor. It therefore becomes necessary to inquire whether the state court was right in determining that the bankruptcy court had *lost its jurisdiction because of the proceedings had therein. In addition to the facts stated, the supreme court of Missouri, in its opinion, said that at the time of the hearing in that court, five years after the institution of bankruptcy proceedings, counsel admitted that no adjudication in bankruptcy had as yet taken place. The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it

received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act. The creditors in large numbers signified a purpose to take stock in a reorganization, and for more than five years after the time of the filing of the petition, it was found by the supreme court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act.

It was the duty of the bankruptcy court, if it intended to administer the property under the bankruptcy law, to promptly determine the question of adjudication, to proceed with the selection of a trustee and the administration and distribution of the estate, as required by the act. This it evidently declined to do; and permitted the creditors' committee, which had been organized for the avowed purpose of defeating court proceedings, to administer the estate, to buy and sell property, and mature a plan for the reorganization of the concern. This may have been for the benefit of the creditors, but it was not the administration of the law as laid down in the bankruptcy act. It is not within the province of the bankruptcy court to deny an adjudication in bankruptcy, and then hold jurisdiction *over the property for the purpose of [310] allowing some of the creditors to effect a reorganization and distribution of the property.

We cannot say that the supreme court of Missouri was wrong; indeed, we think it was right in reaching the conclusion that the district court had declined to adjudicate the corporation a bankrupt and vest its property in a trustee, and, deeming it best for the creditors to follow out their plans, had found that the case was not one calling for the intervention of the bankruptcy court. Indeed, there is nothing in the record to contradict the statement of the circular in evidence in the court below, that the court had found the corporation solvent. With the question of adjudication determined against the right to proceed in bankruptcy, the jurisdiction of the district court ended, and the property became subject to the ordinary methods of procedure in courts of competent jurisdiction.

It is suggested that even now the bankruptcy court may proceed to an adjudication, but this suggestion is at war with all that has been done with the knowledge and sanction of the district court. As we have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition,

and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or 50 cents on the dollar, of the amount of their claims. The whole proceeding makes it clear that the district court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court.

As to the injunction, we are of the opinion that there was no power in the district court to issue an *ex parte* injunction, [311]*without notice or service of process, attempting to restrain the Beekman Lumber Company from suing in a state outside the jurisdiction of the district court. Such proceeding could only have binding force upon the lumber company if jurisdiction were obtained over it by proceedings in a court having jurisdiction, and upon service of process upon such creditor.

Whether ancillary proceedings could be had in a district court in aid of the jurisdiction of an original court of bankruptcy was a subject of much discussion and diverse decisions in the Federal courts. In *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, and *Re Elkus*, 216 U. S. 115, 54 L. ed. 407, 30 Sup. Ct. Rep. 377, the matter came before this court, and it was there determined that there was ancillary jurisdiction in the courts of bankruptcy, in aid of the original jurisdiction in the bankruptcy court, to make orders and issue processes summarily in aid of the original jurisdiction. In the opinion in *Babbitt v. Dutcher* it was pointed out by Mr. Chief Justice Fuller, speaking for the court, that the jurisdiction of the bankruptcy courts under the act of 1898 was limited to their respective territorial limits, and was in substance the same as that provided by the act of 1867, giving such courts jurisdiction in their respective districts in matters of proceedings in bankruptcy. The necessary deduction from these cases is to deny to the district courts jurisdiction such as was sought to be asserted in this case by the issuing of an injunction against one not a party to the proceeding, and which undertook to have effect in the distant jurisdiction outside the territorial jurisdiction of the district court. Under the act of 1898, as expounded in the two cases in 216 U. S., *supra*, the injunction might have been sought in the district court of the United States in the district in Missouri, where personal service could have

been made upon the Beekman Lumber Company. Since the decision *in the cases [312 just referred to, Congress has passed the act of June 25, 1910, amending the bankruptcy law, specifically giving ancillary jurisdiction over persons and property within their respective territorial limits to the district courts of the United States in aid of the receiver or trustee appointed in a bankruptcy proceeding pending in another court of bankruptcy. 36 Stat. at L. page 838, chap. 412.

Nor is there anything in the decision in *Re Wood & Henderson*, 210 U. S. 246, 52 L. ed. 1046, 28 Sup. Ct. Rep. 621, running counter to the conclusion herein announced. In that case it was held, under § 64d, giving the bankruptcy court having jurisdiction of the estate the right to determine the amount of an attorneys' fee paid out of the estate in anticipation of bankruptcy proceedings, that notice might be served outside the district with a view to a hearing to determine the amount of such compensation. In that case it was expressly held that § 64d was *sui generis*, and the right to send notice to the attorneys outside of the district was based upon the theory of that section that the property was within the jurisdiction of the bankruptcy court, which could alone determine the amount to be deducted for the attorneys' fee in anticipation of the proceedings; that the proceeding was administrative in character, and that for its purpose a hearing might be had upon form of notice sufficient to advise the attorneys that the court was proceeding to act under the authority conferred by the law.

Finding no error in the judgment of the Supreme Court of Missouri, it is affirmed.

*CITY OF CHICAGO, Plff. in Err., [313
v.

FRANK STURGES.

(See S. C. Reporter's ed. 313-324.)

Constitutional law — due process of law — municipal liability for damage by mob — police power.

1. Making a municipality liable for three

NOTE.—On municipal liability for damage by mob—see notes to *Gianfortone v. New Orleans*, 24 L.R.A. 592; *Adamson v. New York*, 10 L.R.A.(N.S.) 925; and *Chicago v. Pennsylvania Co.* 57 C. C. A. 517.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

fourths of the damage to property within its limits caused by a mob or riot, as is done by Ill. Laws 1887, p. 237, which saves to the owner his action against the rioters and gives the municipality a lien upon any judgment against such participants for reimbursement, or a remedy to the municipality directly against the individuals causing the damage, to the amount of any judgment it may have paid the sufferer, is a valid exercise of the police power, and does not deny to the municipality due process of law because it imposes liability irrespective of any question of the power of the municipality to have prevented the violence, or of negligence in the use of its power.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — municipal liability for damage by mob.

2. A city is not denied the equal protection of the laws by Ill. Laws 1887, p. 237, imposing upon it a liability for damage to property within its limits, caused by a mob or riot, because when property damaged under like circumstances is situated in a village or other incorporated town, the liability is imposed upon the county instead of upon such village or town.

[For other cases, see Constitutional Law, IV. a, 1, in Digest Sup. Ct. 1908.]

[No. 39.]

Argued November 6, 1911. Decided December 18, 1911.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, in that state, enforcing a statutory liability against a municipality for damage caused by a mob or riot. Affirmed.

See same case below, 237 Ill. 46, 86 N. E. 683.

The facts are stated in the opinion.

Messrs. **John W. Beckwith** and **Joseph F. Grossman** argued the cause, and, with Mr. William H. Sexton, filed a brief for plaintiff in error:

English authority for legislation under the police power of the state is inapplicable to our jurisprudence. In England there are no vested rights. Its police power is absolute and without limitation.

4 Coke, Inst. 36.

To justify legislation in this country under the police power of the state, it must appear that the act is reasonably necessary for the accomplishment of the purpose for which it is passed, and not unduly oppressive.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The proceedings in the state courts in

which judgment was rendered against plaintiff in error herein were not due process of law. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Ziegler v. South & North Ala. R. Co. 58 Ala. 594; **Chicago, M. & St. P. R. Co. v. Minnesota**, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The state has no greater control over the property rights of municipal corporations than of other corporations or individuals.

Dartmouth College v. Woodward, 4 Wheat. 518, 694, 4 L. ed. 629, 673; **New Orleans v. New Orleans Waterworks Co.** 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; **Williams v. Eggleston**, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; **Louisville v. Com.** 1 Duv. 295, 85 Am. Dec. 624; **New Orleans, M. & C. R. Co. v. New Orleans**, 26 La. Ann. 478; **Touchard v. Touchard**, 5 Cal. 306.

The funds of plaintiff in error are its private property, and they cannot be taken without due process of law.

Dartmouth College v. Woodward, 4 Wheat. 518, 694, 4 L. ed. 629, 673; **Chicago v. Chicago & N. W. R. Co.** 87 Ill. App. 611; **People v. Fields**, 58 N. Y. 491.

The guaranty of the equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.

Missouri v. Lewis (**Bowman v. Lewis**) 101 U. S. 22, 25 L. ed. 989; **Barbier v. Connolly**, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; **Cotting v. Kansas City Stock Yards Co.** (**Cotting v. Godard**) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; **Connolly v. Union Sewer Pipe Co.** 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

To justify legislation affecting a class of persons, the classification must bear a reasonable relation to the purposes for which the legislation is aimed.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; **Cotting v. Kansas City Stock Yards Co.** (**Cotting v. Godard**) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; **Connolly v. Union Sewer Pipe Co.** 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; **People ex rel. Stuck-**

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art v. Knopf, 183 Ill. 410, 56 N. E. 15; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; State ex rel. Richards v. Hammer, 42 N. J. L. 435; State, Hightown, Prosecutor, v. Glenn, 47 N. J. L. 105; People ex rel. Danville v. Fox, 247 Ill. 402, 93 N. E. 302.

Each city, village, or town incorporated prior to the adoption of the Illinois Constitution of 1870 is as similar or dissimilar as their special charters; and hence the fact that a municipality was organized under the name of "city," prior to the Constitution of 1870, bears no reasonable relation to the purposes of the act, which is to suppress mob violence and to indemnify the owners of property for damages occasioned by mobs and riots throughout the state.

People ex rel. Thorp v. Normal, 170 Ill. 468, 48 N. E. 901.

The judgment of the state supreme court that there is such a difference between cities, villages, and towns as to form a rational basis for classification in the act under consideration, is not conclusive upon the Supreme Court of the United States.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 222, 6 Sup. Ct. Rep. 1064; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Houston & T. C. R. Co. v. Texas, 177 U. S. 77, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358.

The terms "city," "village," or "incorporated town" are not synonymous, nor is the term "city" generic, so as to include "village" or "incorporated town."

Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Pitzman v. Freeburg, 92 Ill. 111; People ex rel. Danville v. Fox, 247 Ill. 402, 93 N. E. 302.

The act is penal as well as remedial, and should be strictly construed.

Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Underhill v. Manchester, 45 N. H. 221.

The statute is in derogation of the common law, and nothing can be read into it by implication.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Porter v. Dement, 35 Ill. 478; Thompson v. Weller, 85 Ill. 197; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Thornburg v. American Strawboard Co. 141 Ind. 443, 50 Am. St. Rep. 334, 40 N. E. 1062; Sarazin v. Union R. Co. 153 Mo. 479, 55 S. W. 92.

The statute gives to owners of property
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in the county outside the limits of any city a right of action against said county, but does not give such right to owners of property within the same county, if within the limits of any city.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The statute imposes a burden upon some of the inhabitants of the county (those living within the limits of a city) which is double that imposed upon all other inhabitants of the same county. The former exclusively must bear the burden of indemnifying persons for property destroyed within the limits of their city, and must also share the burden of indemnification for property destroyed in their county outside the limits of any city; but the latter must only share with the inhabitants of cities in indemnifying owners of property destroyed in the county outside city limits.

Ibid.

Messrs. Edward J. Brundage and Robert N. Holt also filed a brief for plaintiff in error:

The "equal protection of the law" covers privileges conferred as well as liabilities imposed.

Guthrie, 14th Amendment, Lecture 4, p. 111; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

Laws inflicting penalties should operate equally on all citizens equally situated.

Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

An arbitrary classification of persons or corporations to be affected does not render a law applying to one such class general in character.

Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; People ex rel. Deneen v. Martin, 178 Ill. 611, 53 N. E. 309; People ex rel. Stuckart v. Knopf, 183 Ill. 410, 56 N. E. 155; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28.

Where a general law can be made applicable, a special law is unconstitutional.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Badenoch v. Chicago, 222 Ill. 72, 78 N. E. 31; Bailey v. People, 190 Ill. 34, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Hibbard v. Chicago, 173 Ill. 91, 40 L.R.A.

621, 50 N. E. 256; *People ex rel. Miller v. Cooper*, 83 Ill. 585; *People ex rel. Stuckart v. Knopf*, 183 Ill. 410, 56 N. E. 155; *People ex rel. Gleeson v. Mecch*, 101 Ill. 200.

The mere fact that a municipality has adopted the form of government provided for cities affords no reasonable basis for conferring upon it benefits and privileges withheld from villages of equal population, and differing from cities only in that they have not incorporated as cities.

People ex rel. Danville v. Fox, 247 Ill. 402, 93 N. E. 302.

There is a very important difference as between counties and those municipal corporations known as cities, villages, and towns. Cities, villages, and towns are voluntary organizations, while counties are quasi municipal organizations, involuntarily organized.

Dill. Mun. Corp. chap. 2, § 23, p. 42.

Due process of law requires that a party be given an opportunity to be heard on every question of fact or liability.

Ohio & M. R. Co. v. Lackey, 78 Ill. 55; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Jensen v. Union P. R. Co.* 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Wadsworth v. Union P. R. Co.* 18 Colo. 600, 23 L.R.A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; *Catril v. Union P. R. Co.* 2 Idaho, 576, 21 Pac. 416; *Bielenberg v. Montana Union R. Co.* 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; *Thompson v. Northern P. R. Co.* 8 Mont. 279, 21 Pac. 25; *Schenck v. Union P. R. Co.* 5 Wyo. 430, 40 Pac. 840; *East Kingston v. Towle*, 48 N. H. 57, 2 Am. Rep. 174, 97 Am. Dec. 575; *Stoudenmire v. Brown*, 48 Ala. 699; *Street v. New Orleans*, 32 La. Ann. 577.

Due process of law requires only what is demanded by the usual general law, according to the nature of the particular matter in hand. It will not tolerate unusual or arbitrary actions.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Where the void provisions in a statute cannot be eliminated without affecting the remaining portions, the whole statute becomes void.

Cooley, Const. Lim. pp. 178, 179; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177.

A corporation is a person within the meaning of the equal protection provision of the 14th Amendment.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

Equal protection means subjection to equal laws, applying alike to all in the same situation.

Ibid.

The province of construction lies wholly within the domain of ambiguity.

Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20; *Sedgw. Statutes*, § 271; *Wellford v. Snyder*, 137 U. S. 524, 34 L. ed. 780, 11 Sup. Ct. Rep. 183.

The court declined to hear Messrs. Almon W. Buckley, Frank J. Loesch, James Stillwell, and Timothy J. Scofield for defendant in error:

It is a rule of construction that a penal statute is to be strictly construed; but courts do not construe such statutes so strictly as to defeat the apparent purpose of the legislature in the enactment of the law.

United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *Black, Constr. & Interpretation of Laws*, 288; *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740; *Hines v. Wilmington & W. R. Co.* 95 N. C. 434, 59 Am. Rep. 250; *People v. Goodhart*, 248 Ill. 373, 94 N. E. 148.

A penal statute is one which imposes punishment for a violation of statutes, and which the governor of a state, or the President of the United States, is vested with power to pardon.

Pittsburg, Ft. W. & C. R. Co. v. Methven, 21 Ohio St. 586; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Sutherland, Stat. Constr. § 358.*

The indemnifying statute here involved, as construed by the supreme court of Illinois, is not an act for the punishment of a city or county for a failure or an inability to control the actions of mobs and riotous assemblages.

Sturges v. Chicago, 237 Ill. 46, 86 N. E. 683.

When an act of the legislature can be construed and applied so as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts.

Colwell v. May's Landing Water Power Co. 19 N. J. Eq. 249; *People ex rel. Burrows v. Orange County*, 17 N. Y. 241; *Newland v. Marsh*, 19 Ill. 384; *Cooley, Const. Law*, 184, 185; *Grenada County v. Brogden (Grenada County v. Brown)* 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125.

The indemnifying act here involved is remedial, and should be liberally construed.

Sturges v. Chicago, 237 Ill. 46, 86 N. E. 683; *Schiellein v. Kings County*, 43 Barb. 490; *Sarles v. New York*, 47 Barb. 447;

Underhill v. Manchester, 45 N. H. 214; Hermits of St. Augustine v. Philadelphia County, Brightly (Pa.) 116.

There is a difference between cities and villages which forms a rational basis for a valid classification for purposes of legislation.

Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; Sturges v. Chicago, 237 Ill. 46, 86 N. E. 683; People ex rel. Davis v. Nellis, 249 Ill. 12, 94 N. E. 165.

A legislature may classify cities, and enact laws applicable to such cities, according to their classification, but the classification must not be arbitrary.

State, Anderson, Prosecutor, v. Trenton, 42 N. J. L. 486; People ex rel. Danville v. Fox, 247 Ill. 402, 93 N. E. 302.

The Supreme Court of the United States is not authorized to inquire into the grounds or reasons upon which a state supreme court proceeds in its construction of a state statute.

Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894.

A village is a small assemblage of houses for dwelling, or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not.

Illinois C. R. Co. v. Williams, 27 Ill. 48; Toledo, W. & W. R. Co. v. Spangler, 71 Ill. 568.

The supreme court of Illinois construes the word "village," as used in the act for the incorporation of cities and villages, to be a village or small collection of residences which has become incorporated for the better regulation of its internal police.

Phillips v. Scales Mound, 195 Ill. 358, 63 N. E. 180.

Cities and villages organized under special charters, and having thereafter adopted the general law, exercise all powers conferred upon cities and villages by the general law, and in addition thereto such powers as were conferred upon them respectively by their special charters which are not inconsistent with the general law, the adoption of the general law, not abrogating their special charters.

Speight v. People, 87 Ill. 595; Fuller v. Heath, 89 Ill. 296; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Smith v. People, 154 Ill. 58, 39 N. E. 319; Brenan v. People, 176 Ill. 620, 52 N. E. 353; Cleveland, C. C. & St. L. R. Co. v. Randle, 183 Ill. 364, 55 N. E. 728; School Trustees v. School Inspectors, 214 Ill. 30, 73 N. E. 412; People ex rel. School Inspectors v. Mottinger, 215 Ill. 256, 74 N. E. 150; People ex rel. Chicago v. Hummel, 215 Ill. 71, 74 N. E. 78.

The word "city," as used in the indemnity

act here involved, is a generic designation and includes villages.

Burke v. Monroe County, 77 Ill. 610; Martin v. People, 87 Ill. 524; Bruner v. Madison County, 111 Ill. 11; People ex rel. Longenecker v. Harvey, 142 Ill. 573, 32 N. E. 295; Phillips v. Scales Mound, 195 Ill. 353, 63 N. E. 180; People ex rel. Mohlenbrock v. Pike, 197 Ill. 452, 64 N. E. 393; State ex rel. Rice v. Simmons, 35 Mo. App. 374; State ex rel. Wood v. Goldstucker, 40 Wis. 124; State, Bell, Prosecutor, v. Newark, 40 N. J. L. 552, 29 Am. Rep. 266; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358.

Every borough or city is a town.

1 Coke, Inst. 116.

The act in question does not violate the provisions of the 14th Amendment guarantying due process of law.

Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. Their functions are for the public good. They are created, among other purposes, to manage the concerns, police, and public interest of the people living within their territory, and they are subject to legal obligations and duties, and derive all their powers from the legislature, except where the Constitution of the state otherwise provides. They have only such powers as the legislature confers upon them. All the rights, duties, and obligations of such a corporation must be ascertained and defined by the laws of the state which created it.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

The terms of the act do not violate the provisions of the 14th Amendment guarantying the equal protection of the laws.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Marchant v. Pennsylvania R.

Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

Mr. Justice Lurton delivered the opinion of the court:

The only question under this writ of error is as to the validity of a statute of the state of Illinois entitled, "An Act to Indemnify the Owner of Property for Damages by Mobs and Riots." Laws of 1887, p. 237.

The defendant in error recovered a judgment against the city under that statute, which was affirmed in the supreme court of the state. 237 Ill. 46, 86 N. E. 683. The validity of the law under the Illinois Constitution was thus affirmed, and that question is thereby foreclosed. But it was urged in the Illinois courts that the act violated the guaranty of due process of law and the equal protection of the law, as provided by the 14th Amendment of the Constitution of the United States.

By the provisions of the statute referred to, a city is made liable for three fourths of the damage resulting to property situated therein, caused by the violence of any mob or riotous assemblage of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner, etc. If the damage be to property not within the city, then the county in which it is located is in like manner made responsible. The act saves to the owner his action against the rioters, and gives the city or county, as the case may be, a lien upon any judgment against such participants for reimbursement, or a remedy to the city or county directly against the individuals causing the damage, to the amount of any judgment it may have paid the sufferer.

It is said that the act denies to the city due process of law, since it imposes liability irrespective of any question of the power of the city to have prevented the violence, or of negligence in the use of its power. 322] This was the interpretation *placed upon the act by the supreme court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable narrows the objection to the single question of legislative power to impose liability regardless of fault.

It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight

could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded, may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the 14th Amendment.

The law in question is a valid exercise of the police power of the state of Illinois. It rests upon the duty of the state to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the state to preserve social order and the property of the citizen against the violence of a riot or a mob.

*The state is the creator of subor-[323]dinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus intrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.

The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, "The Hundred," a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in

the statutes of Westminster, coming on down to the 27th Elizabeth, the riot act of George I. and act of George II., chap. 10, we may find a continuous recognition of the principle that a civil subdivision intrusted with the duty of protecting property in its midst, and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the states and held valid exertions of the police power. *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Fauvia v. New Orleans*, 20 La. Ann. 410; *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the 324]*lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law.

There remains the contention that the act discriminates between cities and villages or other incorporated towns.

The liability is imposed upon the city if the property be within the limits of a city; if not, then upon the county. The classification is not an unreasonable one. A city is presumptively the more populous and better organized community. As such it may well be singled out and made exclusively responsible for the consequence of riots and mobs to property therein.

The county, which includes the city and other incorporated subdivisions, is, not unreasonably, made liable to all sufferers whose property is not within the limits of a city.

The power of the state to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate.

56 L. ed.

The cases upon this subject are so numerous as to need no further elucidation.

Among the later cases are *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *House v. Mayes*, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234.

Judgment affirmed.

*ALLEN A. BROWN et al., Appts., [325 v.

ALTON WATER COMPANY.

(See S. C. Reporter's ed. 325-334.)

Appeal — from circuit court — jurisdiction below — prior appeal to circuit court of appeals.

A direct appeal will not lie to the Federal Supreme Court under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), to review, as presenting a question of jurisdiction, a decree of a circuit court entered pursuant to the mandate of a circuit court of appeals, which, being of the opinion that the bill was within the ancillary jurisdiction of the circuit court, had reversed a decree of that court dismissing such bill for want of jurisdiction, since there was an opportunity afforded by the statute to obtain a review of the jurisdictional question in the Supreme Court, either upon a certificate of the circuit court of appeals, or on writ of certiorari to that court.

[For other cases, see *Appeal and Error*, 990-993, in *Digest Sup. Ct.* 1908.]

[No. 75.]

Argued December 4 and 5, 1911. Decided January 9, 1912.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois to review a decree entered pursuant to the mandate of the Circuit Court of Appeals for the Seventh Circuit, reversing a prior decree of the Circuit Court, dismissing, for want of jurisdiction, a bill invoking the ancillary jurisdiction of the court to protect rights acquired under a foreclosure decree. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

NOTE.—On direct appeals to Federal Supreme Court from circuit and district courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741, and *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333.

Messrs. **Elijah N. Zoline** and **James Hamilton Lewis** argued the cause and filed a brief for appellants:

Mr. William Burry argued the cause, and, with Messrs. **Levi Davis** and **F. B. Johnstone**, filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

In view of the fact that our interposition was vainly sought at one or the other stage 326] of this protracted litigation, *we shall state the history of the controversy more fully than perhaps we would otherwise do.

In 1901 the New England Water Company owned and operated a water plant at Alton, Illinois. This plant was acquired from the Alton Water Works Company. In October, 1901, the United Water Works Company filed in a court of the state of Illinois a creditors' bill against the New England Water Company and the Farmers' Loan & Trust Company, trustee under a mortgage covering the plant of the waterworks company. Other parties and corporations, because of their asserted claims in or to the property, were joined as defendants.

The Farmers' Loan & Trust Company not only appeared in the cause, but in the same court filed a bill to foreclose its mortgage. Among those made defendants to this bill were a corporation known as the Boston Water & Light Company and the International Trust Company. The Boston Company was made a defendant on the ground that it asserted some claim to a portion of the property which the complainant insisted was covered by the mortgage sought to be foreclosed as a result of an after-acquired property clause contained in that mortgage. The International Trust Company was made a defendant as trustee of a mortgage executed in favor of that company by the Boston Company, embracing the property which the bill averred was covered by the prior mortgage in favor of the Farmers' Loan & Trust Company.

The causes were consolidated and a receiver was appointed. The Boston Water & Light Company, asserting a separable controversy, removed the consolidated cause to the circuit court of the United States for the southern district of Illinois, and that court overruled a motion to remand. The International Trust Company answered and contested the claim made in the bill that the property mortgaged to it was covered by the mortgage of the Farmers' Loan & Trust Company.

327] *The circuit court entered a final decree on December 23, 1903. By that decree the operation of the mortgage in favor of the Farmers' Loan & Trust Company, as 222

charged in the bill, was recognized and the priorities of the respective liens upon the property were fixed. While the lien of the mortgage in favor of the International Trust Company, as trustee, was recognized, it was decreed to be subordinate to the prior mortgage to the Farmers' Loan & Trust Company. The decree contained the usual provisions fixing the amount due, directing payment, ordering a sale upon default in payment, and barring all parties and their privies.

The circuit court of appeals, on an appeal taken by the International Trust Company and others, finally disposed of the case. The removal was sustained, and it was held that by the after-acquired property clause in the mortgage of the Farmers' Loan & Trust Company, that mortgage embraced the property covered by the mortgage in favor of the International Trust Company as trustee. 69 C. C. A. 297, 136 Fed. 521. A writ of certiorari was refused by this court on April 3, 1905. *Boston Water & Light Co. v. Farmers' Loan & T. Co. and New England Waterworks Co. v. Farmers' Loan & T. Co.* 197 U. S. 622, 49 L. ed. 910, 25 Sup. Ct. Rep. 798, 799.

A sale under the decree of foreclosure took place, the property bringing about enough to satisfy the mortgage in favor of the Farmers' Loan & Trust Company. Pending a motion to confirm this sale, certain parties, the same who are now appellants, alleging themselves to be holders of bonds secured by the mortgage of the International Trust Company, objected to the confirmation of the sale, on the ground that the property embraced in the mortgage to the International Trust Company was not covered by the mortgage of the Farmers' Loan & Trust Company. It was alleged that the persons appearing were not privies to the foreclosure proceedings and the decree entered *therein, because they had 328 not been made parties *eo nomine*, and were not represented by the International Trust Company, as the powers conferred upon that corporation by the deed of trust did not give authority to represent the bondholders. The objections were stricken from the files, and the sale was confirmed. Among other things, the order of confirmation enjoined all parties to the suit and all persons claiming through or under them, their attorneys, solicitors, etc., "from setting up any pretended or alleged title against the title of the purchasers." A question as to the distribution of the proceeds among coupon holders was subsequently reviewed in the circuit court of appeals. 70 C. C. A. 163, 137 Fed. 729.

The present appellee, the Alton Water Company, became the owner of the prop-

erty sold under the decree in foreclosure. Subsequently the present appellants, as holders of bonds secured by the mortgage to the International Trust Company, and the same persons who had objected to the confirmation of the sale, treating the prior foreclosure proceedings as to them as non-existing, commenced in a state court a suit to foreclose the mortgage in favor of the International Trust Company. The International Trust Company, the Boston Water & Light Company, the Alton Water Works Company, the Alton Water Company, as one in possession of the property, as well as other bondholders, various alleged lien holders, and adverse claimants, were made parties. As stated by both parties in argument, persons who were interested in maintaining the decree in the prior foreclosure proceedings asked a commitment for contempt against the attorney who appeared for the complainants in the suit in the state court, and under the stress of a commitment for contempt the proceedings in the state court were discontinued. The commitment was, however, set aside by the circuit court of appeals, 83 C. C. A. 211, 154 Fed. 273, and a petition for a writ of **329** certiorari to review the order of reversal was denied by this court. *Peck v. Lewis*, 207 U. S. 593, 52 L. ed. 355, 28 Sup. Ct. Rep. 258.

Following the decision last referred to, appellants refiled their foreclosure bill in the state court. The Alton Water Company thereupon filed in the court below the bill which is now before us as ancillary to the bill filed in the original foreclosure suit, invoking the authority of the court in virtue of the jurisdiction acquired in the foreclosure proceedings, to protect, as between the parties to such suit, the rights acquired under the foreclosure sale. The bill only prayed that the further prosecution in the state court be enjoined. The defendants were those who were asserting the right as bondholders under the International Trust Company mortgage to foreclosure in the state court, and their attorneys. Each of such defendants separately filed a general demurrer, and each also specially demurred on the ground that the court was "without jurisdiction, both over the subject-matter and parties to the suit," and that the bill was not an ancillary bill, as it appeared on its face that the defendant was not a party to the prior foreclosure proceedings. The demurrers were sustained and the bill was dismissed "for want of jurisdiction."

The circuit court of appeals reversed this decree, and held that the persons who, as alleged bondholders, were complainants in the foreclosure suit in the state court, had been fully represented in the prior fore-

closure by the International Trust Company, and therefore that such persons were parties and privies to the prior decree, and their rights were concluded thereby. Upon this basis it was expressly decided that the bill did not invoke the power of the court as a matter of original jurisdiction, but was, in its essence, purely ancillary, since it only sought the aid of the court to uphold a jurisdiction previously acquired, and to enforce and protect an authority previously exerted. In thus enforcing its prior decree it was pointed out there was no **330** room for saying that the original jurisdiction and power of the court as a Federal court was involved, upon the theory that the defendants had not been brought in by proper process, since there was no controversy on that subject. It was moreover held that upon the premises stated, none of the grounds of demurrer raised any controversy as to the general power of the court, under the laws of the United States, to administer the relief prayed, but simply called in question the right of the court, as a matter of chancery practice, to afford relief in the mode and manner asked. The court decided that the case was one properly within its appellate cognizance, and was not within the category of cases susceptible of being brought directly to this court from a circuit court, as involving the jurisdiction and authority of the circuit court as a Federal court. 92 C. C. A. 598, 166 Fed. 840. A petition for certiorari to review this action of the court was denied on January 11, 1909. *Lewis v. Alton Water Co.* 212 U. S. 581, 53 L. ed. 659, 29 Sup. Ct. Rep. 690.

Several months after the filing of the mandate of the circuit court of appeals, reversing the decree of dismissal, the cause was heard upon bill and answer and upon the default of certain defendants. A decree was entered perpetually enjoining the prosecution of the cause in the state court, and prohibiting any attempt in the future to foreclose the mortgage to the International Trust Company. Thereupon the court allowed the direct appeal which is now before us. At the time of granting the appeal there was filed among the papers in the cause a certificate signed by the presiding judge, in which in substance it was recited that when the case came on for hearing, the answering defendants challenged the jurisdiction of the court as a Federal court to hear and determine the cause, and that the objection was overruled and exception taken. It was further recited that, at the close of the hearing, the defendants excepted to the ruling "that the acts stated in the answers do not **331** constitute a sufficient defense in law to the

cause of action of the complainants, and that no constitutional guaranties or privileges of the defendants, as set forth in their answers, were violated by the entering of the decree set forth in the bill and answer, and that the defendants were not deprived of their property without due process of law, in violation of the Federal Constitution."

It is plain that our right to review depends on the existence of a question of jurisdiction subject, under the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], to be brought here directly from a circuit court. The case reduces itself to this, since the matters of constitutional right to which the court refers in its certificate are not independent, but are involved in and subordinate to the question of jurisdiction, and hence will be disposed of by deciding that issue.

It is not disputable that the action of the court below on the question of jurisdiction was the necessary result of the decision of the circuit court of appeals, since it was the imperative duty of the circuit court to give effect to that decision. As consequently it will be impossible to reverse for error the action of the circuit court without reversing the foundation upon which the action of that court rested, that is, the dominant decree of the circuit court of appeals, it must result that the decree can only be reversed by reviewing and reversing the decree of the circuit court of appeals. That decree, however, not being before us, and moreover, as the statute gives no power to this court to review a decree of a circuit court of appeals merely because of the existence of a question of jurisdiction, it comes to pass that we may not by indirection do that which we cannot do directly, and hence the decree of the circuit court, under the conditions here existing, is not susceptible of being reviewed.

The fundamental mistake which underlies the argument by which it is sought to sustain the right to a direct *review consists in failing to distinguish between the mere methods of review provided by the act of 1891, and the distribution made by that act of original and appellate judicial power. More immediately the fault of the argument consists in disregarding the duty of the circuit court to apply the law of the case arising from the decision of the circuit court of appeals,—an error hitherto pointed out in *Aspen Min. & Mill. Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4. That case involved an unsuccessful attempt to obtain a review in this court of a judgment of a circuit court entered in compliance with a mandate of

the circuit court of appeals, to which the case had been previously taken. In denying the right to review under the circumstances, the court said (p. 37):

"That court [the circuit court of appeals] took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it is not for the circuit court to pass upon that question. The circuit court could not do otherwise than carry out the mandate from the court of appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court."

But the proposition insisted upon virtually is that this ruling is inapplicable here, since this case involves a question of jurisdiction directly reviewable in this court under the act of 1891. The reasoning sustaining this assumption is as follows: As, it is said, the decision of the circuit court was in favor of the defendants, and therefore no occasion arose to seek a review of the question of jurisdiction until the decree of the circuit court of appeals, unless it be held that the right exists to review the action of the circuit court, it will arise that the right of direct review of the jurisdictional questions, which it was the purpose of the act of 1891 to confer upon this court, will be lost in many cases, and thus the purpose of the statute be frustrated. This, however, as already pointed out, in *a changed form of statement[333 involves confounding the remedial process created by the act of 1891, with the distribution of jurisdiction made by that act. True it is that the act confers authority to directly review the classes of jurisdictional questions which the act contemplates. True, also, it is that the act does not deprive judgments of the circuit courts of appeals of their final character, and open them to review in this court, because alone of the presence of a jurisdictional question susceptible of being reviewed directly from a circuit court. But this affords no reason for the exertion of an appellate power not conferred by the act, nor does it justify the assumption that the power of this court to review in such a case would be wanting. On the contrary, as pointed out long ago by this court, the remedial processes which the statute of 1891 creates when rightly understood are adequate, by one method or the other, to afford ample opportunity for a review by this court of every judgment or decree of a lower court which the statute contemplated should be reviewed and revised by this court. *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343. Thus, as the case cited points out, if a question of juris-

diction which would be directly reviewable in this court if arising in the circuit court should develop or require decision for the first time in the circuit courts of appeals, the power to certify to this court would afford ample means to obtain a review by this court of such question. And if that right in such a case should not be exerted by the circuit court of appeals, the discretionary right to allow the writ of certiorari which the act confers would afford a complete means of securing, in the fullest degree, the results contemplated by the act. It is, of course, an obvious misconception to indulge in the assumption that it was the duty of the circuit court of appeals to have certified the question of jurisdiction, since the opinion of that court shows that it deemed the case would not have justified a 334] direct appeal to this court had *the question of jurisdiction arisen primarily in the circuit court. The fact that after the decision of the circuit court of appeals a petition for certiorari was considered and by this court denied makes it certain that there was opportunity by this court to revise the action of the circuit court of appeals.

As it follows that we have no jurisdiction to review by direct appeal the action of the Circuit Court in giving effect to the decision of the Circuit Court of Appeals, it results that the appeal must be dismissed.

Appeal dismissed.

R. J. BERRYMAN, Assessor; P. B. Hawley, Treasurer; W. J. Honeycutt, Auditor, et al., Appts.,

v.

BOARD OF TRUSTEES OF WHITMAN COLLEGE.

(See S. C. Reporter's ed. 334-353.)

Courts — jurisdictional amount — suit to enjoin tax.

1. A suit to enjoin the collection of taxes on the property of an educational institution on the ground of a perpetual contract of exemption from taxation, protected from impairment by the contract clause of the Federal Constitution, involves the amount essential to sustain the original jurisdiction of a Federal circuit court, where the contract right exceeds in value that

amount, although the particular tax assessed and levied is less than that sum.

[For other cases, see Courts, 925, 926, in Digest Sup. Ct. 1908.]

Territories — power of legislature — grant of especial privileges.

2. The granting of especial privileges by any form of legislative action, and not merely the conferring of such privileges as a part of the grant of a forbidden private charter, was what was prohibited by the provision of the Washington organic act of March 2, 1867 (14 Stat at L. 426, chap. 150), that the territorial legislature should not grant private charters or especial privileges, but might enact general incorporation acts.

[For other cases, see Territories, 26-35, in Digest Sup. Ct. 1908.]

Territories — power of legislature — grant of especial privileges.

3. The generic prohibition against the granting of especial privileges, made by the Washington organic act of March 2, 1867, cannot be construed as intended to forbid merely the creation of such privileges as a legislative grant of an exclusive right to ferries, bridges, etc., even if it be conceded that such grants were a common form of territorial legislative abuse prior to the adoption of that statute, and were the generating cause of the insertion of this prohibition.

[For other cases, see Territories, 26-35, in Digest Sup. Ct. 1908.]

Taxes — exemptions — construction.

4. The rule of strict construction is just as applicable when determining whether words of restriction found in the fundamental law are intended to operate as a limitation on the legislative power to grant contract exemptions from taxation, as where the question is whether the particular terms of an alleged contract did or did not embrace an exemption from taxation.

[For other cases, see Taxes, 372-375, 396-417, in Digest Sup. Ct. 1908.]

Taxes — exemptions — legislative power.

5. A territorial statute giving perpetual succession to an incorporated educational institution, and endowing it with a perpetual exemption from taxation as to all its property, real and personal, grants an especial privilege within the meaning of the provisions of the Washington organic act of March 2, 1867, that the territorial legislature shall not grant private charters or especial privileges, but may enact general incorporation acts.

[For other cases, see Taxes, 396-417, in Digest Sup. Ct. 1908.]

Territories — congressional confirmation — acquiescence.

6. The assent of Congress to the grant

That exemption from taxation, whether a contract or not, is not implied—see note to Tucker v. Ferguson, 22 L. ed. U. S. 805.

As to the power of a state legislature to exempt from taxation—see note to Hogg v. Mackay, 19 L.R.A. 77.

NOTE.—On the jurisdiction of Federal courts as affected by the amount in dispute—see notes to Rich v. Bray, 2 L.R.A. 225; Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459, and O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.

of an especial privilege by the territorial legislature, contrary to the express provisions of the organic act, cannot be implied from its failure to disapprove such enactment.

[For other cases, see Territories, 40, 41, in Digest Sup. Ct. 1908.]

[No 95.]

Argued December 13, 1911. Decided January 9, 1912.

APPEAL from the Circuit Court of the United States for the Eastern District of Washington to review a decree enjoining the collection of a tax on the ground of a perpetual contract exemption from taxation. Reversed and remanded for further proceedings.

See same case below, 156 Fed. 112.

The facts are stated in the opinion.

Mr. **Everett J. Smith** argued the cause, and, with Mr. **Lester S. Wilson**, filed a brief for appellants:

The effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute.

Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *Clay Center v. Farmers' Loan & T. Co.* 145 U. S. 224, 36 L. ed. 685, 12 Sup. Ct. Rep. 817; *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348.

The prayer for a perpetual injunction against future taxation does not strengthen or add to the value of the matter in dispute.

Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64.

The territorial grant of exemption was an "especial privilege," within the meaning of the amendment to the organic act of Congress relating to territories, of March 2, 1867, being § 1889 of U. S. Revised Statutes.

Given v. Wright, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. ed. 401; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*)

112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299.

A territorial law passed in violation of the positive prohibition of Congress is void.

Clayton v. Utah, 132 U. S. 632, 33 L. ed. 455, 10 Sup. Ct. Rep. 190.

This court has several times held that the assent of Congress may be implied, from lapse of time, and without specific sanction, to certain laws of a territory. But the laws so presumptively sanctioned relate to territorial matters of a general character, within the apparent scope of a territorial legislature, and necessary to the efficient regulation and control of those general matters which had been delegated to the territorial legislature by Congress.

Clinton v. Englebrecht, 13 Wall. 446, 20 L. ed. 662; *Miners' Bank v. Iowa*, 12 How. 7, 13 L. ed. 870; *Baca v. Perez*, 8 N. M. 187, 42 Pac. 162.

Mr. **W. T. Dovell** argued the cause, and, with Messrs. **Thomas Burke** and **George Turner**, filed a brief for appellee:

When the object or purpose of the bill is the assertion of a right which is alleged to be disputed by the respondent, and it may be fairly gathered from the bill that the asserted right is of a value in excess of \$2,000, jurisdiction is thereby conferred.

Brown v. Trousdale, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547; *Stinson v. Dousman*, 20 How. 461, 15 L. ed. 966; *Evenson v. Spaulding*, 9 L.R.A. (N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; *Albright & New Mexico*, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; *Simon v. House*, 46 Fed. 317; *Humes v. Ft. Smith*, 93 Fed. 857; *Southern Exp. Co. v. Ensley*, 116 Fed. 756; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399; *Pennsylvania Co. v. Bay*, 138 Fed. 203; *Bitterman v. Louisville & N. R. Co.* 207 U. S. 225, 52 L. ed. 183, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Hunt v. New York Cotton Exch.* 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; *Lanning v. Osborne*, 79 Fed. 657.

The term "especial privileges," as used in the act of Congress, does not refer to a grant of this character.

Chesapeake & O. R. Co. v. Miller, 114 U.

S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 578; *Plattsmouth v. Nebraska Teleph. Co.* 80 Neb. 460, 14 L.R.A.(N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336.

An institution of the character of Whitman College renders to the state a consideration to support its charter.

Dartmouth College v. Woodward, 4 Wheat. 519, 4 L. ed. 629; *Home of Friendless v. Rouse*, 8 Wall. 430, 437, 19 L. ed. 495, 497; *Nobles County v. Hamline University*, 46 Minn. 316, 48 N. W. 1119; *Yale University v. New Haven*, 71 Conn. 316, 43 L.R.A. 490, 42 Atl. 87.

No grant made by the state for an adequate consideration may be called an "especial privilege."

Illinois v. Illinois C. R. Co. 33 Fed. 769; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217.

The failure of Congress to disapprove the act of the legislature is the strongest possible evidence of approval by that body.

Clinton v. Englebrecht, 13 Wall. 446, 20 L. ed. 662; *Cooley, Const. Lim.* 7th ed. p. 54, note; *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867; *Atlantic & P. R. Co. v. Lesueur*, 2 Ariz. 428, 1 L.R.A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157; *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204; *Baca v. Perez*, 8 N. M. 187, 42 Pac. 162; *Williams v. Bank of Michigan*, 7 Wend. 540.

Mr. Chief Justice **White** delivered the opinion of the court:

On December 20, 1859, the legislature of Washington enacted a private law creating Whitman Seminary in Walla Walla county. By the act eight persons were incorporated under the name of the "President and Trustees of Whitman Seminary." The corporation was given perpetual existence and the incorporators authority to govern its affairs and to name their successors. The right to acquire and hold real estate was conferred, with the duty of devoting all the revenue to the support of an institution of learning, for the education of both sexes, which it was the purpose of the act to have established. The capital stock of the corporation was limited by the 6th section to \$150,000. The act was accepted by the incorporators, and the institution for which it provided, the Whitman Seminary, was established in Walla Walla county. After a lapse of twenty-three years, the Seminary, in November, 1883, owned considerable personal and real property, devoted to the purposes of the corporation.

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In that year and month a special act was passed by the territorial legislature, entitled, "An Act to Amend . . ." the act previously referred to. By this act, in the form of an amendment, the original incorporators were incorporated under the name of "The Board of Trustees of Whitman College." The act, section by section, amended the prior act. It gave the trustees power to perpetuate themselves and govern the new corporation, which [343] was endowed with perpetual existence. The act, in many respects, enlarged the powers of the old corporation, struck out the 6th section, which contained the limitation of \$150,000 of capital stock, and substituted for it the following: "That the property of said Board of Trustees of Whitman College, including all income and proceeds, shall be used exclusively for the purpose of education, and in consideration of said use the said property, income, and proceeds shall not be subject to taxation." The organic law of the territory, the act of Congress of March, 1867 (14 Stat. at L. 426, chap. 150), when this last act was passed, contained the following, now embodied in Rev. Stat. § 1889:

"That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific association."

Whitman College took over the property and effects of the Seminary. It increased its holdings of real and personal property, the avails of which were all devoted to the purposes of the institution. It was in existence when the territorial government passed out of being and the state of Washington was incorporated into the Union, and it is conceded by both sides in argument that no question which requires to be decided on this record calls for a consideration of any of the events or legislation which were a part of the transition from the territorial form of government to statehood. Up to 1905 it is inferable that no attempt was made to tax the property of Whitman College. *In 1905, however, [344] the assessing officers of the county of Walla Walla, who are the appellants upon this record, acting under the authority of the state taxing law, and upon the assumption

that the property of the corporation was taxable, assessed its real property in the county of Walla Walla not actually and physically used for the purposes of the institution, and taxes were levied on such assessment, amounting to \$946.32. The corporation thereupon filed in the circuit court of the United States the bill which is now before us. The bill contained no averment of diversity of citizenship, and exclusively invoked the authority of the court below upon the ground of the existence of a perpetual contract right of exemption from taxation created by the 6th section of the act of 1883, and the impairment of such contract by the assessment and levy of the taxes in question.

The bill, as amended by stipulation, averred the existence of the contract, the compliance by the corporation with all its obligations, the acquisition of large amounts of property through contributions and otherwise dedicated to the purposes of the corporation, the detriment and loss which would be occasioned as the result of levying taxes upon the property of the corporation by the county of Walla Walla or otherwise by state authority, the destruction of the right of perpetual exemption, not only as to the present, but as to all future acquired property of the corporation, which would result, and a consequent loss or damage vastly in excess of \$2,000. In substance, the prayer was for a decree recognizing and enforcing the contract of perpetual exemption from taxation as to all the property of the corporation, present or prospective, and for an injunction adequate to secure these results.

The defendants by demurrers challenged the jurisdiction of the court and the equity of the bill. After hearing, the court held that it had jurisdiction, that the contract 345*]declared on had been established, and was protected from impairment by the contract clause of the Constitution, and therefore the assessment and levy of the taxes complained of were void. As defendants elected not to further plead, a final decree was entered, granting the relief prayed in the bill. The appeal now before us was then taken.

The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that, as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxa-

tion which might be exerted in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.

Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation, and as broad as its power to acquire and hold property.

Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue *presented is[346 not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right, and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. And the doctrine just cited has been applied in two cases so obviously in principle like this as practically to foreclose the question. The first is *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905. In that case a corporation of the state of Louisiana filed its bill in the circuit court to enjoin the collection of all taxes of a particular character against it, on the ground of a contract of exemption protected from impairment by the contract clause of the Constitution. As a means of establishing the existence of the contract exemption relied upon, certain judgments recognizing the existence of the contract exemption and enjoining particular taxes were pleaded as conclusively, by the principle of the thing adjudged, establishing the existence of the alleged contract. It was contended, among other things, that as the controversies in the cases in which judgments had been rendered concerned taxes for only particular years, the thing adjudged arising from the judgments was necessarily restricted to the

taxes of the years in controversy, and did not extend to future taxes, as they were not and could not have been embraced in the litigation. Deciding that this contention was unsound, and deducing the existence of the contract as the result of the proof arising from the thing adjudged, it was pointed out that to deny in a case of contract exempting from taxation the right to a decree coextensive with the power to tax which the contract restrained would be, in and of itself, an impairment of the contract, since, if judicial power was not adequate to control by the thing adjudged the right to a contract exemption, and to prevent violations of such right, the power to contract would be of no avail. The second case, *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154, came here on error to the court of appeals of the state of Kentucky. In the state court a judgment of a circuit court of the United States, recognizing the existence of contract exemption from taxation, was pleaded as a bar against the enforcement of taxes which were embraced within the contract of exemption. The state court refused to give effect to the pleaded judgment of the circuit court of the United States on the ground that as, by the settled rule in Kentucky, judgments restraining the collection of taxes were limited to the particular taxes referred to, and did not extend to taxes for future years, the judgment of the circuit court should be so limited, and therefore that judgment was not *res judicata*. In reversing the action of the state court on this subject, this court said (p. 512):

"The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract; not for one year, but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

348]*Measuring the contention as to the absence of the jurisdictional sum by the 56 L. ed.

principles thus established, it answers itself, since the argument is equivalent to saying that a subject which is necessarily included in the relief to be granted, and is, in the nature of things, concluded by the decree to be rendered, is yet excluded from consideration for the purpose of the issues in the cause,—that is, may not be taken into account in ascertaining whether there is jurisdiction over the controversy.

We state in the margin the cases principally relied upon to support the contention as to the want of jurisdiction.† It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed. But such result is uncalled for, as an analysis of the case will show that all of them considered, in the absence of contract, where the right to levy a particular tax was assailed, whether there was authority to make up the jurisdictional amount required, by calling into the consideration the influence which the judgment might have upon different taxes or the power to take in view future illegal taxes, upon the theory that they might be levied.

We come to the merits, that is, to determine whether the special act incorporating Whitman College was a private charter within the prohibition of the organic act, and therefore void, and, if not, whether the exemption from taxation which it conferred was an "especial privilege" within the prohibition of the organic act, and hence beyond the power of the territorial legislature to grant. We thus at once bring face to face the act of 1883 and the *prohibitions of the organic act, dis- [349 missing all questions concerning the incorporation of the territory of Washington into the Union as a state, because, as we have seen, it is conceded that nothing on that subject controls the question here to be decided.

We do not think it necessary to inquire whether the act of 1883, although it be assumed that it virtually called into being a new juridical person, endowed with new powers and duties, may be treated, not as the original grant of a private charter,

†*Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *Clay Center v. Farmers' Loan & T. Co.* 145 U. S. 224, 36 L. ed. 685, 12 Sup. Ct. Rep. 817; *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348.

but as simply an amendment of the prior charter, because of the form in which the act of 1883 was couched. This is done, because, as the issues for decision will be disposed of by considering the case in the light of the prohibition against "especial privileges," it will become unnecessary to consider the operation of the prohibition against the grant of private charters. We think it clear also that the disjunctive character of the prohibition found in the organic act excludes in reason the possibility of saying, as contended in argument, that the especial privileges provided against were simply intended to prohibit the conferring of such privileges as part and parcel of the granting of the prohibited private charters. To adopt such a view would cause the prohibition against especial privileges to be superfluous, and would be repugnant to the plain intent of the act, as manifested from its language. That intent, we think, was to take away the power to grant the forbidden especial privileges by any form of legislative action, leaving no room, therefore, for the implication that it was the purpose of the organic act to recognize the right to give especial privileges, provided only it was not made a part of the grant of a forbidden private charter. And this also completely serves to dispose of the contention that it was the intention of the prohibition against especial privileges to forbid merely the creation of such privileges as a legislative grant of an exclusive 350]right to ferries, bridges, etc., *which it is urged was a common form of territorial legislative abuse prior to the adoption, in 1867, of the organic act, and therefore was presumably the evil intended to be reached by the enactment of that act. We say this because, even if it be conceded that such alleged abuses were the generating cause of the insertion in the organic act of the prohibition against especial privileges, that concession affords no ground for the generic prohibition, and for saying that it should be only applied to one class of especial privileges, to the exclusion of all other such privileges. We must be controlled by the power which the act manifests, not by a consideration of the mere motive which initially energized the bringing of the power into play.

We at once, moreover, concede, for the sake of the argument, that the exemption from taxation which was conferred was upon a consideration, and therefore rested in contract, and if it was in the power of the territorial government to make, is protected from impairment by the contract clause of the Constitution. With this concession in mind, and before coming to determine whether the exemption was valid,

that is, whether, in and by virtue of the prohibition in the organic law forbidding especial privileges, the territorial legislature was incompetent to grant a contract exemption, we briefly advert to the contention made that a broad meaning must be given to the organic act for the purpose, if it can be done, of establishing that there was no limit upon the power of the territorial legislature to exempt. It is conceded that the elementary rule is that exemptions from taxation must be strictly construed. But it is said that this applies only to the contract of alleged exemption, and has no relation to the inquiry whether the legislature had the power to exempt, because full legislative power must be presumed to exist unless there be a plain prohibition to the contrary. While we are of opinion that the contention has *no direct bearing on[351 the more important proposition here to be decided, we cannot give it, even by silence, our assent, because we consider that it admits, on the one hand, the rule of strict construction, and at once denies it upon the other, by improperly restricting the area of its operation. We say this because if, in a particular case, the duty arises of determining whether words of restriction found in the fundamental law are intended to operate a limitation on the legislative power to grant contract exemptions from taxation, the rule of strict construction is just as applicable as it would be to a case where it was applied for the purpose of determining whether the particular terms of an alleged contract did or did not embrace an exemption from taxation. We think the rule of construction is as broad as the subject to which it relates, and its operation does not depend upon whether the question is one of limitation of legislative power or of the true interpretation of a contract asserted to be one of exemption.

This brings us to the text of the organic act. That a contract giving perpetual succession to a corporation, and endowing it with a perpetual exemption from taxation as to all its property, real and personal, is an "especial privilege," seems to us too clear for anything but statement. We fail to see how any other conclusion can be reached, in view of the fact that the very essence of such a contract is to endow the corporation as to its property forever with the privilege of being exempt from the operation and control of the essential governmental power of taxation, and thereafter to cause the corporation and all its property, so far as that subject is concerned, to live under the law of the contract, and not under the law of general taxation.

But it is said that while this may be the superficial view, it is not an accurate and

legal one, since the word "privilege" has been construed by this court not to include a **352]***contract of exemption from taxation. The cases relied upon are, *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813, and *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471. Briefly, the subject passed upon in those cases and in others of a similar character was this: Where a corporation enjoyed a right of exemption as to the whole or a part of its property, did such exemption from taxation pass under a foreclosure sale to the purchaser, at such sale when by law the rights and privileges of the corporation were transferred by the sale? In other words, the question was whether the transmission of the privileges of the corporation to another embraced the privilege resulting from a contract exemption from taxation. It was held that it did not, upon the theory that a contract exemption from taxation was so exceptional in its nature that the right to transmit it was not embraced in the general authority to transmit privileges, and therefore the power to transfer must be expressly and specially conferred. These rulings were but an illustration in another form of the duty to which we have previously referred under all circumstances to bring to the consideration of the question whether a contract exemption from taxation exists, the rule of strict construction. And of course, when the principle upon which the cases were decided is rightly understood, their inappositeness to the case before us is manifest. This must be, unless it can be said that a ruling which held that a contract of exemption was a privilege of such character that it could not be transmitted without express authority was a ruling that a contract exemption was no privilege at all.

It is urged that, as in this case there was a consideration for the especial privilege granted, the agreement of the incorporators to establish and maintain an institution of learning, therefore the exemption cannot be held to be an especial privilege within the intendment of the organic act, since the privilege so bestowed was **353]**conferred not as *an especial privilege, but as an equivalent for the contract obligations assumed. As we have seen, however, it is the contract of exemption which, in the very nature of things, characterizes the grant as an especial privilege. When this is borne in mind it appears that the proposition is that the feature which gave to the grant the essential characteristic of an especial privilege must be held to cause it not to be of that nature.

The only principal contention remaining

unnoticed is the alleged acquiescence of Congress in the grant of exemption, resulting from its failure to disapprove the act of 1883. Rev. Stat. § 1850. The foundation, however, upon which that contention rests, has been decided to be without merit. *Clayton v. Utah*, 132 U. S. 632, 642, 33 L. ed. 455, 459, 10 Sup. Ct. Rep. 190.

We have not reviewed the minor considerations which, in various forms of statement, have been pressed in argument concerning the wisdom displayed by the territorial assembly in enacting the act of 1883, and the far-reaching and public benefits which have resulted from the provisions of that act, and the possible injury to the public weal to arise from now holding that the contract exemption from taxation which the act granted was beyond the scope of the legislative authority. It suffices to say that whatever may be the cogency of the suggestions thus made, it is obvious that they but invite us into a field of inquiry which lies beyond the line which separates the judicial from the legislative authority, and therefore we may not give heed to them.

The decree of the Circuit Court is reversed, and the cause is remanded to the District Court, with directions for further proceedings in conformity to this opinion.

*ROCK ISLAND PLOW COMPANY, **[354]**
Appt.,
v.

W. J. REARDON, Trustee in Bankruptcy
of Frank Brown, Bankrupt.

(See S. C. Reporter's ed. 354-364.)

Execution — lien — delivery to sheriff.

1. The delivery to the sheriff of an execution on a judgment operates without levy, in Illinois, to create a lien upon the real and personal property of the judgment debtor within the county.

[For other cases, see Execution, II. d, in Digest Sup. Ct. 1908.]

Execution — lien — conditional sales.

2. The lien created in Illinois by the delivery to the sheriff of an execution on a judgment attaches to the property held by the judgment debtor under a contract of conditional sale, and is paramount to the rights of the conditional vendor.

[For other cases, see Execution, II. d, in Digest Sup. Ct. 1908.]

NOTE.—As to laches as a defense—see notes to *Middletown v. Newport Hospital*, 1 L.R.A. 191; *Calhoun v. Delhi & M. R. Co.* 8 L.R.A. 248; *Coffey v. Emigh*, 10 L.R.A. 125; *Pratt v. Carroll*, 3 L. ed. U. S. 627; *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; and *Abraham v. Ordway*, 39 L. ed. U. S. 1027.

Bankruptcy — lien of execution creditor — preservation for benefit of estate.

3. The liens of execution creditors on property held by the insolvent judgment debtor under a contract of conditional sale, as they existed when a petition in involuntary bankruptcy was filed, could not be subsequently destroyed so as to prevent a court of bankruptcy from preserving them for the benefit of the estate, by the act of the conditional vendor in retaking the property.

[For other cases, see Bankruptcy, 296-304, in Digest Sup. Ct. 1908.]

Laches — as barring relief — rights of trustee in bankruptcy.

4. The trustee in bankruptcy is not barred, on the ground of laches, from asserting rights under the liens of execution creditors upon property held by the bankrupt under a contract of conditional sale, which had been preserved for the benefit of the estate by an order of the bankruptcy court because the first based his right to relief solely upon the claim that an unlawful preference was created through the payment of an indebtedness by the transfer of the property to the vendor by the bankrupt when insolvent.

[Laches as equitable defense, see Limitation of Actions, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 98.]

Submitted December 11, 1911. Decided January 9, 1912.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the District Court for the Southern District of Illinois, dismissing the bill in a suit by a trustee to preserve liens of execution creditors for the benefit of the bankrupt estate. Affirmed.

See same case below, 94 C. C. A. 118, 168 Fed. 654.

Statement by Mr. Chief Justice **White**:
355] *Whether the plow company or Reardon, as trustee of the bankrupt estate of Frank Brown, have the better right to certain personal property delivered by Brown to the plow company, is the question to be decided on this record.

The facts pertinent to the controversy are these: Brown was a merchant and engaged in business at Pekin, Tazewell county, Illinois. On November 13, 1907, he confessed judgment for \$247.15 and \$400 and costs in favor of a creditor, the Peoria Cordage Company, a corporation, and on the same day an execution was issued, which was received and indorsed by the sheriff of Tazewell county on the following day. On November 23, 1907, Brown confessed judgment in favor of another

creditor, the D. M. Sechler Carriage Company, a corporation, for the sum of \$282.25 and \$400, with costs, and on the same day execution issued, and on the next day was received and indorsed by the sheriff of Tazewell county. While these executions were outstanding and unsatisfied, Brown, on November 25, 1907, delivered merchandise, consisting of gang plows, cultivators, and other farm implements of the value of \$500, to the Rock Island Company, appellant, and as the result of the transaction an indebtedness of Brown to the plow company of \$406 was extinguished. When the goods were delivered to the plow company, Brown was insolvent, and the plow company had reason to believe that such was the fact. Two days after the delivery of the property to the plow company, Brown filed a petition in voluntary bankruptcy, and Reardon was subsequently qualified as trustee of the bankrupt estate.

Seeking to avail of the provisions of § 67, paragraphs c and f of the bankruptcy act, the trustee, on January 21, 1908, filed with the referee a petition setting forth the obtaining of the judgments by the Sechler and cordage companies heretofore referred to, that the executions issued on those judgments were liens from the date of receipt by the sheriff on all the real and personal property *of the bankrupt located in Tazewell county, Illinois, and continued to be liens down to the date of the filing of the petition in bankruptcy, and prayed that the liens of said executions might be declared null and void as to the Sechler and cordage companies, but might be preserved for the benefit of the estate in bankruptcy. The creditors just named entered their appearance and consented that the prayer of the petition be granted, and an order was entered on the date when the petition was filed, granting the relief sought.

Three days after the entry of the subrogation order the trustee commenced this litigation by filing a bill of complaint on the chancery side of the district court of the United States, southern district of Illinois, northern division,—the same court in which the bankruptcy proceedings were pending. The petition assailed the transfer and delivery of property by Brown to the plow company on November 25, 1907, heretofore referred to, as an unlawful preference. The court was asked to decree a surrender of the property to the trustee, or payment of its value. On March 27, 1908, the plow company filed its plea, and therein in substance contended that the assailed transaction was not an unlawful preference. It averred that it had previously delivered the property to Brown,

under and by virtue of the terms of certain written contracts, annexed as exhibits to the plea; that the title of such property "always was and remained in" the plow company; and, that it "lawfully took and repossessed itself" of the property by reason of the failure of Brown to pay for the same according to the contracts. Shortly after, the trustee, by leave, filed an amendment to his bill of complaint. The amendment consisted in detailing the facts as to the obtaining of the judgments of the Sechler and cordage companies heretofore referred to, and an issue of executions on the judgments prior to the transfer of Brown to the plow company, and that the executions 357]*were outstanding at the time of the filing of the petition in bankruptcy. The proceedings before the referee culminating in the order preserving the liens of the judgments for the benefit of the bankrupt estate were next set forth, and it was claimed that the liens thereby preserved were superior to any claim which the plow company had to the goods in controversy. In a plea to the amended bill the plow company reiterated the facts upon which it based the claim that, in receiving the goods from Brown, it merely took possession of its own property, and had not obtained an unlawful preference. It further sets forth that when it received the goods no levy had been made under either of the executions issued upon the judgments obtained by the Sechler and cordage companies, and that in consequence it had the superior right to the goods. Want of notice of the subrogation proceedings and the consequent invalidity of the order of subrogation was also averred. It was in addition averred that the judgment in favor of the cordage company was not a valid lien on January 21, 1908, the date when the order of subrogation was made, because prior thereto the execution had been returned by the sheriff and filed and docketed in the court which had issued the same. Furthermore, it was averred that the execution on the Sechler judgment had been returned by the sheriff with an indorsement, "no property found," and was filed on February 22, 1908, in the court from which it had issued, and that rights based upon the issue of such execution could not be originated thereafter, *viz.*, on April 16, 1908, when the amended bill was filed.

The cause was heard upon the sufficiency of the plea just reviewed, and the plea was held sufficient. The trustee elected not to file a reply to the plea, and a decree was thereupon entered dismissing the bill. On appeal the decree of dismissal was reversed by the circuit court of appeals (94 C. C. A. 118, 168 Fed. 654), and this appeal was then taken.

56 L. ed.

Mr. W. H. Sholes submitted the cause for appellant. Mr. Walter H. Kirk was on the brief:

The statutory or judicially determined rules of property of the state of Illinois control and determine the validity of such liens, if any, as the judgment creditors of the bankrupt obtained by their judgments and executions.

Collier, Bankr. 6th ed. 553; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567, 14 Am. Bankr. Rep. 74; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, 13 Am. Bankr. Rep. 437; Re First Nat. Bank, 14 Am. Bankr. Rep. 180, 67 C. C. A. 536, 135 Fed. 62; Re Greenc, 13 Am. Bankr. Rep. 504, 134 Fed. 137.

Under the laws and judicially determined rules of property in Illinois, the liens of the executions which had not been perfected and made absolute and effective by levy, were, on November 25, 1907, defeated and lost in consequence of the repossession of its goods then in the possession of the bankrupt, by the vendor, under conditional-sale contracts, and thereafter neither the sheriff nor the trustee of the bankrupt had the right to follow and take the same away from the conditional vendor.

People v. Johnson, 4 Ill. App. 346; Persels v. McConnell, 16 Ill. App. 526; Travers v. Cook, 42 Ill. App. 582; Minor v. Herri-ford, 25 Ill. 344; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Chittenden v. Rogers, 42 Ill. 100; Powers v. Wheeler, 63 Ill. 29; Re Hopkins, 1 Am. Bankr. Rep. 212; Mulheisen v. Lane, 82 Ill. 117.

The retaking of the goods by the conditional vendor did not amount to a voidable preference under the bankruptcy act.

Sabin v. Camp, 3 Am. Bankr. Rep. 578, 98 Fed. 974.

Mr. Franklin L. Velde submitted the cause for appellee. Mr. Ira J. Covey was on the brief:

The trustee stands in the position of an execution creditor.

First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580, 15 Am. Bankr. Rep. 639; Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514, 6 Am. Bankr. Rep. 620; Re Merrow, 131 Fed. 993, 12 Am. Bankr. Rep. 615.

There can be no question but what, under the law of Illinois, these goods which the Rock Island Plow Company received from the bankrupt two days before the petition in bankruptcy was filed, and while both of these executions were in the hands of the sheriff of Tazewell county, could have been levied upon by the sheriff under these executions.

Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; St. Louis Iron & Mach. Works v. Kimball, 53 Ill. App. 636.

When the trustee is appointed, his title goes back by relation to the date of the commencement of the proceeding.

Collier, Bankr. 6th ed. p. 588.

In Illinois, if a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.

Harkness v. Russell, 118 U. S. 678, 30 L. ed. 290, 7 Sup. Ct. Rep. 51; Brundage v. Camp, 21 Ill. 330; McCormick v. Hadden, 37 Ill. 370; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Michigan C. R. Co. v. Phillips, 60 Ill. 196; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499; Gilbert v. National Cash Register Co. 176 Ill. 294, 52 N. E. 22.

An execution is a lien upon the personal property of the debtor not exempt, from the time it comes to the officer's hands, and gives the officer the right to seize and sell the same for the satisfaction of the judgment upon which it has been issued.

Frink v. Pratt, 130 Ill. 331, 22 N. E. 819.

362] *Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

The only question arising for decision is whether the facts set up in the plea of the plow company are sufficient to exempt that company from accountability to the trustee for receiving a preference within the terms of the bankrupt act. The consideration which this question received in the opinion delivered by the circuit court of appeals makes unnecessary and elaborate review of the subject.

We assume, for the sake of argument, as did the circuit court of appeals, that the contracts by virtue of which the plow company claimed it retook possession of the property in question were conditional-sale contracts, whereby the plow company retained in itself the title and right of possession of its goods until paid for by Brown, and that by virtue of such contracts the taking or retaking of the property in question was valid as between the plow company and the bankrupt. The inquiry, then, is whether the contracts and the possession taken thereunder of the property in controversy by the plow company are operative to bar the rights asserted by the trustee in and by force of the subrogation proceedings.

The claim of the trustee was in substance (1) that delivery to the sheriff of executions upon the Sechler and cordage judgments operated without levy to create liens upon the real and personal property of Brown, the judgment debtor, within the county; (2) that such liens were paramount to rights in the property possessed by a vendor under a contract of conditional sale; and (3) that the effect of the subrogation order was to render inoperative as a preference the liens obtained by the judgment creditors through their executions, and to preserve such liens as of the date of the filing of the proceedings in voluntary bankruptcy for the benefit of the estate in bankruptcy. *That the [363 circuit court of appeals rightly held the affirmative of these three propositions we entertain no doubt. Upon the first two propositions that court said:

"As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Paragraph 9 of chapter 77, Rev. Stat. 1874 (2 Starr & C. Anno. Stat. 1896, p. 2336) provides: 'No execution shall bind the goods and chattels of the person against whom it is issued until it is delivered to the sheriff or other proper officer to be executed.' This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & C. Anno. Stat. supra. See Frink v. Pratt, 130 Ill. 327, 331, 22 N. E. 819, one of the citations in appellee's brief. The cases cited *contra*, declaratory of the rule that an officer receiving the execution has 'no interest in the property itself' to maintain an action therefor 'until after a levy,' do not touch the present inquiry of lien in favor of the execution creditor, and are plainly inapplicable. Upon the second question, it is stated in Gilbert v. National Cash Register Co. 176 Ill. 288, 296, 52 N. E. 22, that 'whatever may be the rule in other jurisdictions,' this rule is established in Illinois: 'If a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.' The authorities there cited for such rule are deemed sufficient reference; and we remark that no departure appears from the doctrine thus stated in any of the Illinois cases called to our attention."

364] *It is significant that in the argument at bar counsel for the plow company make no attempt to point out wherein the authorities cited by the court are not applicable and authoritative on the propositions which they were cited as supporting, and, indeed, entirely omit any reference to them.

The decision in *First Nat. Bank v. Staake*, 202 U. S. 141, 146, 50 L. ed. 967, 969, 26 Sup. Ct. Rep. 580, is authoritative upon the last proposition. As the executions issued upon the judgments, which executions were held by the sheriffs for levy, operated to create liens upon the property in question, then in the possession of Brown, although held under conditional-sale contracts, and such liens were paramount to the rights of the vendor, the plow company, it is manifest that the right of the judgment creditors to resort to such property in satisfaction of their liens could not be destroyed by a mere transfer of possession from one party to the contract to the other party thereto. It also follows in reason, we think, that the liens of the execution creditors in the property as they existed when the petition in involuntary bankruptcy was filed could not be subsequently destroyed by the acts of the creditors, the third parties, to the prejudice of the estate, and that if the rights of the bankrupt estate could be lost by the laches of the trustee, the record presents no evidence of such laches. The circumstance that the trustee, in ignorance, perhaps, of the existence of the conditional-sale contracts, first based the right to relief solely upon the claim that an unlawful preference was created through the payment by means of the transfer made by Brown, when insolvent, of an indebtedness to the plow company, did not operate to the prejudice of the plow company, and was plainly insufficient to bar the trustee from asserting an additional right to the relief prayed, viz., the right growing out of the subrogation order made prior to the commencement of the litigation.

Decree affirmed.

365] *CHARLES GRING, Plff. in Err.,
v.

LIZZIE IVES and Pat Ives, by their
Father and Next Friend, P. H. Ives.

(See S. C. Reporter's ed. 365-370.)

**Error to state court — frivolousness
of Federal question — harbor lines.**

The contention that a marine railway which projected beyond the harbor line established by the Secretary of War conformably to the act of March 3, 1899 (30
56 L. ed.

Stat. at L. 1151, chap. 425, U. S. Comp. Stat. 1901, p. 3541), § 10, is illegal and a public nuisance, which the owner of a vessel might wantonly injure or destroy, although such railway was constructed and had been in operation many years before the establishment of such harbor line, is so clearly unfounded as not to serve as the basis of a writ of error from the Federal Supreme Court to review the judgment of a state court adverse to such contention.

(For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.)

[No. 115.]

Submitted December 18, 1911. Decided
January 9, 1912.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court for Pasquotank County in that state in favor of plaintiff in an action by the owner of a marine railway to recover for damages occasioned by a collision caused by a vessel. Dismissed for want of jurisdiction.

See same case below, 150 N. C. 137, 63 S. E. 609.

The facts are stated in the opinion.

Mr. James A. Toomey submitted the cause for plaintiff in error:

This court has jurisdiction.

Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 67, 43 L. ed. 368, 19 Sup. Ct. Rep. 97.

The defendants in error claim damages upon allegations of ordinary negligence, while at the very moment of the collision in question they are guilty of maintaining a public nuisance in a navigable river of the United States, placing themselves in an unlawful and illegal position, outside of a duly established harbor line, where the captain navigating the tug had a right to assume, as a matter of law, at least, that there was no obstruction.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

As to necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619; *Grand Trunk R. Co. v. A. Backus, Jr. & Son*, 46 Fed. 216; *Northern P. R. Co. v. United States*, 59 L.R.A. 80, 44 C. C. A. 135, 44 C. C. A. 136; *Albina Ferry Co. v. The Imperial*, 3 L.R.A. 234, 13 Sawy. 639, 38 Fed. 614; *Thompson v. Paterson & H. R. Co.* 9 N. J. Eq. 526; *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351; *Dyer v. Curtis*, 72 Me. 181; *Morgan v. Kink*, 18 Barb. 277; *Wood v. Esson*, 9 Can. S. C. 239; *Hutton v. Webb*, 59 L.R.A. L.R.A. 90, note 7.

Mr. Charles B. Aycock submitted the cause for defendants in error. Mr. E. F. Aydlett was on the brief:

The evidence shows this railway to have been constructed "some eighteen years ago;" that referring to harbor line tends to show an establishment, if any, in 1902, sixteen or eighteen years after the construction of the ways. Such an ordinance has no retroactive effect, and does not affect structures previously erected.

29 Cyc. 343, 344 (b); *Com. v. Alger*, 7 Cush. 53.

In the absence of any specific legislation on the subject, riparian owners have a qualified property in the water frontage belonging by nature to their land, and a right to construct wharves, piers, landings, etc., subject to such general rules and regulations as the legislature, in the exercise of its power, may prescribe for the protection of public rights in rivers or navigable waters.

Bond v. Wool, 107 N. C. 148, 12 S. E. 281.

And this right extends to deep water or point of navigability.

Ibid.

And by point of navigability is meant such point as is necessary to make his property reasonably available for the purpose for which it was constructed.

29 Cyc. 343; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; 29 Cyc. 305, note 7.

Mere inconvenience is not an obstruction.

29 Cyc. 312, 313, 343, note 7.

The rights of navigation, while paramount, are not exclusive (*Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570), and even granting that the railways were absolutely without warrant of law, and therefore a nuisance, and subject to abatement, parties must yet exercise care, and cannot recklessly or wantonly injure them, for they are still private property, and entitled to this degree of protection.

29 Cyc. 305 note 7, 311 (h), 318; *Bain-*

bridge v. Sherlock, 29 Ind. 364, 95 Am. Dec. 644; *The Brinton*, 13 C. C. A. 331, 26 U. S. App. 486, 66 Fed. 71.

*Mr. Chief Justice White delivered [368 the opinion of the court:

Gring, upon the theory that Federal questions were wrongly decided against him, seeks the reversal of a judgment for \$300, damages occasioned by the running of a tugboat, of which he was the owner, against a marine railway, the property of the defendants in error, who were plaintiffs below. The railway was situated on the shore of the Pasquotank river in the harbor of Elizabeth City, North Carolina. The injury to the railway was committed on the night of December 24, 1905. The supreme court of North Carolina, in affirming the judgment of the trial court, rendered on the verdict of a jury, stated these facts:

The marine railway had been in existence for eighteen years prior to the injury complained of. The railway extended to the margin of the channel, and between the end of the railway and the opposite side of the channel, which was buoyed, there was a space of 540 feet, constituting the usual highway for navigation. The night upon which the tug collided with the bridge was "a bright moonlight night, and there was also a bonfire on shore and a line of electric lights which lighted up the harbor." The conduct which occasioned the running of the tug against the railway was thus stated: "The evidence is that the tugboat, which was bound down the river, instead of following the usual course, ran diagonally towards the shore, and, striking the marine railway of plaintiffs, damaged it. The captain of the tugboat testified that he knew the locality well, having passed it more than two hundred times. After the injury he offered to pay damages, but the parties could not agree upon the amount." [150 N. C. 138, 63 S. E. 609.] Commenting upon the facts thus stated, the court observed: "Clearly the proximate cause [of the injury] was the negligence of the tugboat in not proceeding upon its course in a channel 540 feet *wide, but going several hundred feet out of its way, and driving in-shore against the marine railway."

In disposing of a contention concerning an alleged harbor line established under the act of Congress of March 3, 1899, chap. 425, § 10, 30 Stat. at L. 1151, U. S. Comp. Stat. 1901, p. 3541, and the proposition that the railway, because it projected beyond said assumed line, was a public nuisance, and therefore the complainant was

entitled to negligently and wantonly injure it, the court said:

"Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show."

The only one of the assignments of error filed at the time this writ of error was sued out which in the remotest way relates to a Federal question is the third, which is concerned with the reasoning of the court just referred to, and is based upon the assumption that there could be no recovery because of the asserted establishment by the Secretary of War, some time between 1900 and 1902, of a harbor line under the authority of the act above mentioned. In argument the proposition to which the assignment relates is, that the court erred in not deciding that any structure projecting into the river beyond the established harbor line was illegal and a public nuisance, which the plaintiff might wantonly injure or destroy. As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years before the establishment of the alleged harbor line. Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899, and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed Federal 370]*right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899, under the sanction of state authority. *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472. See also *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.

In view of the character of the case, the facts found by the court below, and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be,

Dismissed for want of jurisdiction.

58 L. ed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

STATE OF WASHINGTON EX REL.
JOHN D. ATKINSON, Attorney General.

(See S. C. Reporter's ed. 370-380.)

Commerce — state regulation of hours of railway employees — congressional action.

1. Congress had so acted upon the subject of the hours of labor of interstate railway employees by enacting the hours of service act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1909, p. 1170), as to preclude a state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees a local regulation limiting hours of labor.

[For other cases, see *Commerce*, I. c; III., in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — hours of labor.

2. The clause in the hours of service act of March 4, 1907, regulating the hours of labor of interstate railway employees, by which its operation is postponed for one year, precludes a state from making or enforcing during the interim a local regulation affecting the hours of labor of such employees.

[For other cases, see *Commerce*, I. c; III., in Digest Sup. Ct. 1908.]

[No. 136.]

Submitted December 19, 1911. Decided January 9, 1912.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court for Thurston County, in that state, enforcing a penalty for violation by a carrier of a state statute regulating the hours of labor of railway employees. Reversed and remanded for further proceedings.

See same case below, 53 Wash. 673, 102 Pac. 876, 17 A. & E. Ann. Cas. 1013.

The facts are stated in the opinion.

NOTE.—As to the power of states to regulate hours of labor as affected by the commerce clause—see notes to *State v. Northern P. R. Co.* 15 L.R.A.(N.S.) 134, and *People v. Erie R. Co.* 29 L.R.A.(N.S.) 240.

On the validity generally of regulations of hours of labor—see notes to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33; *Ex parte Martin*, 26 L.R.A.(N.S.) 242; *Withey v. Bloem*, 35 L.R.A.(N.S.) 628, and *Atkin v. Kansas*, 48 L. ed. U. S. 148.

Mr. Charles W. Bunn submitted the cause for plaintiff in error:

Where Congress has undertaken to regulate a branch of interstate commerce, no additional regulation by a state, by virtue of its police power, is permissible.

Houston v. Moore, 5 Wheat, 1, 21, 5 L. ed. 19, 24; Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. ed. 1060, 1089; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A. (N.S.) 326, 117 N. W. 686.

Mr. W. V. Tanner, Attorney General of Washington, submitted the cause for defendant in error:

An act regulating the hours of labor of employees engaged in train service on railroads is within the police power of the state.

Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

In order to determine whether any particular act of Congress, passed in pursuance of its power to regulate commerce, operates to supersede state legislative action upon the same subject, regard must be had to the purpose of the Congressional enactment, and the object sought to be attained thereby. This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction, and that it should not be held that the state legislation has been superseded except in cases of manifest repugnancy.

Reid v. Colorado, 187 U. S. 137-148, 47 L. ed. 108-114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

As a general rule, a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect.

Rice v. Ruddiman, 10 Mich. 125; Price v. Hopkin, 13 Mich. 318; Grant v. Apena, 107 Mich. 335, 65 N. W. 230; Galveston, H. & S. A. R. Co. v. State, 81 Tex. 573, 17 S. W. 67; Jackman v. Garland, 64 Me. 133; Evansville & C. R. Co. v. Barbee, 59 Ind. 592; 26 Am. & Eng. Enc. Law, 565.

This question has been passed upon by the supreme courts of four of the states. In Montana and Washington it has been held

that the act of Congress is not repugnant to acts theretofore adopted by the state legislatures. In Missouri and Michigan the courts have reached the contrary conclusion.

State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A. (N.S.) 326, 117 N. W. 686; State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500; State v. Northern P. R. Co. 36 Mont. 591, 15 L.R.A. (N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144.

Mr. Chief Justice White delivered the opinion of the court:

On July 3 and 4, 1907, the Northern Pacific Railway Company, in operating a train on its road in the state of Washington, permitted some of the train crew to remain on duty more than sixteen consecutive hours. This being apparently contrary to the prohibition of the act of Congress known as the "hours of service" law, approved March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1909, p. 1170, if the railroad company, in the operation of the train, was subject to the power of Congress, and the prohibitions of the act were otherwise applicable, there was a violation of the act and a liability to its penalties.

The train, although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state, destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside of the state, and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling. Southern R. Co. v. United States, 222 U. S. [376] 20, ante, 2, 32 Sup. Ct. Rep. 2. But, while thus governed by the act of Congress, the prohibitions of that act were not operative. This follows, by reason of the provisions of § 5 to the following effect: "That this act shall take effect and be in force one year after its passage."

About a month before the occurrences heretofore referred to, that is, on June 11th, 1907, a law of the state of Washington regulating the hours of service of railway employees became effective. Without going into detail it suffices to say that the provisions of that act greatly resembled those of the act of Congress, and pro-

hibited the consecutive hours of service which had taken place on the train of the Northern Pacific road. The attorney general of the state commenced the proceeding now before us to recover penalties for the violation of the state law. The railroad answered, admitted the acts complained of, but denied any liability for the penalties imposed by the state law. The denial was based upon the assertion that the train was an interstate train, and was not subject to the control of the state because within the exclusive authority of Congress, manifested by the enactment of Congress on that subject. The trial court granted a motion for judgment upon the pleadings, and awarded \$1,000 penalty, and it is to a judgment of the supreme court of the state, affirming such action, that this writ of error is prosecuted.

Considering the character of the transportation, the court below held that the train was an interstate train, and within the potentiality of the exercise by Congress of its power to regulate commerce. Despite this, it was held that the penalty had been rightly imposed, because, until Congress had acted upon the subject, it was competent for the state to make a regulation concerning the hours of service of employees on railroad trains moving within the state, and to apply such regulation to a train engaged in interstate commerce. 377] This, however, *was based not upon a supposed concurrent state and Federal power, but solely on the ground that Congress had not acted on the subject, and therefore the state regulation should be applied. Indeed, the court in express terms declared that if Congress had legislated, "its act supersedes any and all state legislation on that particular subject," and it was stated that the state in argument had so conceded.

The court said:

"On the other hand, it is conceded by the state that the power of the Congress to regulate interstate commerce is plenary; and that, as an incident to this power, the Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employee of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon the subject, its act supersedes any and all state legislation on that particular subject. In fact, these propositions can hardly be said to be debatable in the state courts, since the Federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation

concerning carriers of interstate commerce. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Nashville C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Erbe v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819."

Thus, conceding the paramount power of Congress, the operative force of the state law was solely maintained over the interstate commerce in question because of the provision of the act of Congress providing that it should not take effect until one year after its passage. As a result, the act was treated as not existing until the expiration of a year from its passage. Copiously referring *to authorities as to when a legislative act was to be treated as taking effect, the court said:

"It seems clear that the Federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if, prior to the time it goes into effect, no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law; and, without special words of limitation, when it goes into effect for one purpose, it goes into effect for all purposes."

But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once re-

moved from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing *provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control,—a manifestation arising from the mere fact of the enactment of the statute.

We do not pause to cite authorities additional to those referred to by the court below, but we observe in passing that the aspect in which we view the question was cogently stated by the supreme court of the state of Missouri in *State v. Missouri P. R. Co.* 212 Mo. 658, 111 S. W. 500, and has also been lucidly expounded by the supreme court of the state of Wisconsin in *State v. Chicago, M. & St. P. R. Co.* 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that, during the year of postponement, state police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision, if it was contemplated that the prohibitions of state laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by state laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a state regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act,—a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very 380]reason which *caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill, made to the House of Representatives by the Committee on

Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):

"Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval."

For the reasons stated, the judgment of the Supreme Court of the State of Washington must be and it is reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

RED "C" OIL MANUFACTURING COMPANY, Appt.,

v. .

BOARD OF AGRICULTURE OF NORTH CAROLINA, William A. Graham, H. C. Carter, et al.

(See S. C. Reporter's ed. 380-395.)

Commerce — state regulation — inspection laws.

1. Subjecting all kerosene or other illuminating oils sold or offered for sale in the state to an inspection for the purpose of determining the safety and value of such oils for illuminating purposes, as is done by the North Carolina act of March 8, 1909, is a proper exercise of the police power, and does not violate the commerce clause of the Federal Constitution.

[For other cases, see Commerce, 524-547, in Digest Sup. Ct. 1908.]

Commerce — state regulation — inspection fees.

2. A charge of $\frac{1}{2}$ cent per gallon, made by the North Carolina oil inspection act of March 8, 1909, for the avowed purpose of defraying the expense connected with the inspection, cannot be said, in advance of the experience gained from the actual operation of the act, to be so seriously in excess of what is necessary as to justify the imputation that the real purpose of the statute was to raise a revenue, in violation of the commerce clause of the Federal Constitution.

[For other cases, see Commerce, 546, 547, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power.

3. Legislative powers are not unconstitutionally delegated to the board of agriculture by the provisions of the North Carolina oil inspection act of March 8, 1909, which requires that illuminating oils sold or offered for sale in the state be safe, pure, and afford a satisfactory light, leav-

NOTE.—On inspection laws as regulations of commerce—see note to *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 51 L. ed. U. S. 78.

ing it to the board to determine what oils will measure up to these standards.

[For other cases, see Constitutional Law, 159-166, in Digest Sup. Ct. 1908.]

[No. 141.]

Argued December 21 and 22, 1911. Decided January 9, 1912.

A PPEAL from the Circuit Court of the United States for the Eastern District of North Carolina to review a decree dismissing a suit to restrain the enforcement of the North Carolina oil inspection act. Affirmed.

See same case below, 172 Fed. 695.

Statement by Mr. Chief Justice **White**:

In the year 1909, North Carolina passed an act for the inspection, under the control of the board of agriculture, of all kerosene or other illuminating oils sold, or offered for sale, in the state. The object of such inspection was declared to be in order to determine the safety and value of such oils for illuminating purposes. A charge of $\frac{1}{2}$ cent per gallon was fixed, which law declared should be paid to the commissioner of agriculture for the purpose of defraying expenses connected with the inspection, testing, and analyzing of oils in this state. It was provided that the act should **382**]go into effect on July 1, 1909. *Two days after, *viz.*, on July 3, 1909, this suit was commenced by the appellant, the Red "C" Oil Manufacturing Company, a corporation of the state of Maryland. The defendants named were the board of agriculture of North Carolina and the members of the board, and the object of the bill was to restrain the enforcement of the act referred to because it was charged to be not a proper exertion of the police power of the state, and, besides, was asserted to be repugnant to the Constitution of the United States.

The bill averred that the complainant was a large shipper of illuminating oils from the state of Maryland into the state of North Carolina, and that it did an extensive business in North Carolina in dealing in such oil. The provisions of the assailed act were set out *in extenso*, as also the terms of an act of the general assembly approved on March 9, 1909, which forbade the collection of a tax upon dealers in oils, authorized by § 58 of the revenue act, passed at the same session, "from any persons, dealers, or corporations paying the taxes imposed under the inspection law enacted at the present session of the general assembly, entitled, 'An Act to Provide for the Inspection of Illuminating Oils and Fluids;' Provided, however, if the said oil

inspection act should be held invalid, § 58, revenue act, shall remain in full effect." In the preamble of this latter act it was recited that the "inspection tax" was much greater than the "tax" imposed under § 58 of the revenue act, and that "it is not the purpose of the general assembly that the said tax shall be cumulative." In addition to averring the appointment of inspectors by the board of agriculture, and the purpose of the board to enforce the collection of the inspection taxes, there were set forth the regulations adopted by the board under the authority of the statute.

*The particulars by which it was as-**383**serted the statutory charge was shown to be unlawful may be thus summarized: The charge or "tax" was not for the purpose of defraying the cost of the inspection of oil, but was imposed for revenue upon the goods of complainant shipped into the state of North Carolina from the state of Maryland, and was hence in conflict with the commerce clause and the 14th Amendment. The law, it was charged, was not a police regulation, since an inspection of oil "for value and luminosity" was not within the competency of legislative action, and the public safety was not concerned, since illuminating oils, as the result of modern methods of manufacture, were no longer explosive. The charge or tax, it was averred, was more than double the amount necessary for the inspection proposed, and would realize annually a surplus for the state treasury of more than \$20,000. It was further charged that the act fixed no standard for the guidance of the board of agriculture, but in effect arbitrary powers were conferred upon the board, and, indeed, legislative authority had been delegated to it. The power thus conferred, it was also alleged, had been exerted in an arbitrary manner, and tests prescribed which were not necessary "in order to procure the safety of oil, to protect the people from the sale of oils which are dangerous." Certain of the regulations promulgated by the board were also assailed as being uncertain, unreasonable, illegal, and oppressive.

On the filing of the bill an order was entered temporarily restraining the defendants from enforcing, as against the complainant, the statute and the rules and regulations of the board thereunder. The restraining order was subsequently amended by requiring the complainant, "pending the final determination of this cause," to "pay the $\frac{1}{2}$ cent per gallon upon all illuminating oils sold by it in the state, as prescribed in said act." The defendants jointly and severally answered the bill, and took *issue upon all the matters**384**

alleged in the complaint. As regards the allegation that the inspection fee was unnecessarily high and would yield a large surplus over the expenses, the defendants said:

"Defendants say that they have made no estimate that any excess may be left after paying all the proper and necessary expenses of inspection, and these defendants say that they have no means of actually approximating the amount that the tax of $\frac{1}{2}$ cent per gallon will yield, or the expenses of equipping and maintaining a competent inspection force and department. That the legislature thought that $\frac{1}{2}$ cent a gallon would be necessary to pay the expenses of inspection, and these defendants are informed and believe, and therefore aver, that this is as low an inspection tax as there is to be found in any state having oil inspection laws, and lower than the taxes in a great many of the states. In some states there is a graduated scale of taxation of more than $\frac{1}{2}$ cent for small quantities and less than $\frac{1}{2}$ cent for large quantities. The said act expressly provides, in § 6, that the commission of agriculture shall include in his report to the general assembly an account of the expenses under this act. The said act also provides that all money paid for inspection taxes shall be kept by the state treasurer as a distinct fund, to be styled, 'The Oil Inspection Fund.' At the end of one year, it can be seen exactly what the inspection costs and how much is paid for it by dealers in oil, and until it shall appear that said tax is excessive, a charge to that effect, by complaint, is premature and ill-considered."

Both parties filed affidavits in support of their respective claims. The matter was heard upon a motion for an injunction upon the bulk, answer, and affidavits just referred to. Elaborately examining all the contentions, the court (172 Fed. 695) concluded that the complainant was not entitled to relief by injunction, and that, 385]*as respects the other relief asked, the bill should be dismissed. A final decree was thereupon entered and this appeal was then taken.

Mr. Robert W. Winston argued the cause, and, with Mr. Charles B. Aycock, filed a brief for appellant:

If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious or partial restraint.

Gibbons v. Ogden, 9 Wheat. 9, 6 L. ed. 25.

By whatever name called, the attempt by a state to tax interstate commerce is void.

Flint v. Stone Tracy Co. 220 U. S. 160, 55 L. ed. 417, 31 Sup. Ct. Rep. 342; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

An habitual and continual levying and collecting of taxes for inspection purposes, far in excess of the amount necessary, and the covering of such taxes into a state treasury, is quite conclusive that the law was passed to raise revenue, and not for inspection purposes.

Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204.

If the legislature can handicap commerce between the states by imposing excessive inspection taxes, the police power would not only be a formidable rival, but in a struggle must necessarily triumph over the commercial power.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

Under the guise of inspection laws, a system of interstate tariff taxation has arisen, and states have acted under a misconception of the opinion of this court in the Patapseo Guano Case, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, to such an extent that state governments are largely operated upon funds derived from illegal and unjust inspection laws.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552.

That the act does not on its face discriminate against oil from sister states makes no difference. Interstate commerce cannot be taxed at all.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Wrought Iron Range Co. v. Campen, 135 N. C. 520, 47 S. E. 658.

All statutes which relate to the same subject-matter must be taken to be one system, and so construed.

Lord Bacon, 3d rule, vol. 6, 382; State v. Bell, 25 N. C. (3 Ired. L.) 509; State v. Melton, 44 N. C. (Busbee, L.) 49.

A disproportionate inspection tax is strong evidence of the unconstitutionality of the act.

Brimmer v. Rebman, 138 U. S. 79, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 485; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 610; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208.

This court will look at the substance of such acts, and while it acts on the presumption that the statute was enacted in good faith for the purposes for which the power can be exercised, yet its operation and va-

lidity must be determined by its natural and reasonable effect; and this presumption cannot control the final determination of the question whether it is repugnant to the Constitution of the United States.

Calvert, Regulation of Commerce, p. 97; Vance v. W. A. Vandercook Co. 170 U. S. 439, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

Legislative power cannot be delegated.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; United States v. Keokuk & H. Bridge Co. 45 Fed. 178; Freund, Pol. Power, ¶ 649; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Com. v. Maletsky, 203 Mass. 241, 24 L.R.A. (N.S.) 1172, 89 N. E. 245; 1 Cooley, Taxn. 3d ed. p. 99; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; O'Neil v. American F. Ins. Co. 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; Anderson v. Manchester F. Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; State ex rel. Hahn v. Young, 29 Minn. 551, 9 N. W. 737; Ex parte Cox, 63 Cal. 21; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; State, Marshall, Prosecutor, v. Cadwalader, 36 N. J. L. 283; State v. Armstrong, 3 Sneed, 635; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Kosciuszko v. Slomberg, 68 Miss. 469, 12 L.R.A. 528, 24 Am. St. Rep. 281, 9 So. 297; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Re Smith, 146 N. Y. 68, 28 L.R.A. 820, 48 Am. St. Rep. 769, 40 N. E. 497; State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476; State ex rel. Bowe v. Board of Education, 63 Wis. 234, 53 Am. Rep. 282, 23 N. W. 102.

The legislature itself ought to lay down the test, which ought to be defined by general rules.

Freund, Pol. Power, ¶ 649; Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; 56 L. ed.

Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444.

Mr. T. W. Bickett Attorney General of North Carolina, argued the cause, and, with Mr. R. H. Battle, filed a brief for appellees:

The suggestion that, under the guise of doing one thing, the general assembly is attempting to do another, will not be considered by this court. The courts are not disposed, neither are they at liberty, to impute improper motives to the lawmaking power of the government.

Black, Const. Law, § 41; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623.

The complainant seems to concede that if the act is intended in good faith to protect the public from danger, or from being imposed upon, and is reasonably calculated to afford such protection, it is well within the police power of the state.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Asbell v. Kansas, 209 U. S. 257, 52 L. ed. 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270.

Oil inspection laws have three times been before this court, and none of them have been condemned.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270.

The inspection tax of $\frac{1}{2}$ cent per gallon is not so excessive upon its face as to warrant the court in declaring it unconstitutional and void.

Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 354, 43 L. ed. 194, 18 Sup. Ct. Rep. 862.

The line between powers strictly and exclusively legislative, and those which are merely administrative, is vague and shadowy; and the undoubted tendency, born of

the necessities of the times, is to place all doubtful powers on the administrative side of the line.

6 Am. & Eng. Enc. Law, p. 1021; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 720; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253.

In the oil inspection act there is no delegation of legislative powers.

Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 720; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Buttfield v. Stranahan*, 192 U. S. 492, 48 L. ed. 534, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

Mr. Chief Justice **White**, after making the foregoing statement, delivered the opinion of the court:

In view of the full reference to and the review of decided cases made by the dissenting judge in the opinion by *him delivered, we content ourselves with a comparatively brief discussion of the questions pressed at bar.

These all come to two propositions, which are thus stated by counsel:

"1. That the North Carolina oil inspection act is unconstitutional and void in that, under the guise of exercising a police power, the general assembly of North Carolina is really attempting to impose a revenue tax upon interstate commerce.

"2. That the said inspection act is unconstitutional, in that the general assembly of North Carolina has attempted to delegate to the board of agriculture legislative powers."

As to the first proposition, we append in the margin a clear and adequate summary of the act, made by the judge below:†

†The act provides:

Sec. 1. "That all kerosene or other illuminating oils sold or offered for sale in this state shall be subject to inspection and test to determine the safety and value for illuminating purposes." All manufacturers, wholesalers, and jobbers, before selling or offering for sale, in this state, any kerosene or other oil, for illuminating purposes, are required to file with the commissioner of agriculture a statement showing that they desire to do business in the state, and to furnish the name or brand of the oil or oils which they desire to sell, with the names and address of the manufacturer, and that such oil will comply with the requirements of the law.

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*The bill, as we have stated, was filed[391 when the statute had been in force but two days, and when, of necessity, the result of its operations was conjectural. We are asked now to hold that, although the general assembly declared in the statute that the charge or tax authorized to be imposed was made "for the purpose of defraying the expenses connected with the inspection, testing, and analyzing of oils in this state," the real purpose of the legislature was to levy a tax for revenue, in violation of the commerce clause of the Constitution. Reading the statute as an entirety, or in connection with the supplemental legislation of March 9, 1909, we find no adequate reason for imputing to the general assembly of North Carolina an attempt to do one thing under the guise or pretense of doing another. The mere designation of the exaction as a tax is not sufficient to warrant the deduction *that the charge authorized[392 for the inspection was not one really for such purpose. We cannot lightly attribute improper motives to the lawmaking power. *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589. Putting out of view, therefore, questions of motive, two subsidiary contentions remain; viz: (a) that oil is not a proper subject of inspection; and (b) that the tax in question is so excessive on its face as to be unconstitutional. The conceded fact that in thirty-five states of the Union oil inspection laws are in force is sufficient to adversely dispose of the first of these contentions. As stated by the court below:

"While there is much diversity of opinion in respect to the danger of explosion from the use of kerosene oil, and of the power to ascertain its illuminating capacity, it is evident that the question has not so far passed beyond the domain of debate, that the legislature may not subject it *to reasonable inspection before per-[393

Sec. 2. Power is conferred upon the commissioner of agriculture to collect samples of any illuminating oil offered for sale in this state, and have the same analyzed. The inspection of oil, as authorized by the act, is to be made under the direction of the board of agriculture, which is authorized "to make all necessary rules and regulations for the inspection of such oil, and to adopt standards of safety, purity, or absence from objectionable substances, and luminosity, when not in conflict with this act, and which they may deem necessary to provide the people of the state with satisfactory illuminating oil."

The board of agriculture is required to appoint oil inspectors not exceeding in

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mitting its sale in the state. The court cannot say that such a law has no reasonable relation to the public safety or welfare."

The contention that the tax is so excessive on its face as to conclusively evidence the unconstitutionality of the burden, if imposed as a mere inspection charge, is, we think, also without merit. *Prima facie* the charge must be deemed to be reasonable. *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204. Again, as said by the court below:

"It appears from an examination of the various oil inspection laws in force in the United States that the charges for inspection vary from $\frac{1}{2}$ to $1\frac{1}{2}$ cents per gallon, and that in states wherein population and other conditions are similar to those in this state the charge is about the same as that fixed by the act."

Looking at the elements which may have possibly entered into the calculation of the general assembly as to what would be a reasonable inspection charge, we cannot, to quote from the opinion in the *Patapsco Guano Case*, 171 U. S. 354, 43 L. ed. 194, 18 Sup. Ct. Rep. 892, "conclude that the charge is so seriously in excess of what is necessary for the objects designed to be

effected as to justify the imputation of bad faith, and change the character of the act."

In disposing of the contention just stated we are not at liberty to travel outside of the record and take judicial notice of the operation of the act since the transcript of record was filed in this court. We here reiterate what was said in the case last cited: "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." If the trial made of the act establishes the fact to be as asserted, that the exaction in question is excessive, the presumption is that, in the *orderly conduct of the public[394 business of the state, the necessary correction will be made to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the state for the expenses properly incurred in enforcing the authorized inspection. What relief should be awarded in the event the legislature of North Carolina failed in its positive duty in this particular is not a question open for consideration upon this record, as no such failure of duty on the part of the legislature had occurred or could possibly have happened when this

number one from each congressional district, whose compensation shall not exceed \$1,000 a year and expenses. They are given power to examine all barrels, tanks, or other vessels containing kerosene or other illuminating oils, to see that they are properly tagged, and shall, as directed, collect and test samples of oil offered for sale in different sections of the state, and when instructed, collect and send samples to the Department of Agriculture for examination.

Sec. 3. "For the purpose of defraying the expenses connected with the inspection, testing, and analyzing oils in this state, there shall be paid to the commissioner a charge of $\frac{1}{2}$ cent per gallon, which payment shall be made before delivery to agents, dealers, or consumers in this state." Provision is made for attaching to each barrel, tank car, and other containers, "a tag or stamp to be furnished by the commissioner of agriculture, showing that the tax has been paid. When oil is shipped in tank cars or other large containers, the manufacturer or jobber shall give notice to the commissioner of agriculture of every shipment, with the name and address of the person, company, or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

Sec. 4. "All moneys received under the provisions of this act shall be paid into the state treasury and kept as a distinct fund to be styled 'The Oil Inspection Fund.' All checks or orders in payment for tags or stamps shall be made payable 56 L. ed.

to the state treasurer. The commissioner of agriculture is authorized to draw out of said fund, upon his warrant, such sums as may be necessary to pay all expenses incurred in connection with this act, including salary to oil chemist, or chemists, cost of inspection, blanks," etc.

Sec. 5. "The state treasurer shall, on the first day of June and December of each year, turn into the general fund of the state all moneys of the oil fund in his hands in excess of the amount drawn out by the commissioner of agriculture for expenses."

Sec. 6. The commissioner of agriculture is required to include in his report to the general assembly an account of the operations and expenses under the act.

Sec. 7. Provides: That, whenever complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this state, the commissioner shall cause a sample of said oil or oils complained of to be procured, and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden, and report of the result or results shall be sent to the party making the complaint and to the manufacturer of such oil.

The remaining sections prescribe penalties for violation of the provisions of the law. The act went into effect July 1, 1909.

suit was commenced, a few days after the passage of the act.

The remaining contention is that the act is repugnant to the state Constitution because it attempts to delegate to the board of agriculture the exercise of legislative powers. The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, and it was left to the board of agriculture to determine what oils would measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable. *Buttfield v. Stranahan*, 192 U. S. 492, 48 L. ed. 534, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture. The court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them. A law cannot be declared 395] invalid because, in the opinion *of the court, it does not accord with sound policy. The appeal for redress in such case must be to the lawmaking power.

Decree affirmed without prejudice.

ALCIDES ARAN† and Francis Dexter,
Plffs. in Err.,

v.

CAMILO ZURRINACH.

(See S. C. Reporter's ed. 395-400.)

Error to district court of Porto Rico — denial of Federal right — objections to jury panel.

General objections to the jury panel, based upon the political status of the clerk of the court and of the jury commissioner, or upon the political opinions of the jurors, are too frivolous and wanting in merit to afford any support for the contention that the court, in overruling a motion to quash

the panel on those grounds, denied a right claimed under an act of Congress, within the meaning of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191) § 35, governing the appellate jurisdiction of the Federal Supreme Court over the district court of the United States for the district of Porto Rico.

[For other cases, see Appeal and Error, 1036-1043a, in Digest Sup. Ct. 1908.]

[No. 146.]

Submitted December 22, 1911. Decided January 9, 1912.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment in favor of plaintiff in an action against the principal and surety on a written contract. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Francis H. Dexter submitted the cause for plaintiffs in error.

Messrs. N. B. K. Pettingill and Frederick L. Cornwell submitted the cause for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Zurrinach sued Aran and Dexter, the one as principal and the other as surety, on a written contract, and recovered judgment, the court having instructed a verdict for the amount claimed, *viz.*, \$1,565.72.

When our jurisdiction to review the court below depends upon amount, \$5,000 is the criterion. We have hence no jurisdiction on this writ unless there be some basis for it other than the amount involved. Act of April 12, 1900, 31 Stat. at L. 85, chap. 191. The basis relied upon to establish that we have jurisdiction is the action of the court upon certain motions concerning the qualifications of the jury commissioners, and an alleged failure of such commissioners, in making up the panel, to comply with the law of the United States. The proceedings thus relied on are as follows: At the opening of the trial the defendants thus moved:

"Defendants move the court to quash the panel of the jury drawn for service at this term for the reason that the said panel was not drawn from a box containing the names of three hundred qualified jurors; and for the further reason that the present panel was not drawn and the names of the jurors constituting the same were not placed

†Death of Alcides Aran suggested December 19, 1911, and appearance of Pedro Aran, Ascuncion Aran, Carlos Aran, Francisco Aran, Emilio Aran, Gonzalo Aran, Rafael Aran, Gilbert Aran, Natalia Aran, and Patria Aran filed and entered.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rico courts—see note to *Garrozi v. Dastas*, 51 L. ed. U. S. 369

therein as required by the act of Congress, 398] . . . *in this: to wit, that the clerk of this court, John L. Gay, is a member of the Democratic party of the United States, but is not a member of any political party of Porto Rico or of the district, nor is he a registered voter in Porto Rico. The jury commissioner of this court, who, together with the said clerk, placed the names of jurors in the jury box, is not a member of any political party of the United States, and is not an American citizen, but is a member of the so-called Republican party of Porto Rico. The principal or majority party in this district is, and was at the time the names of jurors were placed in the said box and drawn therefrom by the said clerk and jury commissioner, the so-called Unionist party, all to the prejudice of defendants."

On making this motion, the counsel stating that he desired to offer proof, the clerk of the court was called to the stand, but the court refused to hear his testimony, and overruled the motion forthwith, stating "that it had personal knowledge of the mode and manner in which the jury was drawn and the law with reference to the manner, and regards the same as having been strictly in accordance with the law, and does not regard the question in Porto Rico of the politics of the parties as being applicable to the same extent as it would be in the states." The motion was "also denied on the ground that it was not filed within the time required by law, and no five days' notice was given to the other party."

It is settled that the provisions of the 35th section of the act of April 12, 1900, previously referred to, which give a right to bring to this court from the district court of Porto Rico, by writs of error or appeal, all final decisions of such court in all cases where "an act of Congress is brought in question and the right claimed thereunder is denied," do not contemplate that the right to review thus conferred should be confined solely to cases where the validity of an act of Congress is called in 399] in question *or its interpretation is necessarily involved, but also give power to review where a right under an act of Congress was asserted and denied in the court below. *Crowley v. United States*, 194 U. S. 466, 48 L. ed. 1078, 24 Sup. Ct. Rep. 731; *Rodriguez v. United States*, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617. In the *Crowley* Case the accused, by a plea in abatement, questioned the competency of certain grand jurors, who participated in the finding of the indictment, on the ground that the grand jury had been selected without any reference to the qualifications

prescribed by the local law, when, as the result of an act of Congress, the local law should have been respected and applied. The plea was specific, and set up accurately the particular persons whose qualifications were challenged. Without going into detail in the *Rodriguez* Case, it is true also to say that the legality of both the grand and petty jury was drawn in question because of a failure to apply the law of the United States governing the same.

But neither the principle which the cases referred to maintain nor the reasoning by which they were controlled supports the proposition that any and every mere question of irregularity in applying the law of the United States which arises in a case in the court below confers a right to review on this court which otherwise would not exist. Moreover, neither the rule announced in the cases nor the reasoning which controlled them gives support to the further assumption that the right to a review by this court of the whole case, which otherwise would not exist, can be brought about by raising in the court below questions concerning the application or methods of enforcement of the applicable laws of the United States when, from the manner in which they are raised,—that is, their generality of statement and the absence of all specification to sustain them,—the conclusion is justified that they are of a frivolous character.

Putting out of view the ruling of the court based on the delay in making the motion assailing the capacity of the *jury[400 commissioner and the qualifications of the panel, which, it is urged, establish the right to review by this court, we are of opinion that the questions raised in the motion, either inherently or because of the manner in which they were raised, come within the propositions just stated, and therefore are not controlled by the ruling in the *Crowley* or *Rodriguez* Case. In the first place, in so far as the motion was addressed to the qualifications of the jury commissioners, it was, on its face, so wanting in merit and wholly frivolous as to afford no support whatever to the contention that the court, in overruling it, denied a right claimed under an act of Congress. In the second place, that is, as far as the challenge to the panel is concerned, if it be that the concluding sentence of the motion referring to the alleged political opinions of some of the jurors selected by the commissioners was an enumeration of the disqualification relied upon as the basis of the motion to quash the panel, its frivolousness was equally manifest. If, on the other hand, this view be not taken, then the mere general statement in the motion to quash, without any specification whatever of the

ground relied upon, renders a like conclusion inevitable.

As the amount involved is not adequate to give jurisdiction, and the alleged claims of right under the act of Congress relied upon for that purpose are inadequate to form the basis of the exertion of jurisdiction, because of their unsubstantial and wholly frivolous character, it results that our order will be, writ of error dismissed for want of jurisdiction.

401]*TITLE GUARANTY & SURETY COMPANY, Plff. in Err.,

v.

UNITED STATES TO THE USE OF GENERAL ELECTRIC COMPANY.

(See S. C. Reporter's ed. 401-403.)

Error to circuit court of appeals — supersedeas — time.

1. The general provisions of U. S. Rev. Stat. § 1007, U. S. Comp. Stat. 1901, p. 714, limiting the time within which a writ of error must be allowed and lodged in the clerk's office if a supersedeas is desired, would govern writs of error from the Federal Supreme Court to the circuit courts of appeals, even under the mistaken hypothesis that writs of error from the circuit courts of appeals to inferior courts, and appeals from such courts to the circuit courts of appeals, were all that were within the purview of the provision of the act of March 3, 1891 (26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552). § 11, that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

[For other cases, see Appeal and Error, 2559-2570, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — supersedeas — time.

2. The time fixed by U. S. Rev. Stat. § 1007, U. S. Comp. Stat. 1901, p. 714, within which a writ of error from the Federal Supreme Court to a circuit court of appeals must be allowed and lodged in the clerk's office if a supersedeas is desired, cannot be extended by a stay granted to afford an opportunity to apply for a writ of certiorari, since there is no power in the Federal Supreme Court to allow a certiorari under the act of March 3, 1891, in a case where there is authority to

review the action of the lower court by writ of error or appeal.

[For other cases, see Appeal and Error, 2959-2970, in Digest Sup. Ct. 1908.]

[No. 856.]

Motion submitted November 20, 1911. Decided January 9, 1912.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania in favor of plaintiff in an action on the bond of a public contractor. A motion was made to vacate the supersedeas. Motion granted.

See same case below, 109 C. C. A. 106, 187 Fed. 98.

The facts are stated in the opinion.

Messrs. H. B. Gill and Louis Bancroft Runk in support of the motion.

Messrs. Russell H. Robbins and James F. Campbell opposed.

Mr. Chief Justice White delivered the opinion of the court:

The motion to vacate the supersedeas must prevail.

Although the writ of error was allowed and was lodged in the office of the clerk more than six months after the entry of the judgment, the bond was approved to operate as a supersedeas. Under these circumstances it is apparent *that the[402 order for supersedeas was improvidently granted. No other conclusion is possible in view of § 1007, Rev. Stat. U. S. Comp. Stat. 1901, p. 714, making the allowance of a writ and the lodgment of the same in the office of the clerk within sixty days after the date of a judgment an essential prerequisite to the granting of a supersedeas. Western Air Line Constr. Co. v. McGillis, 127 U. S. 776, 32 L. ed. 324, 8 Sup. Ct. Rep. 1390; Covington Stock Yards Co. v. Keith, 121 U. S. 248, 30 L. ed. 914, 7 Sup. Ct. Rep. 881; Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810.

It is nevertheless, insisted, first, that this case is not within the rule, because, as the judiciary act of 1891 by the 6th section [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549] allows one year for the prosecution of error from this court to the judgments of the circuit courts of appeals, and in express terms fixes no period for the allowance of a supersedeas, therefore as the supersedeas was allowed within the year, it was in time. This, however, ignores the provision of § 11 of the act of 1891 as follows: "And all provisions of law now in force regulating the

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, . . . " *Hudson v. Parker*, 156 U. S. 282, 39 L. ed. 425, 15 Sup. Ct. Rep. 450, 9 Am. Crim. Rep. 91. Nor would a different result arise from the concession argumentatively that from a consideration of the context of § 11 of the act of 1891, the passage which we have quoted should be restricted to writs of error from the circuit courts of appeals to inferior courts, and to appeals from such courts to the circuit courts of appeals. Nothing is contained in the act of 1891 regulating the time when an appeal from a circuit court of appeals to this court or a writ of error from this court to such courts must be taken in order to operate as a **403**]persedeas. The general provision *of Rev. Stat. § 1007, under the hypothesis stated, would therefore be applicable. It thus results that the mistake in allowing the supersedeas in the case which is before us is equally demonstrated by the correct application of the act of 1891, as well as by yielding to the erroneous construction of that act which is pressed in argument. Second. After the entry of the judgment in the circuit court of appeals a stay order was entered in that court to afford an opportunity of applying to this court for a writ of certiorari, and such application was made and refused. Upon this premise the argument is that, as the writ of error was allowed and lodged with the clerk within sixty days after the refusal by this court of the petition for certiorari, therefore, even under the assumption that § 1007 applied, there was power to allow the supersedeas. But no power in this court to allow a certiorari under the act of 1891 exists in a case where there is authority to review the action of the lower court by error or appeal. This being true, it follows that the contention is that the granting of the stay order to enable a certiorari to be applied for operated to change the statutory time fixed for allowing a supersedeas on error or appeal, although such subject could not have been lawfully contemplated as being within the scope of the stay order. In other words, the argument comes to this,—that the stay order embraced and controlled a subject to which it could not lawfully extend. And this consideration at once serves to mark the distinction between the operation of a stay order granted for the purposes of a pending application for rehearing, since the pending of a

rehearing operates to prevent the judgment or decree from becoming final, for the purpose of error or appeal, until the application is disposed of.

As it results that the supersedeas was improvidently allowed, our order must be and is,

Supersedeas vacated.

*FREDERICK H. VOGT, Appt., [404
v.

CHARLES GRAFF, Frederick C. Giesecking,
and Matilda S. Vogt.

(See S. C. Reporter's ed. 404-415.)

Wills — rule in Shelley's Case.

1. The testator must be deemed to have used the words of inheritance as mere *descriptio personarum*, and not in their full legal sense, thus defeating the application of the rule in Shelley's Case, where, after giving outright to his other children their respective shares of his estate, he directed that the share of a specified son should be paid over to certain designated trustees, the income therefrom to be paid over to such son, "the principal to be paid to his heirs after his death."

[For other cases, see Wills, 137-143, in Digest Sup. Ct. 1908.]

Real property — rule in Shelley's Case — legal and equitable estate.

2. The rule in Shelley's Case does not apply where the particular estate is equitable, and the estate in remainder legal.

[For other cases, see Real Property, 33-39; Wills, 137-143, in Digest Sup. Ct. 1908.]

[No. 73.]

Argued November 17, 1911. Decided January 9, 1912.

APPPEAL from the Court of Appeals of the District of Columbia to review a decree, which, on a second appeal, affirmed a decree of the Supreme Court of the District, refusing to apply the rule in Shelley's Case in a suit to construe a will. Affirmed.

See same case below on first appeal, 26 App. D. C. 46; on second appeal, 33 App. D. C. 356.

The facts are stated in the opinion.

Mr. John C. Gittings argued the cause, and, with Mr. Justin Morrill Chamberlin, filed a brief for appellant:

The rule in Shelley's Case was a positive rule of law, and not one of construction.

Grimes v. Shirk, 169 Pa. 74, 32 Atl. 113; McCann v. Barclay, 204 Pa. 214, 53 Atl. 767; Shapley v. Diehl, 203 Pa. 569, 53 Atl. 374; Jones v. Morgan, 1 Bro. Ch. 206.

NOTE.—As to the rule in Shelley's Case—see note to *Hamilton v. Sidwell*, 29 L.R.A. (N.S.) 963.

If technical words are used, they must be given their primary legal meaning, unless there is something on the face of the will that shows that they were not so used by the testator, but will clearly show in what sense they were used.

Daniel v. Whartenby, 17 Wall. 643, 21 L. ed. 663; Van Grutten v. Foxwell [1897] A. C. 658, 66 L. J. Q. B. N. S. 745, 77 L. T. N. S. 170.

Under the tenth paragraph of the will, the ancestor, Fred H. Vogt and heirs, take the same quality of estates.

Hill, Trustees, p. 288; Perry, Tr. § 311; Denton v. Denton, 17 Md. 403; Warner v. Sprigg, 62 Md. 14; Long v. Long, 62 Md. 68; Glover v. Condell, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173.

Messrs. J. J. Darlington and Leon Tobriner argued the cause and filed a brief for appellees:

The word "heirs," as used in the will, should be construed as *designatio personarum*, descriptive of the persons who were to take upon the death of the life tenant.

Hargrave, Law Tracts, 574-576, Bennett v. Bennett, 217 Ill. 444, 4 L.R.A. (N.S.) 470, 75 N. E. 339; Taylor v. Lindsay, 14 R. I. 520; Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812; De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 222, 37 L. ed. 138, 142, 13 Sup. Ct. Rep. 283; Howell v. Ackerman, 89 Ky. 28, 11 S. W. 819; Haley v. Boston, 108 Mass. 579; Jones v. Lloyd, 33 Ohio St. 578; Albert v. Albert, 68 Md. 368, 12 Atl. 11; De Beauvoir v. De Beauvoir, 3 H. L. Cas. 557, 16 Jur. 1147; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203; Monast v. Letourneau, 87 Ill. App. 300; Jones v. Rees, 6 Penn. (Del.) 504, 16 L.R.A. (N.S.) 734, 69 Atl. 785; Low v. Smith, 2 Jur. N. S. 344, 4 Week. Rep. 429; Smith v. Butcher, L. R. 10 Ch. Div. 113, 48 L. J. Ch. N. S. 136, 27 Week. Rep. 281; Sands v. Old Colony Trust Co. 195 Mass. 579, 81 N. E. 300, 12 Ann. Cas. 837; Clarke v. Cordis, 4 Allen, 480.

It being beyond dispute that, where it first occurs, the testator used the word "heirs" in a nontechnical sense, not as a word of limitation, but to designate the members of his family among whom the proceeds of his real estate should be divided, the authorities are overwhelming to the effect that the word is to be taken in the same sense, in the absence of any manifestation of a contrary intent, where it is again used in the same instrument.

Elliot v. Carter, 12 Pick. 443; Bundy v. Bundy, 38 N. Y. 421; Kiah v. Grenier, 56 N. Y. 224; Lawrence v. Lawrence, 105 Pa. 341; Brearley v. Brearley, 9 N. J. Eq. 27; Chew v. Chew, 1 Md. 168; Van Nostrand v.

Moore, 52 N. Y. 12; VanKleeck v. Dutch Church, 20 Wend. 471; Tucker v. Tucker, 5 N. Y. 418; Tucker v. Ball, 1 Barb. 94; Hoppock v. Tucker, 59 N. Y. 208; Carnagy v. Woodstock, 2 Munf. 234, 5 Am. Dec. 470; Feltham v. Butts, 8 Bush, 119; Moore v. Moore, 12 B. Mon. 656; Ferry v. Langley, 1 Mackey, 140; Butler v. Butler, 2 Mackey, 104; White v. Crenshaw, 5 Mackey, 118, 60 Am. Rep. 370.

Even where the word occurs in different instruments, as in two statutes, enacted at different times, but *in pari materia*, the like rule prevails.

United States v. Central P. R. Co. 118 U. S. 235, 240, 30 L. ed. 173, 175, 6 Sup. Ct. Rep. 1038.

The limitation to the ancestor and his heirs must both be of the same nature or quality, either both legal or both equitable, and not one legal and the other equitable.

1 Preston, Estates, 321; Green v. Green, 23 Wall. 486, 489, 23 L. ed. 75, 76; Sims v. Georgetown College, 1 App. D. C. 79; Handy v. McKim, 64 Md. 573, 4 Atl. 125; Croxall v. Shererd, 5 Wall. 268, 282, 19 L. ed. 572, 577; Bacon's Appeal, 57 Pa. 505; Westcott v. Edmunds, 68 Pa. 34; Mannerback's Estate, 133 Pa. 342, 19 Atl. 552; Harbster's Estate, 133 Pa. 351, 19 Atl. 558; Eshbach's Estate, 197 Pa. 153, 46 Atl. 905.

Mr. Justice McKenna delivered the opinion of the court:

Bill in equity filed in the supreme court of the District of Columbia by the children of John L. Vogt, to determine the meaning of a clause in the latter's will.

*The defendants in the case, appel-[409] lees here, were Charles Graff and Frederick C. Giesecking, executors and trustees named in the will, and Matilda S. Vogt, infant daughter of one of the complainants, appellant here, Frederick H. Vogt.

The part of the will to be construed is as follows:

"All the rest and residue of my real estate shall, when my youngest surviving child attains the age of twenty-one years, or one year thereafter, in the discretion of my executors, be sold by my executors at public auction, after due notice in the newspapers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, except the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Giesecking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death."

Regarding this provision as a simple composition of English words, we should have

no difficulty in deciding that the testator intended to give to Frederick H. Vogt a life estate in the designated share. But it is contended that the meaning of the testator is determined otherwise by the rule in *Shelley's Case*. The rule is thus laid down: Where "the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately to his heirs in fee or in tail, . . . 'the heirs' are words of limitation of the estate, and not words of purchase." 1 Coke, 104; *Daniel v. Whartenby*, 17 Wall. 639, 641, 21 L. ed. 661, 663; *Green v. Green*, 23 Wall. 486, 488, 23 L. ed. 75, 76.

It will be observed that, under the rule, by a technical circumlocution, one estate only is created, though two parts are expressed,—a particular estate for life, with a remainder to the heirs of him who takes the particular estate. The rule, therefore, [410] has been a fruitful source *of controversy. On the one hand it has been praised as having a substantial foundation and necessarily expressing and enforcing essential legal distinctions in the transfer of property; to be, indeed, the very opposite of a technical rule, and one "established through a long course of decisions extending over a great many generations," and declared therefore to be a rule of substance in order to give effect to the intention of the grantor or testator. On the other hand, it is attacked as oftener defeating intention than executing it, being applied as an absolute and peremptory obligation to convey or devise an estate in fee simple even against an express declaration to the contrary. Inveective, therefore, has been employed against it, and even ridicule; and English and American judges, while yielding to it, have pronounced it unjust. We, however, need not enter into the field of controversy. Whether it had a legal and substantial foundation when first pronounced, or yet has, whether it is a useful rule of property or part of the *débris* of an ancient system, having now only the mischievous vitality of frustrating the intention of a grantor or testator, we need not consider.

It is conceded to be a rule of property in the District of Columbia, and we are brought to the question whether, consistently with it, the intention which we have seen Vogt has expressed may be executed?

The statement of the rule we have given. There are certain conditions attached to it which give precision to its application. One of these is that the remainder after the particular estate must be to heirs of the whole line of inheritable blood, designating those who are to take from generation to generation. And they must be heirs

of him who takes the particular estate, and by devolution from him.

This is important to be observed. The heirs must take from the first taker, and not be a description of a class taking from the testator, becoming themselves "the[411 root of a new succession." Guthrie's Appeal, 37 Pa. 9. Hargrave, in his *Law Tracts*, states the test to be "whether the party entailing means to build a succession of heirs on the estate of the tenant for life." If he does not, but intends to describe a class taking from him, the rule does not apply. We proceed to illustrate this.

Kemp v. Reinhard, 228 Pa. 143, 29 L.R.A. (N.S.) 958, 77 Atl. 436, expresses the principle, and its facts bring it into close similarity to the case at bar. In that case the testatrix gave to her son, Jacob E. Kemp, the use and income of seven enumerated properties "for and during his lifetime." Then followed this clause: "And immediately after the decease of the said Jacob E. Kemp, I give and devise the above-described seven tractz or pieces of land devised to him herein for life to his issue in fee. Should he, however, die without leaving issue living, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns in fee." The court said:

"Though the intention of the testatrix may have been to give only a life estate to the appellant, if in the devise there was a limitation of the estate to his heirs, to take by devolution from him at his death, her intention is overridden by the rule in *Shelley's Case*; but in every case in which the application of that rule is involved, the first question is whether the deviser or grantor intended a limitation of the remainder in fee or in tail, as such, to the heirs of the first taker or that there should be the root of a new succession taking directly from the deviser or grantor as purchasers. When the latter intention appears, the rule has no place, and the intention must be given effect."

And further:

"It is very carefully to be noted that, in searching for the intention of the donor or testator, the inquiry is not whether the remaindermen are the persons who *would have been heirs had the fee been[412 limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take. In the very many cases in which the question has arisen whether the rule was applicable, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or originally, as the stock

of a new inheritance.' Guthrie's Appeal, supra."

Hall v. Gradwohl (1910) 113 Md. 293, 29 L.R.A.(N.S.) 954, 77 Atl. 480, is also somewhat similar to the case at bar, and we quote the more readily since it is said that the rule in Shelley's Case prevails in the District of Columbia because it prevailed in the law of Maryland. After discussing the rule, the court said that "it is not a favored" one "in the law of Maryland, although the court will never refuse to apply it in a proper case." And it was decided that where the particular intention of the testator is not to use the words of inheritance in their full legal sense, but "as mere *descriptio personarum* or a particular designation of individuals who were to take as purchasers at his death," the rule should not prevail. The will passed on made certain bequests and devises and then provided: "The balance of my estate to be equally divided among my five children or their heirs, share and share alike," with this proviso: "That the portion to which my daughter Sarah [Gradwohl] may be entitled shall be invested in some safe stocks or other securities, the said Sarah [Gradwohl] to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." The court refused to apply the rule. To apply the rule it was said that the words "children or legal heirs" would have to be treated as words of limitation; that is, as "marking out the extent and duration of her interest." This construction the 413] court rejected as consonant with "neither reason, policy, justice, nor equity," and could only be supported by giving to the words "legal heirs," which are superadded to the word 'children,' the arbitrary meaning placed upon them 'by an artificial rule of law.'" The court, after an analysis of the will, decided that it plainly manifested a particular intention to use those words as mere *descriptio personarum*, as a particular designation of individuals who were to take as purchasers at the death of the testatrix.

The conclusion of the court was based upon the special provision of the will which directed that the portion given to the testatrix's daughter Sarah should be invested in some safe stocks or securities, and that Sarah should "receive the income from the same during the term of her natural life," and should be at her death "equally divided among her children or legal heirs." This language, the court added, manifested a particular intention on the part of the testatrix "to use the words as mere *descriptio personarum*. . . . In such cases,

under all of the authorities, the rule in Shelley's Case does not apply."

A like intention is expressed in Vogt's will. His real estate, after satisfying particular devises, is directed to be sold when his youngest surviving child shall attain the age of twenty-one years. The proceeds he directs "shall be then divided among my heirs, share and share alike, and paid over to them, respectively, at once, except the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Giesecking, as trustees, by them invested, the income therefrom to be paid to said Fred H. Vogt, the principal to be paid to his heirs after his death." If the rule in Shelley's Case be applied, it will destroy all of the distinctions that the testator has expressed. The distinctions are radical, and must be looked to in ascertaining his intention. And this was done, as we have seen, in Hall v. Gradwohl, supra, and it was done, to, we may say in Kemp v. Reinhard, *supra. The latter case has[414 not the infirmity that counsel for appellant ascribes to some of the earlier Pennsylvania cases, of regarding the rule as one of construction, yielding to and not overriding the intention, as, it is contended, its unflinching and dominating character requires.

The intention of the testator, therefore, may have some sway. We may inquire, at least, as to his intention in the use of the word "heirs," whether as taking from him or as taking from the life tenant. The rule "is silent until the intention of the grantor or deviser is ascertained." Kemp v. Reinhard, supra.

Of Vogt's intention we have no doubt. It is made clear by the distinctions to which we have adverted. To his other children their shares are to be delivered immediately upon the sale of the real estate. To appellant there is nothing of his share to be delivered at all. It is to be delivered to others for him, he to receive, not the body of the share, but only the revenue from it. He is separated from it completely. He does not handle it or direct its investment, and after his death, the testator, through trustees he has selected, directs it to be delivered to persons designated by him; or, to use the language of the cases, described by him as taking from him. Opposing reasoning, it is true, might be brought forward, but this court, while asserting and recognizing the peremptory force of the technical terms of the rule, has said: "But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intention of the testator, the former must yield and the latter will prevail." Daniel

v. Whartenby, 17 Wall. 639, 643, 21 L. ed. 661, 663.

Another condition of the application of the rule is that the particular estate and the estate in remainder must be of the same quality,—both legal or both equitable. The court of appeals decided that such condition did not exist, and on that ground, as well as on that which we have discussed, held adversely to appellant. In other words, 415]the *court decided that the estate given to appellant was equitable and the estate devised to the daughter legal, and that therefore the estates did not merge. It is admitted that the estate taken by appellant is equitable; the contentions of the parties turn upon the character of the estate given to his daughter. We will not consider the contentions, nor whether the rule is applicable to personal property. We rest our decision on the ground discussed by us.

Judgment affirmed.

J. H. WILLIAMS, Plff. in Err.,
v.

J. E. WALSH, Sheriff and *Ex Officio* Jailer
of the County of Crawford, Kansas.

(See S. C. Reporter's ed. 415-424.)

**Constitutional law — equal protection
of the laws — discrimination — regu-
lating sale of explosive.**

1. The exception in favor of existing contracts, contained in Kan. Laws 1907, chap. 250, making it criminal to sell or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, does not make such statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a. 8, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review
— questions not involved in record.**

2. The question whether the commerce clause of the Federal Constitution is violated by the provisions of Kan. Laws 1907, chap. 250, making it unlawful to sell or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, is not open on a writ of error from the Federal Supreme Court to review a judgment of the state court refusing a writ of habeas

corpus to one convicted of a violation of the state statute, where the latter court refused to consider the contention because the fact of the importation of the package sold from outside the state did not appear at the trial.

[For other cases, see Appeal and Error, 2164-2174, in Digest Sup. Ct. 1908.]

**Commerce — state regulation — sale of
explosive.**

3. The use of the words "original packages" in Kan. Laws 1907, chap. 250, making it unlawful to sell, offer for sale, or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, does not necessitate the conclusion that the statute prohibits the importation of black powder from other states in other than 12½-pound packages.

[For other cases, see Commerce, IV. b. 3, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

4. One who does not appear to have imported black powder from outside the state cannot raise the question of the validity under the commerce clause of the Federal Constitution of the provisions of Kan. Laws 1907, chap. 250, making it unlawful to sell, offer for sale, or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder.

[For other cases, see Statutes, I. d. 3, in Digest Sup. Ct. 1908.]

[No. 79.]

Argued and submitted December 5, 1911.
Decided January 9, 1912.

IN ERROR to the Supreme Court of the State of Kansas to review an order refusing a writ of habeas corpus to one convicted of a violation of the statute regulating sales of black powder. Affirmed.

See same case below, 79 Kan. 212, 98 Pac. 777.

The facts are stated in the opinion.

Mr. Charles Blood Smith argued the cause, and, with Mr. D. B. Holmes, filed a brief for plaintiff in error:

The Kansas black-powder act is repugnant to the clause of U. S. Const. 14th Amendment, which prohibits a state denying to any citizen the equal protection of the laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Magoun v. Illinois Trust & Sav. Bank, 170

NOTE.—As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On what questions the Federal Supreme
56 L. ed.

Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The act is in direct conflict with the commerce clause of the Constitution of the United States.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Sawrie v. Tennessee*, 82 Fed. 615; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Rhodes v. Iowa*, 170 U. S. 423, 42 L. ed. 1095, 18 Sup. Ct. Rep. 664; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Messrs. **John S. Dawson** and **Fred S. Jackson** submitted the cause for defendant in error. Messrs. **S. N. Hawkes** and **O. D. Boaz** were on the brief:

This law clearly operates on all persons similarly situated and upon all property similarly situated. Consequently, it cannot be said that any person is denied equal protection under this law.

Wurts v. Hoagland, 114 U. S. 615, 29 L. ed. 232, 5 Sup. Ct. Rep. 1086; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; *Eldridge v. Trezevant*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 345; *Lowe v. Kansas*, 163 U. S. 88, 41 L. ed. 80, 16 Sup. Ct. Rep. 1031.

The courts have clearly and sufficiently accorded to the legislatures the right, under the police power retained by them, to regulate both the subject of the handling of black powder and of carrying on the business of mining for coal.

Foster v. Kansas, 112 U. S. 206, 28 L. ed. 697, 5 Sup. Ct. Rep. 8, 97; *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 617; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 691; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76.

Unless the black-powder act is, upon its face, absolutely void, and void even as relating to offenses committed entirely within the state, and in which no question of interstate commerce is concerned, then clearly the supreme court of Kansas had no jurisdiction, under the commerce clause of the Constitution of the United States, to review

the evidence before the justice of the peace, or to release the defendant upon the ground that additional evidence, if it had been introduced, would have resulted in his acquittal.

Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570.

Errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus.

Franklin v. Westfall, 27 Kan. 618.

The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.

Cooley, Const. Lim. 7th ed. p. 232.

Mr. Justice **McKenna** delivered the opinion of the court:

A statute of Kansas provides as follows:

"It shall be unlawful for any individual, firm, or corporation to sell, offer for sale, or deliver for use at any coal mine or mines in the state of Kansas, black powder in any manner except in original packages containing 12½ pounds of powder, said package to be securely sealed; said powder to be delivered by the company to the miner at its powder house, not more than 300 feet from pit head, unless hereafter [419 otherwise provided by contract; provided, however, this act shall not be construed as in any manner conflicting with any existing contract of sale of black powder."

Plaintiff in error was convicted of violating the statute by selling and delivering to one John Thomas black powder which was not in an original package of 12½ pounds, securely sealed, there being no existing contract to sell between the parties. He was condemned to pay a fine of \$50 and the costs of the case, and stand committed to the county jail until he should pay the fine or be discharged by law.

In a petition to the supreme court of the state in habeas corpus to be discharged from custody, he alleged the illegality of his conviction, and that the statute was null and void because in conflict with the 14th Amendment to the Constitution of the United States and the commerce clause, and also with the Constitution of the state of Kansas.

His contentions were not sustained, and he was remanded to custody. 79 Kan. 212, 98 Pac. 777.

Some of the contentions which were made in the state court are abandoned here. "We admit," counsel say, "that the Kansas legislature had the right to determine that the local conditions in the state required

that black powder should not be sold and delivered for use in any coal mines in the state except in packages containing exactly 12½ pounds, no more nor less; that precisely that amount of powder was required to be sold to protect the miners that are employed in the coal mines of the state, and that the mere fact that courts or judges may differ as to the wisdom of such legislation would afford no ground for judicial interference, unless the question was in excess of legislative power." It is, however, insisted that there is a limitation of the power of the state, and that the law in question transcends the power of the

We shall consider these objections in their order:

(1) The discriminatory effect of the statute comes, it is urged, from its 1st section, which directs that it shall not be construed to conflict with existing contracts. "The act thus recognizes," it is said, "the fact at the time it took effect, May 27, 1907, of the existence of contracts" for the delivery of powder in other than the described packages. "It is thus made unlawful," it is said, "for some persons to sell or buy black powder otherwise than in 12½ pounds in original sealed packages, while others may lawfully do the same thing."

We might, indeed, hesitate to assume, as counsel does, from the possibility of the existence of a fact, its actual existence, if by doing so we should have to regard a state law as unconstitutional, but as we do not think the result will follow, we shall assume the existence of the fact. The purpose of the statute is to provide for the safety of coal mining operations, and if it may be said that whatever danger can come from packages of powder will come from them regardless of the date of the contract under which they may be delivered, there are nevertheless other considerations to be taken into account. The statute is criminal. A retrospective operation of it was to be avoided,—might, indeed, be illegal. At any rate, it was a matter properly to be considered by the legislature in distinguishing between contracts made before the passage of the law and those made after its passage. The former might not be numerous, their evil would be temporary; and certainly legislation which makes acts criminal which are done after they are forbidden, and assigns no penalties to acts done in pursuance of obligations legally

incurred, is not arbitrary classification. It is not necessary to do more than *re-[421] peat what we have said many times, that a classification which is not arbitrary is not repugnant to the Constitution of the United States. We may add that "the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus discriminate between the rights of an earlier and later time." *Sperry & H. Co. v. Rhodes*, 220 U. S. 502, 505, 55 L. ed. 561, 562, 31 Sup. Ct. Rep. 490.

(2) To make good the contention that the statute of Kansas offends the commerce clause of the Constitution, plaintiff in error refers to an amendment to his petition that the powder sold and delivered by him was inclosed in an original unbroken package, containing 25 pounds of powder, imported from the state of Missouri by the Central Coal & Coke Company, of which company he was the agent and representative in selling and delivering. And it is further alleged that black powder has been and is put up by manufacturers thereof, and sold and transported among the states in original packages containing 25 pounds.

It is, however, admitted that proof of such facts was not attempted to be made in the justice's court. The case was submitted in that court upon a stipulation that the powder, at the time of its sale and delivery, was not "in an original package, containing 12½ pounds, securely sealed, and that then and there, there was not an existing contract for the sale of black powder, to be used in said mine."

Plaintiff in error insists that the absence of proof of the facts which he alleges is immaterial, because, as he urges, "this court will take judicial notice of the matter of common knowledge that black powder is a subject of interstate commerce." But plaintiff in error invokes a broader knowledge, or, rather, a broader knowledge is necessary to sustain his allegations. We must not only take notice that black powder is a subject of interstate commerce in packages of 25 pounds, but of the more particular *facts that[422] he was the agent and representative of the Central Coal & Coke Company in selling and delivering the powder, and that the company had imported it in the package in which it was sold. What sources of knowledge have we of such facts? It is true that the stipulation recited that Thomas's purchase of the powder was voluntary, and that it was sold to him "in the usual and ordinary course of business." Of what business, and whose? It will be observed that the stipulation merely negatives the requirements of the statute. It follows the

complaint, and states that the powder was not sold in an original package containing 12½ pounds, and that there was not an existing contract. How it was sold is not stated. It is true the supreme court supplied the omission as to quantity. In answering an objection (the objection is not made here) that the law was invalid on account of its rigid requirement that a package should contain 12½ pounds, neither more nor less, the court stated that the sale in this case was of 25 pounds. The court went no farther, and of the contention that the statute was repugnant to the commerce clause of the Constitution, said: "The final claim of the petitioner, that the act is in violation of the commerce clause of the Federal Constitution, may not be presented in this record, since the fact of the importation of the package from Missouri did not appear at the trial before the justice." It was certainly within the competency of the court to refuse to consider the contention. The validity of the judgment against plaintiff in error could only be determined by the defense he made, not by the defense he might have made, and which he did not even offer to make. We have often said that the writ of habeas corpus cannot be made to perform the office of a writ of error. It certainly cannot be made the means of obtaining a new trial.

It may, however, be said that the supreme court expressed its views of the validity of the Kansas statute under the commerce clause of the Constitution, and thereby ruled on the contention of plaintiff in error, based on that clause. We do not so understand the opinion of the court. It in no way, nor to any extent, modified its view that the contention was not available to plaintiff in error, or intimated that such view was not the basis of its decision.

Plaintiff in error, apprehending this, declares that it is immaterial whether the package of powder sold by him was imported, and insists that the act must be held to be void because it must be considered "as applicable to importations of black powder from other states." The words "original packages," used in § 1 of the statute, had, it is said, "a technical meaning well known to the members of the Kansas legislature." In definition of the meaning of those words, plaintiff in error cites certain familiar decisions of this court, and, from the definition given in them of "original packages," deduces the conclusion that the words were used in the

same sense in the Kansas statute, and hence, that the statute must be held as designed to prohibit importations of black powder in other than 12½ pound packages. We are not impressed by the reasoning. The act does not deal with importations, special or general, but only with sales within the state at a specified place, and the delivery at such place of the powder sold in other than a prescribed quantity and in a prescribed package. It may be that powder is imported or put up in the state in such packages. If so, it makes compliance with the law all the easier. Or it may be that the seller may compose the package securing its integrity in the manner provided by the statute. What the supreme court of the state may decide in that regard we do not know, for the point was not made in that court, and the interpretation of the statute invoked.

There is another answer to the contention. A law cannot be declared invalid at the instance of one not affected by it[424 and, as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder. We do not wish to be understood as intimating that if such proof had been made, it would have been a defense. Powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity. It is subject, therefore, to a measure of regulation from which harmless articles of commerce may be exempt. It is said by this court in *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28: "Indeed, it is a principle fully recognized by decisions of state and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." See further on the same principle, *Foster v. Kansas*, 112 U. S. 206, 28 L. ed. 697, 5 Sup. Ct. Rep. 97; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.

D. L. REID and Etta C. Reid, His Wife.

(See S. C. Reporter's ed. 424-444.)

Commerce — conflicting state and Federal regulations.

1. Inhibitive congressional legislation is not essential to exclude state legislation upon incidental matters relating to interstate commerce with respect to which the states and Congress have a concurrent power. It is sufficient if the congressional legislation occupies the field of regulation. [For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Commerce — state regulation of carrier — conflicting Federal regulation.

2. Congress has so completely taken control of the subject of rate making and charging by the provisions of the act to regulate commerce and the amendments thereof as to invalidate the provisions of N. C. Code 1905, § 2631, so far as they penalize the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state where no rate for such shipment has been established, filed, or published.

[For other cases see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

[No. 487.]

Argued December 6, 1911. Decided January 9, 1912.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Mechenburg County, in that state, enforcing a state statute penalizing the refusal of a carrier to accept a tender of an interstate shipment. Reversed and remanded for further proceedings.

See same case below, 153 N. C. 490, 69 S. E. 618.

The facts are stated in the opinion.

Mr. Alfred P. Thom argued the cause, and, with Mr. John K. Graves, filed a brief for plaintiff in error:

The receiving by a carrier of goods tendered at a point in one state for transportation to a point in another state, and the duties of the carrier with respect thereto, are matters of interstate commerce, and therefore within the power of Congress.

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 56 L. ed.

Gibbons v. Ogden, 9 Wheat. 1, 189, 210, 6 L. ed. 23, 68, 73; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 150, 54 L. ed. 698, 705, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

The decisions of this court clearly lay down the principles to be applied in the determination of whether a statute of the sort here involved does or does not contravene the Federal Constitution. Among others, the following may be cited as showing where the line is to be drawn:

Statutes upheld:

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399.

Statutes condemned:

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 126; *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26st Sup. Ct. Rep. 491; *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476.

No duty at common law rests upon a carrier, in the absence of contract or custom, either to receive freight at, or deliver to, an industrial siding or nonagency station.

Hutchinson, Carr. 3d ed. § 122; *Louisville N. A. & C. R. Co. v. Flanagan*, 113 Ind.

579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

488, 3 Am. St. Rep. 676, 14 N. E. 370; Charnock v. Texas & P. R. Co. 194 U. S. 436, 48 L. ed. 1059, 24 Sup. Ct. Rep. 671; State ex rel. Kellogg v. Suffolk & C. R. Co. 100 N. C. 158, 5 S. E. 379.

The common-law duty of the carrier in respect to the receiving of goods for transportation is to receive them "upon reasonable request therefor" (see *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 270, 20 L. ed. 423, 428); and this is likewise the national policy in respect to the regulation of interstate commerce, as shown by the language of the interstate commerce act.

Would not the conflict and confusion necessarily resulting from the administration of the state law by the state courts and the Federal law by the Federal tribunals, as to the same subject-matter, so deplored by this court in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 440, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, be inherent in the situation here referred to.

See also *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

Even if the statute should be construed to impose the same affirmative duties upon the carrier as are prescribed by Congress in the "reasonable request" clause, the state statute would be invalid as invading the field of which Congress has taken control; and that, too, in a matter of national scope and importance, admitting of but one uniform system of regulations.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 573, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *West v. Kansas Natural Gas Co.* 221 U. S. 229, 55 L. ed. 716, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564.

No counsel appeared for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the validity of an act of the state of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting \$50 a day to the aggrieved party for

each day of refusal to receive such freight, and all damages actually sustained.†

*Defendants in error brought suit[432 against plaintiff in error, herein called the railway company, in one of the courts of North Carolina, to recover penalties and damages for the failure of the railway company, in violation of the statute, on dates from September 17 to September 23, 1907, to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the state of West Virginia.

The material facts, as stipulated, are as follows: The railway company is a Virginia corporation, and is a common carrier, and operates a line of railroad from the city of Charlotte to the city of Alexandria, Virginia, and another line to the city of Richmond. Davis is a town in West Virginia, and a terminus of a branch road of the Western Maryland Railroad Company, 6 miles long, running from a point on the railroad, known as Thomas, to Davis.

The railway company operates no line of railroad or other means of conveyance to Davis, nor does it connect with the Western Maryland Railroad's line.

On the 17th of September, 1907, Etta C. Reid tendered to the railway company at its depot in Charlotte, where it usually accepts freight, a lot of household goods *and kitchen furniture, and offered to[433 pay the freight charges thereon. She demanded that the company issue to her a bill of lading "reading from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, consignee to be Samuel Hammock." The railway company declined to name a rate to be charged for

†Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf, or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of \$50 for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse [warehouse] at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. Code of North Carolina, 1905, § 2631.

transportation of the goods, declined to permit her to prepay the freight charges from Charlotte to Davis, declined to receive the goods for shipment, and declined to issue a bill of lading therefor.

She renewed her request on four successive days, and, with each demand, the company refused to comply. On September 23, 1907, the company named the sum of \$34.08 as the amount necessary to prepay the freight charges on the shipment from Charlotte to Davis, and thereupon she paid the said sum and the company issued a bill of lading to her.

On September 17, 1907, no through and joint rate of freight had been established by the railway company and the Western Maryland Railroad Company and other roads which the shipment would have to pass over going from Charlotte to Davis, "and no such rates had been filed with the Interstate Commerce Commission, and no rate of freight had been established or filed with the Interstate Commerce Commission, or published, covering shipments between said points." On that day, when Etta C. Reid made her demand of the railway company, the company's agent advised her that there was no established rate for the shipment, that no rate had been filed or published, that he did not know the rate, that he had no authority to receive the goods or the freight charges thereon to destination, and no authority to issue a bill of lading reading "final destination, Davis, in the state of West Virginia."

The agent wired the officer having charge of such matters to obtain authority to 434] name a through and joint rate, *to receive the shipment and issue a bill of lading. Immediately thereafter the officers of the company took up with the officers of the companies over whose lines the shipment of freight would have to move the establishment of a rate, with the result that a rate was established. On Monday, September 23, 1907, the local agent was informed of such rate and given authority to receive the shipment and to issue a bill of lading. Thereupon the company received the shipment, accepted the amount of freight in accordance with the joint and through rate, and issued the bill of lading.

There is, and was, at the date of the tender of the goods, a telegraph office at Davis. Mrs. Reid remained at Charlotte for the time mentioned, awaiting the establishment of the rate.

It is stipulated that she was damaged in the sum of \$25, for the recovery of which and the penalties prescribed by the statute she asked the court to adjudge.

The railway company resisted the demand and contended that to hold that the act was

applicable to it would violate the commerce clause of the Constitution of the United States.

Judgment was awarded to defendants in error as prayed, and it was affirmed by the supreme court of the state, two members of the court dissenting. 153 N. C. 490, 69 S. E. 618.

This statement indicates the questions which are presented for solution and the principles upon which the solution of them depends. It hardly needs to be stated that transportation of property between the states is interstate commerce, and may be of Federal rather than of state jurisdiction. We say may be of Federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the state may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which *the power of the state over the gen-[435] eral subject of commerce has been divided into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot act at all. *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 209, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 655, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934.

These divisions, however, express but the extreme boundaries of the subject. Something more definite is necessary for the decision of the opposing contentions in the case at bar. The supreme court of the state was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was "neither an interference with nor a burden upon interstate commerce." And it decided that the execution of this duty was not precluded by the provision of the interstate commerce act [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154] requiring a schedule of tariffs to be established and charged. It was said by the court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common-law duty by the neglect of its statutory duty.

The case, however, is not quite in such narrow compass. There is something more to be considered than the accumulation of defaults, if there be defaults. It is undoubtedly the duty of a railway company to receive freight when tendered for transporta-

tion. It may, besides, have other obligations, but it does not follow that it is within the power of the state to enforce them. There may be a Federal exertion of authority which takes from a state the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce, and not an interference with or burden upon it, and therefore must be 436] sustained as a valid exercise *of the state's power, citing *Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934.

In those cases, and in the later case of *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59, the principle is expressed that "there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce." Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the *Telegraph Company Cases* there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by the particular state statutes. In the *Railroad Case* a statute of the state of South Carolina which required carriers to settle within a specified time claims for loss of or damage to freight while in their possession within the state was sustained against the objection that it was an interference with interstate commerce. In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision. The circumstance is important, and we are brought to the inquiry whether it exists in the present case.

It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, 437] change the rule *that Congress by non-

action leaves power in the states over merely incidental matters. "In other words," and we quote from the opinion, "the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the Commission, the control of the state over those incidental matters remains undisturbed." The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared to be a common-law duty which the state might, "at least, in the absence of congressional action, compel a carrier to discharge."

The principle of that case, therefore, requires us to find specific action either by Congress in the interstate commerce act, or by the Commission, covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the state cannot even supplement? In other words, has Congress taken possession of the field?

It is not possible to epitomize the act by giving a more particular designation than that it was designed to regulate interstate commerce. Something more was certainly intended by it than the mere ordaining or the supervision of the movement of goods. In a certain general way traffic would be regulated by railroad and shipper, but their powers were not equal. The railroads had the *greater power, and [438] might and did exercise it in unreasonable charges and in discriminations. The potent instrument for this was the difference in the rate charged for transportation, or by secret rebates if the charge was not discriminating in the first instance. Hence we said, in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 437, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075: "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates." To that end, it was further said, schedules of rates were required to be established and published, and departure from the rates established, except in the manner authorized by the

act, was forbidden under criminal penalties, and any injury to persons was provided to be redressed through application to the Commission or to the courts. And it is provided that "if no joint rate over a through route has been established the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applies to the through transportation." [34 Stat. at L. 586, chap. 3591, § 2, U. S. Comp. Stat. Supp. 1909, p. 1153.]

The Commission is given the power to determine and prescribe the manner in which the schedules required by the act are to be kept. And it is enacted that unless otherwise provided, no carrier "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared,—unreasonableness in the rates, and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight, and in [439] facilities furnished. "The power which has been given to the Commission to secure those results we have set forth in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* supra, and in *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164. In the first case it was said: "It is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law." After citing cases, it was further said: "When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute, and prohibitions against preferences and discrimination." In that case it was decided that a shipper could not maintain an action at common law in a state court on the ground that a rate established in accordance with
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the interstate commerce act was unreasonable. In the second case was considered the power of the Commission under the amendments of 1906, and it was decided that, on the principles announced in the *Abilene Case*, and from a consideration of the amendments and their purpose to supply the defects of the act and enlarge the powers of the Commission, the distribution of coal cars by the railroad company among shippers was a matter involving preference and discrimination, and within the competency of the Interstate Commerce Commission to consider, and that the courts could not interfere with such distribution until after action by the Commission. This was resolved notwithstanding § 23 of the act gave jurisdiction to the circuit and district courts of the United States to command, at the suit of one aggrieved, a common carrier "to move and transport *the traffic, or to furnish cars or other[440] facilities for transportation." And transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery, and handling of property transported, and such transportation the carrier must "provide and furnish upon reasonable request therefor." (Section 1, paragraph 2, of the act, as amended June 29, 1906, by the Hepburn act.) Section 7 of the latter act requires the carrier to issue a bill of lading for an interstate shipment, and makes the carrier liable for the loss of or damage to property while on its own line, and also while on the lines over which the property may pass.

There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of. We are therefore brought to consider what the statute of North Carolina provides. Leaving out qualifications with which we are not concerned, the act requires railroad companies to receive freight for transportation whenever tendered at a regular station, and forward the same over the route selected by the person offering the shipment. Fifty dollars a day is the penalty prescribed for refusal, and all the damages incurred.

The particular act which was held to violate the statute was refusing the tender of goods for shipment from Charlotte, North Carolina, to Davis, West Virginia; that is, a tender for interstate shipment, and a demand coincidentally for a bill of lading covering the shipment, explicitly stating the origin of the shipment at Charlotte and its destination at Davis. The supreme court of the state decided, as we have seen, that

the statute deals with a common-law duty simply, one which attaches before freight enters into interstate commerce, and hence 441]concluded as *follows: "The statutory enforcement under penalty of the common-law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce." We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the interstate commerce act which we have quoted. See, in this connection, *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491. In the term "transportation," we have seen, Congress has included "all services in connection with the receipt . . . of property transported." And this certainly imposes the obligation to receive the property as well as to carry it,—one of the obligations the carrier must perform "upon reasonable request therefor." Other provisions of the same import and direction might be quoted. Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficent. But that is not the question. The question is, Where is the control, in the state or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the interstate commerce act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a "through route," must be established, filed, and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries 442]*received by shippers is given through the Interstate Commerce Commission. See *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, post, 288, 32 Sup. Ct. Rep. 114. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of

the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

We cannot assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn act. It was no doubt the adaptation of experience to the exigencies of a practical problem,—Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor,—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the states. The balances of the Constitution are only preserved, and there is given to the states the power which is the states' and to Congress the power which belongs to Congress.

But if there be a middle ground, it certainly can be argued that the cases establish that it is passed when the *state[443 regulation burdens interstate commerce; and whether a regulation has such effect may be determined by its sanctions. If a penalty of \$50 for refusing to receive freight "when tendered" be no burden on interstate commerce beyond the power of a state to impose, would a penalty of \$100 or \$1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (*Southern R. Co. v. Reid*, 222 U. S. 424, ante, 257, 32

Sup. Ct. Rep. 145) still more so. The plaintiffs in that action sued for \$750 for refusal to receive and forward a carload of shingles, and recovered \$350, although one of them testified that they "never lost a cent." The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were "not given solely on the idea of making pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment." [150 N. C. 765, 64 S. E. 874, 17 A. & E. Ann. Cas. 247.] The policy of the statute, then, is to require the acceptance of freight "when tendered," with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?

One other contention remains to be noticed. It is said that there is not presented in the case the dilemma of alternative penalties, for the Hepburn act, it is pointed out, requires a schedule of rates to be filed only "when the through route and joint rate have been established;" and that none were established in the case at bar, and that therefore the railway company was not put to a choice of obligations, and subjected to punishment however it 444] might *choose. But it is also provided that "if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation." There is nothing in the record to show that there were such established separate rates, and that separately established rates were published and kept open for inspection. Indeed, the record shows that a through rate had to be fixed by the several carriers in the through route.

It was only because of the obligation imposed by the Hepburn act that the railway company refused to receive the goods tendered to it, and the agent of the company informed defendant in error that he was without power to comply with her demand. He promptly acted in the matter when the lines over which the freight had to pass established a joint rate. He then received the goods, issued a bill of lading therefor, "and the shipment went forward to its destination."

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

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SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.

C. C. REID and Edward Beam, Copartners
under the Firm Name of Reid & Beam.

(See S. C. Reporter's ed. 444-448.)

This case is governed by the decision in
Southern R. Co. v. Reid, ante, 257.

[No. 80.]

Argued December 6, 1911. Decided January 9, 1912.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Rutherford County, in that state, enforcing a state statute penalizing the refusal of a carrier to accept a tender of an interstate shipment. Reversed and remanded for further proceedings.

See same case below, 150 N. C. 753, 64 S. E. 874, 17 A. & E. Ann. Cas. 247.

The facts are stated in the opinion.

Mr. Alfred P. Thom argued the cause, and, with Mr. John K. Graves, filed a brief for plaintiff in error.

For their contentions, see their brief as reported in Southern R. Co. v. Reid, ante, 257.

No counsel appeared for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

This case involves a consideration of the statute of North Carolina passed on in No. 487 [222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140], and was argued and submitted with the latter case. The question, then, only is whether the principles there expressed apply to it.

The action was brought by defendants in error, a copartnership, against the plaintiff in error, a railway company and a common carrier, for penalties under the statute, which is set out in the opinion in No. 487, to recover the sum of \$50 a day for fifteen days for failing and refusing for such time to receive a carload of shingles tendered to the company at Rutherfordton, North Carolina, for shipment to one James Haddox, at Scottsville, Tennessee.

The case was tried before a jury, which rendered a verdict for the plaintiff firm (defendants in error) for the sum of \$350, upon which judgment was duly entered. It was *affirmed by the supreme court, [446 two of the members of the court dissenting as in No. 487. 150 N. C. 753, 64 S. E. 874, 17 A. & E. Ann. Cas. 247.

The statute is attacked on the same ground as in case No. 487. The facts, as recited by the supreme court, are as follows: Defendants in error having received an order for a carload of shingles from Haddox at Scottsville, Tennessee, applied at Rutherfordton to the railway company for a car. It was furnished and loaded, shipping instructions given, prepayment of the freight tendered, and a bill of lading demanded. The agent of the company refused to give the bill of lading or ship the goods, assigning as a reason that he did not know where Scottsville was nor the road to it. Defendants in error demanded that the goods be shipped, and told the agent that they would pay any additional amount found to be due, and requested that when the agent got ready to ship to telephone them, and they would come over and pay the freight due. Another agent "came to take over the agency, and being told, on inquiry of plaintiffs (defendants in error), about the carload of shingles and what the trouble was," he asked for instructions, which were given him, and on July 19th the freight was paid, the bill of lading given, and the shingles shipped as directed, "arriving at their destination without further let or hindrance." Defendants in error testified that they had received no pecuniary injury by reason of the delay, and that the first agent "still had charge of the depot when the shingles were shipped."

There was evidence offered on the part of the railway company that Scottsville was an industrial siding on the Knoxville & Augusta Road, 8 or 10 miles out of Knoxville, established for the convenience of persons shipping brick from that point, and that bills of lading for goods shipped to and from that point were made out at Rockford, a regular station, 2 miles distant. It was testified that since the consolidation of the East Tennessee & Virginia Railroad with the old Richmond & Danville, the 447]*railway company (plaintiff in error) had paid all of the employees of the Knoxville & Augusta Road their salaries.

The statute was attacked by the railway company in its requests for certain instructions, the refusal to give which was sustained by the supreme court. The court intimated that, as had been held in a former opinion, the commerce clause of the Constitution was not involved in the case, on the ground "that the penalty [under the statute] accrues before the 'freight is accepted for transportation,' and on the principle applied in the case of *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct.

Rep. 475." But the court, conceding, *arguendo*, "that the goods when tendered for transportation to another state, as to matters involved in such transportation, and in reference to these penalty statutes, should be considered and dealt with as interstate commerce," was of opinion that the contention of the railway company could not be sustained, and concluded, after a careful discussion of cases in this court and in the state court, that the statute did not burden interstate commerce, and that, "in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in question is a valid regulation in direct and reasonable enforcement of the duties incumbent on . . . [the railway company] as a common carrier."

We have shown in the opinion in No. 487 that there need not be directly "inhibitive congressional legislation," but congressional legislation which occupies the field of regulation and thereby excludes action by the state. *Southern R. Co. v. Reid* [222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140].

The facts in this case are somewhat different from those in No. 487, and require to be noticed. The majority of the court found that it did not appear from the testimony that the railway company had not filed its schedule of rates with the Interstate Commerce Commission to Scottsville, Tennessee, the court observing that it could "hardly be *seriously contended[443 that the difference between Scottsville, Tennessee, and Scottsville, Tennessee, is of the substance." The court further said: "The presumption is that the company has complied with the law. And if it were otherwise, we are of opinion that the act of Congress, and the orders of the Commission, made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action. See *Harrill Bros. v. Southern R. Co.* 144 N. C., pp. 540-541, 57 S. E. 383."

We have set forth in No. 487 our reasons for holding otherwise.

Judgment reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Lurton does not agree with the court as to the facts of this case, and for that reason does not think that it falls under No. 487. He therefore dissents.

J. R. TREAT, as Treasurer and *Ex Officio*
Tax Collector of the County of Coconino,
Territory of Arizona, et al., Appts.,
v.

GRAND CANYON RAILWAY COMPANY.

(See S. C. Reporter's ed. 448-452.)

**Appeal — review of territorial decision
— statutory construction — exemption
from taxation.**

The decision of the Arizona supreme court that a railway company organized in 1901 under Ariz. Laws 1897, act No. 3, for the purpose of buying the property of a railroad sold on foreclosure, may claim the benefit of the provision of Ariz. Laws 1899, No. 68, that property used or necessary in the construction and operation of railroads thereafter constructed, whether owned or operated by a person, association, or railway corporation, their successors or assigns, shall be exempt from all manner of taxation for ten years from the date of the act, although by § 8 of the earlier act it was provided that that act should not be construed to give to any corporation created under it any exemption from taxation created by any existing or future exemption laws,—is not so clearly erroneous as to require reversal in the Federal Supreme Court.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 86.]

Argued December 8 and 11, 1911. Decided
January 9, 1912.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which, on a second appeal, affirmed a decree of the District Court of Coconino County, in that territory, enjoining the collection of taxes on the property of a railway company. Affirmed.

See same case below, 12 Ariz. 117, 100 Pac. 438; on prior appeal, 12 Ariz. 69, 95 Pac. 187.

The facts are stated in the opinion.

Messrs. Elias S. Clark and William C. Prentiss argued the cause, and, with Mr. Henry F. Ashurst, filed a brief for appellants:

Laws encouraging the construction of new railroads by exempting them from taxation for a period of years do not amount to a contract protected by the constitutional guaranty.

Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

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Even if these acts amounted to contracts with the constructing companies, the constitutional guaranty would extend only to those companies, and whether or not the exemption would pass to a successor or assign would likewise depend on the legislative intent, to be determined in the same manner.

Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469.

And in determining whether the transfer of an exemption was authorized, directed, or intended, every doubt is resolved in favor of the governmental power of taxation, and clear and unmistakable evidence of intent to part with it is required.

Ibid.

Mr. Robert Dunlap argued the cause, and, with Messrs. T. J. Norton and Gardiner Lathrop, filed a brief for appellee:

A contract between the state and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfilment by the opposite contracting party.

Piqua State Bank v. Knoop, 16 How. 382, 14 L. ed. 982. See also *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303.

The intention was that the exemption should attach to the railroad in whosoever hands or possession the same might be during the period specified.

The word "successors," used in the statute, plainly refers to successors in interest or ownership.

International & G. N. R. Co. v. Smith County, 65 Tex. 21; *International & G. N. R. Co. v. State*, 75 Tex. 356, 12 S. W. 685.

The word "assigns," used in connection with "successors," is even broader.

Baily v. De Crespigny, L. R. 4 Q. B. 186, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; *Brown v. Crookston Agri. Asso.* 34 Minn. 545, 26 N. W. 907.

Rules of construction should not be resorted to merely for the purpose of creating some doubt.

Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 25 Sup. Ct. Rep. 181.

If the Arizona legislature intended by Laws 1897, No. 3, § 8, to prevent a subsequent legislature from giving or granting an exemption from taxation, such section would have been nugatory and void.

26 Am. & Eng. Enc. Law, 2d ed. 758; 1 Bl. Com. 90; *Horton v. Newport*, 27 R. I. 283, 1 L.R.A. (N.S.) 512, 61 Atl. 759, 8 Ann. Cas. 1097; *Gunther v. Huneke*, 58

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Wash. 494, 108 Pac. 1079; Philadelphia v. Fox, 64 Pa. 181.

It is the duty of the courts to ascertain the legislative intent, and to give effect to such intent, however the same may be ascertained.

Friend v. Levy, 76 Ohio St. 26, 80 N. E. 1036; Gunther v. Huneke, 58 Wash. 494, 108 Pac. 1079.

If Laws 1897, No. 3, § 8, were construed to prevent the attaching of the exemption from taxation in the hands of the successors or assigns of the original constructor of the railroad in question, yet, as that railroad was constructed under the subsequent law of 1899, which law very plainly attached the exemption to the property in the hands of "successors and assigns," then § 8, so construed, would be in direct conflict with the provisions of the subsequent law, and would therefore be *pro tanto* repealed. The two provisions could not stand. The one would be directly opposed to the other, and the later statute would prevail.

Thomas v. Evans, 73 Ohio St. 140, 76 N. E. 862; Sutherland, Stat. Constr. § 136.

If there was any doubt as to the meaning of the respective acts of 1897 and 1899, this court would lean to the construction placed upon the same by the supreme court of the territory.

English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; Crary v. Dye, 208 U. S. 515, 52 L. ed. 595, 28 Sup. Ct. Rep. 360; Albright v. Sandoval, 216 U. S. 331, 54 L. ed. 502, 30 Sup. Ct. Rep. 318.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the railway company, the appellee, to restrain the collection of taxes from which it says that it is exempt. The facts in brief are these: A predecessor of the appellee, the Santa Fé & Grand Canyon Railroad Company, between August, 1899, and October, 1900, built over 56 miles of the road concerned. In July, 1901, this road was sold on foreclosure sale 451] to purchasers *who organized the appellee and in August conveyed the road to it. The new company finished the road to the edge of the Grand Canyon and laid out stations and hotel grounds at the end. In 1906 the territorial board undertook to levy the tax complained of. The supreme court held that the appellee was exempt. 12 Ariz. 69, 95 Pac. 187. 12 Ariz. 117, 100 Pac. 438.

The railroad company was organized under act No. 3, February 8, 1897, of the territory, which authorized such corporations to

be formed for the purpose of buying the property of railroads sold on foreclosure, and to buy and exercise "all the rights, privileges, franchises, immunities, and powers" of their predecessors. By § 7 such corporations were to have all rights, immunities, etc., then or thereafter given to any railroad organized under the general laws; but by § 8 it was provided that the act should not be construed "to give to any corporation created under it, any exemption from taxation created by any existing or future exemption laws of the territory of Arizona." The question does not stand on this act alone, however, and the cases discussed in Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469, for, by a later statute of March 16, 1899, No. 68, "for the purpose of inducing and encouraging the construction of railroads," it was provided that the "property used or necessary in the construction and operation of railroads," of road thereafter constructed, "whether owned or operated by a person or persons, association or railway corporation, his, their, or its successors or assigns," should be exempt from all manner of taxation for ten years from the date of the act. The supreme court held that this exemption was *in rem*, so to speak, went with the land, and extended to the assigns of the first road.

No doubt a strong argument can be made and was made for a different view, based on the passage before and on the date of the act of 1897 of statutes like that of 1899. *But the considerations that prevailed[452 also are cogent and so obvious as not to need statement. Moreover, the question is not whether the later statute constituted a contract (Damon v. Hawaii, 194 U. S. 154, 160, 48 L. ed. 916, 917, 24 Sup. Ct. Rep. 617; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107). The courts of the territory have given to the railroad the rights that it claims, as against the territory authorities seeking to levy the tax. The only question is whether any sufficient reason appears for not following the construction given to a local statute by the territorial court, when that construction is inherently reasonable, is at least the first to strike the mind, and is one that protects private rights. It is enough to answer that, on the principle followed so far as may be by this court, there is no such manifest error as to warrant us in reversing the decision below. Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; English v. Arizona, 214 U. S. 359, 361, 363, 53 L. ed. 1030, 1033, 29 Sup. Ct. Rep. 658.

Judgment affirmed.

MANUEL ZENO GANDIA, Plff. in Err.,
v.

N. B. K. PETTINGILL.

(See S. C. Reporter's ed. 452-459.)

Libel — privileged communications — comment on official acts.

1. Anything bearing upon the acts of a public officer connected with his office is a legitimate subject of statement and comment, at least in the absence of express malice.

[For other cases, see Libel and Slander, II. b, in Digest Sup. Ct. 1908.]

Appeal — refusal to instruct — libel.

2. The refusal to instruct the jury in an action for libel in publishing newspaper articles charging the United States attorney for Porto Rico with carrying on a private practice and acting as lawyer on behalf of persons bringing suit against the local government, which the articles characterize as a monstrous immorality, a scandal, etc., that so far as the publication of facts disapproved by the community was concerned, the plaintiff could not recover, however technically lawful his conduct might have been, unless there was express malice, or the comment went beyond reasonable limits, is reversible error where there is evidence that the people of Porto Rico considered the acts charged as immoral, and where, had the plaintiff been a local officer, such conduct would have been forbidden by the local law.

[For other cases, see Appeal and Error, 5127-5141, in Digest Sup. Ct. 1908.]

Appeal — noting exceptions to charge — absence of jury.

3. Sending the jury out before counsel had stated all of his exceptions to the charge is not reversible error, where the judge allowed all the exceptions to be noted in open court.

[For other cases, see Appeal and Error, 5149-5169, in Digest Sup. Ct. 1908.]

[No. 97.]

Argued December 14, 1911. Decided January 9, 1912.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment for plaintiff in an action for libel. Reversed.

See same case below, 4 Porto Rico Fed. Rep. 383.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. John Spalding Flannery, William Hitz, and H. H. Scoville, filed a brief for plaintiff in error:

It was error in law on the part of the trial judge to refuse to permit counsel to state, while the jury was yet at the bar, his exceptions to such portions of the court's instructions to the jury as seemed to him to
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be objectionable, either in matter of law or in matter of fact.

United States v. Breitling, 20 How. 252, 15 L. ed. 900; Phelps v. Mayer, 15 How. 160, 14 L. ed. 643; Dredge v. Forsyth, 2 Black, 563, 568, 17 L. ed. 253, 254; Brain v. United States, 168 U. S. 532, 571, 42 L. ed. 568, 583, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; Stone v. United States, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667; Little Rock Granite Co. v. Dallas County, 13 C. C. A. 620, 30 U. S. App. 55, 66 Fed. 523; Johnson v. Garber, 19 C. C. A. 556, 43 U. S. App. 107, 73 Fed. 523; Merchants' Exch. Bank v. McGraw, 22 C. C. A. 622, 48 U. S. App. 55, 76 Fed. 930; New England Furniture & Carpet Co. v. Catholicon Co. 24 C. C. A. 595, 49 U. S. App. 78, 79 Fed. 294; Western U. Tele. Co. v. Baker, 29 C. C. A. 392, 56 U. S. App. 601, 85 Fed. 690; Greene v. United States, 85 C. C. A. 251, 154 Fed. 412; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Dalton v. Moore, 72 C. C. A. 459, 141 Fed. 311; Berwind-White Coal Min. Co. v. Firment, 95 C. C. A. 1, 170 Fed. 153; Mann v. Dempster, 103 C. C. A. 325, 179 Fed. 837.

The learned trial judge in the administration of this cause did not confine himself to the administration of, or feel himself bound by the provisions of, the local law of Porto Rico, which local law, under the statutes of the United States, as interpreted in the case of Perez v. Fernandez, 202 U. S. 80, 91, 50 L. ed. 942, 945, 26 Sup. Ct. Rep. 561, he was bound to consider to the exclusion of all other laws.

Messrs. George H. Lamar and Willis Sweet argued the cause and filed a brief for defendant in error:

The complaint set forth a publication which was libelous *per se*.

White v. Nicholls, 3 How. 266, 285, 291, 11 L. ed. 591, 600, 602; Peck v. Tribune Co. 214 U. S. 185, 53 L. ed. 960, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075; Tillotson v. Cheetham, 3 Johns. 56, 3 Am. Dec. 459; Tawney v. Simonson, W. & H. Co. 109 Minn. 341, 27 L.R.A. (N.S.) 1035, 124 N. W. 229; Lathrop v. Sundberg, 55 Wash. 144, 25 L.R.A. (N.S.) 381, 104 Pac. 176; Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322; Wofford v. Meeks, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195; Davis v. Shepstone, L. R. 11 App. Cas. 187, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 722, 50 J. P. 709.

Error without prejudice will not warrant reversal.

Holloway v. Dunham, 170 U. S. 615, 620, 42 L. ed. 1165, 1167, 18 Sup. Ct. Rep. 784; *San Juan v. St. John's Gas Co.* 195 U. S. 510, 520, 49 L. ed. 299, 304, 25 Sup. Ct. Rep. 108, 1 Ann. Cas. 796; *Cunningham v. Springer*, 204 U. S. 647, 655, 51 L. ed. 662, 665, 27 Sup. Ct. Rep. 301, 9 Ann. Cas. 897; *Mann v. Dempster*, 103 C. C. A. 325, 179 Fed. 839; *W. B. Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. ed. 524, 17 Sup. Ct. Rep. 158; *Drumm-Flato Commission Co. v. Edmison*, 208 U. S. 534, 52 L. ed. 606, 28 Sup. Ct. Rep. 367; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524, 31 L. ed. 258, 8 Sup. Ct. Rep. 246; *Southern R. Co. v. St. Louis, Hay & Grain Co.* 82 C. C. A. 614, 153 Fed. 728; *Gilmore v. McBride*, 84 C. C. A. 274, 156 Fed. 464.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for libels and comes here upon a bill of exceptions after a verdict for the plaintiff. The alleged libels consist of a series of articles in a Porto Rican newspaper, **La Correspondencia*. These articles stated that the plaintiff, *Pettingill*, while United States Attorney for Porto Rico, carried on a private practice also, and even acted as a lawyer on behalf of persons bringing suit against the government of Porto Rico. It seems that, if the plaintiff had been an officer of the local government, he would have been forbidden the practice by the local law, and the articles convey the idea that if the practice is not prohibited also by the law for United States officials, it ought to be, especially as the island is charged with a salary for the attorney. The conduct of Mr. *Pettingill* in the above particulars is described as a monstrous immorality, a scandal, etc., etc. In the view that we take it is not necessary to state the charges here in detail, but it should be observed that in the declaration the plaintiff alleged that while United States Attorney he had a large private practice, and implied, as in his evidence he stated, that a part of this practice consisted of suits against the local government. So there was no issue on the matter of fact.

So far as the facts were concerned, the publication of them alone was not libelous. For, apart from the question whether attributing to the plaintiff conduct that was lawful, as the plaintiff says, could be a libel (*Homer v. Engelhardt*, 117 Mass. 539), he

was a public officer in whose course of action connected with his office the citizens of Porto Rico had a serious interest, and anything bearing on such action was a legitimate subject of statement and comment. It was so, at least, in the absence of express malice,—a phrase needing further analysis, although not for the purposes of this case. Therefore the only questions open for consideration were the motives of the publication and whether the comment went beyond reasonable limits, which, of course, the defendant denied. But so far as we see from reading the charge, the judge did not approach the case from this point of view. For after saying to the jury *that fair com-[458]ment upon the actions of public officials was privileged, he went on: "But you are instructed that in this case . . . [the articles] are what is known in law as libelous *per se*. . . . Therefore, in any event you must find for the plaintiff upon that issue, and give him such damages as you may believe, from all the facts and circumstances in the case, he is entitled to;" and after that proceeded to direct them only as to the conditions for finding punitive damages also. It is at least doubtful whether this instruction meant that the comments were excessive as matter of law. It rather would seem from the previous explanations given to the jury of the independence of United States officials notwithstanding the source of their salaries, and the instructions that the plaintiff's acts were lawful, that the defendant, in order to justify himself, would have to prove that they were wrong in law, and that his inability to do so might be considered as aggravation of the damages to be allowed, that the latter considerations alone were the ground for what we have quoted from the charge.

However this may be, what we have said is enough to show that the mind of the jury was not directed to what was the point of the case. We do not see how, making reasonable allowance for the somewhat more exuberant expressions of meridional speech, it could be said as matter of law that the comments set out in the declaration went beyond the permitted line, and we think it at least doubtful whether the plaintiff would not have got all if not more than all that he could ask if he had been allowed to go to the jury on that issue. In the absence of express malice or excess the defendant was not liable at all, and in the case of mere excess without express malice, the damages, if any, to which he was entitled, were at most only such as could be attributed to the supposed excess. But what really hurt the plaintiff was not the comment, but the fact. The witnesses for the plaintiff said that the people of Porto *Rico considered the[459]

acts charged immoral, and the statute referred to showed that such was their conception of public duty. It was peculiarly necessary therefore to instruct the jury that so far as the publication of facts disapproved by the community was concerned, the plaintiff could not recover for it, however technically lawful his conduct might have been, except as we have stated above. Instructions were requested on the point, and the refusal to give them was excepted to, as also was the corresponding charge. Without nice criticism of the form of the requests, it is enough to say that they were so nearly correct as to call the judge's attention to the matter, and to require a different explanation of the defendant's rights.

An exception was taken to the judge's sending the jury out before the counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct the jury otherwise than as he had, and he allowed all the exceptions to be taken in open court after the jury had retired. No doubt it is the stricter practice to note the exceptions before the jury retires (the judge, of course, having power to prevent counsel from making it an opportunity for a last word to them). *Phelps v. Mayer*, 15 How. 160, 14 L. ed. 643. But in this case they were noted at the trial, in open court (*United States v. Breitling*, 20 How. 252, 15 L. ed. 900), and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground.

Judgment reversed.

460] *UNITED STATES, Plff. in Err., v.

JOHN McMULLEN and Joseph A. Stulz, as Administrator with the Will Annexed of the Estate of R. Percy Wright, Deceased.

(See S. C. Reporter's ed. 460-472.)

Principal and surety — discharge of surety — extension of time.

1. The sureties on the bond of a public contractor, conditioned upon the faithful performance of a contract for dredging a channel, were not discharged by an extension of the time fixed for performance, accorded by the government to the contractor, where the contract definitely contemplated, what the nature of the work made manifest, that it might be necessary or very

convenient to extend the time, and expressly provided for a *per diem* deduction from the contract price for a delay beyond the time prescribed for the completion of the work.

[For other cases, see *Principal and Surety*, III. f, in *Digest Sup. Ct.* 1908.]

Principal and surety — discharge of surety — change in plans or specifications.

2. Provisions in a contract for a public work requiring that changes in the plans or specifications, deemed desirable by the government, be agreed to in writing by the parties to the contract before the work contemplated by such changes is begun, do not require the assent of the sureties in order not to work their discharge.

[For other cases, see *Principal and Surety*, III. f, in *Digest Sup. Ct.* 1908.]

Public contracts — breach — reletting.

3. The obligations of a contract for a public work, so far as applicable to a case of the contractor's default, including the right reserved to the government to secure someone else to complete the work, and charge the original contractor with the reasonable difference in cost, remained in force after the government, exercising its option, declared the contract null and void for the contractor's failure to perform, without prejudice to its right to recover for defaults therein or violations thereof. [For other cases, see *Contracts*, VIII.; *United States*, VI. e, in *Digest Sup. Ct.* 1908.]

Public contracts — breach — reletting.

4. The right of the government under a contract for a public work to charge the contractor with the reasonable difference in cost in case of a reletting after his default is not defeated because the second contract does not appear to have completed the work intended to be accomplished by the first, where the work done under the new contract was work which the first contractor had agreed to perform.

[For other cases, see *Contracts*, VIII.; *United States*, VI. e, in *Digest Sup. Ct.* 1908.]

Contracts — certainty — mutuality.

5. The power to change details, reserved by the government in a contract for a public work, does not make the contract unenforceable for want of certainty and mutuality, there being full provisions for ascertaining a change in the compensation where any such change is proper.

[For other cases, see *Contracts*, 72-77, in *Digest Sup. Ct.* 1908.]

Public contracts — signature.

6. A contract for a public work must be regarded as signed by the United States where it recites that it is made by the United States by a specified officer described as Chief of the Bureau of Yards and Docks, and is signed by such officer, with his official title appended.

[Government Contracts, see *United States*, VI., in *Digest Sup. Ct.* 1908.]

[No. 100.]

NOTE.—As to release or discharge of surety—see notes to *Griswold v. Hazard*, 35 L. ed. U. S. 679; *Bank of Uniontown v. Mackey*, 35 L. ed. U. S. 486; and *Miller v. Stewart*, 6 L. ed. U. S. 190.

56 L. ed.

Argued December 13 and 14, 1911. Decided January 9, 1912.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment reversing a judgment of the Circuit Court for the Northern District of California, in favor of the government in an action on a contract for a public work and the bond made a part of such contract. Reversed, and the judgment of the Circuit Court affirmed.

See same case below, 93 C. C. A. 96, 167 Fed. 460.

The contract provided, *inter alia*, "And it is further agreed that if, during the progress of the work, it shall be deemed by the government necessary or desirable to make any changes or modifications in the plans and specifications, affecting the cost, said changes or modifications and the increased or diminished compensation to be paid the contractor must be agreed to in writing by the parties to the contract before the same is begun; and such increased or diminished compensation based upon the actual cost, and when exceeding \$300, shall be assessed by a board of naval officers appointed for the purpose."

The contract was terminated by the following letter from the Navy Department: "Gentlemen:—It appearing that you have failed on your part to perform the contract between yourselves, as parties of the first part, and the United States, by E. C. Matthews (Chief of the Bureau of Yards and Docks), acting under the direction of the Secretary of the Navy, party of the second part, dated October 25, 1897, for dredging at the Naval Station, Port Royal, South Carolina, which dredging was to have been completed within sixteen calendar months from the date of said contract, the party of the second part, exercising the option reserved to them, declare said contract null and void, without prejudice to their right to recover for defaults therein or violation thereof.

"Please take notice that an advertisement will be prepared and issued inviting proposals to complete the work under the aforesaid contract, and that said work will be completed at your expense."

Other facts appear in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for plaintiff in error:

The extension of time did not discharge the sureties.

United States v. Hodge, 6 How. 279, 12 L. ed. 437; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228.

If the contract authorized an extension of time, the surety assented to it in advance, and is bound by it.

United States v. Freel, 92 Fed. 299, 39 C. C. A. 491, 99 Fed. 237, 186 U. S. 309, 270

46 L. ed. 1177, 22 Sup. Ct. Rep. 875; *United States v. Stone, Sand & Gravel Co.* 100 C. C. A. 651, 177 Fed. 321.

The damage necessarily sustained by the United States because of the breach of the contract could not be less than the lowest price obtainable, after proper effort, for the completion of the work by the cheapest mode of doing it.

New York v. Second Ave. R. Co. 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905; *Kidd v. McCormick*, 83 N. Y. 397; *Baer v. Sleicher*, 82 C. C. A. 281, 153 Fed. 129.

Mr. Burke Corbet argued the cause, and, with Messrs. John R. Selby and Edward J. Lynch, filed a brief for defendants in error:

A change in the time of performance of a contract is a material change, and will release sureties.

Earnshaw v. Boyer, 60 Fed. 528; *Rowan v. Sharps's Rifle Mfg. Co.* 33 Conn. 1; *United States v. Freel*, 92 Fed. 299, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; *United States v. Howell*, 4 Wash. C. C. 620, Fed. Cas. No. 15,405; *Lane v. Scott*, 57 Tex. 367; *United States v. De Visser*, 10 Fed. 642; *Whitcher v. Hall*, 5 Barn. & C. 269, 8 Dowl. & R. 22, 4 L. J. K. B. 167, 29 Revised Rep. 244; *Samuell v. Howarth*, 3 Meriv. 272, 17 Revised Rep. 81; *Todd v. School Dist. No. 1*, 40 Mich. 294; *Judah v. Zimmerman*, 22 Ind. 388; *Barber v. Burrows*, 51 Cal. 404; *Fidelity & D. Co. v. United States*, 70 C. C. A. 204, 137 Fed. 866; *Victor Sewing Mach. Co. v. Scheffler*, 61 Cal. 532.

The courts construe very strictly language claimed to be a consent in advance by the sureties to changes in the contract.

1 Brandt, *Suretyship & Guaranty*, 3d ed. § 423, note; *Miller v. Spain*, 41 Ohio St. 376; *United States v. Freel*, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; *Plunkett v. Davis Sewing Mach. Co.* 84 Md. 529, 36 Atl. 115; *Northern Light Lodge No. 1*, 1 I. O. O. F. v. Kennedy, 7 N. D. 146, 73 N. W. 524.

The change of time of performance amounted to a new contract on that point.

Earnshaw v. Boyer, 60 Fed. 528; *Rowan v. Sharps's Rifle Mfg. Co.* 33 Conn. 1; *United States v. Freel*, 92 Fed. 299, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; *United States v. Howell*, 4 Wash. C. C. 620, Fed. Cas. No. 15,405.

By signing the contract, as surety, no rights are lost which might have been preserved by merely signing the bond.

Beers v. Wolf, 116 Mo. 179, 22 S. W. 620.

The original contract does not provide for extensions of time.

Reese v. United States, 9 Wall. 13, 19 L. ed. 541.

If the contract be construed to provide for
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changes as to time and other points, such changes could only be made by agreement, signed by the sureties.

Beers v. Wolf, 116 Mo. 179, 22 S. W. 620; *Northern Light Lodge No. 1, I. O. O. F. v. Kennedy*, 7 N. D. 146, 73 N. W. 524; *Lonergan v. San Antonio Loan & T. Co.* 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Killoren v. Meehan*, 55 Mo. App. 427.

The extension was granted not according to the terms of the specifications, and this discharged the sureties; assuming, for the sake of argument, that they would not have been discharged by an extension granted under proper circumstances.

Beers v. Wolf, 116 Mo. 179, 22 S. W. 620; *Northern Light Lodge No. 1, I. O. O. F. v. Kennedy*, 7 N. D. 146, 73 N. W. 524; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Killoren v. Meehan*, 55 Mo. App. 427.

Very slight changes in the requirements of contracts have been held to release the sureties.

United States v. Corwine, 1 Bond, 339, Fed. Cas. No. 14,871; *United States v. Tillotson*, 1 Paine, 305, Fed. Cas. No. 16, 524; *United States v. Case*, Fed. Cas. No. 14,743; *Zeigler v. Hallahan*, 66 C. C. A. 1, 131 Fed. 205; *Chesapeake Transit Co. v. Walker & Son*, 158 Fed. 850.

When a contract proper and specifications attached thereto are in conflict, the contract proper, or signed portion of the whole, governs.

Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937; *Palladino v. New York*, 56 Hun, 565, 10 N. Y. Supp. 66; *Demarest v. Haide*, 20 Jones & S. 398.

The recovery for a breach of contract, and the recovery of sums expended under a contract, are not one and the same thing.

Lowell v. Allen, 14 Allen, 130; *Quinn v. United States*, 99 U. S. 30, 25 L. ed. 269.

Viewing the action as for damages for breach of contract, the United States has failed to show the amount of damages.

13 Cyc. 162, 192; 8 Am. & Eng. Enc. Law, 556; *Insley v. Shepard*, 31 Fed. 869; *Goldsboro v. Moffett*, 49 Fed. 213, reversed in 3 C. C. A. 202, 8 U. S. App. 160, 52 Fed. 560; *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. Rep. 601; *Von Dorn v. Mengedolt*, 41 Neb. 525, 59 N. W. 800; *Savage v. Glenn*, 10 Or. 440; *Anderson v. Nordstrom*, 60 Minn. 231, 61 N. W. 1132; *State v. Ingram*, 27 N. C. (5 Ired. L.) 441; *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631; *Fletcher v. Milburn Mfg. Co.* 35 Mo. App. 321.

It has not been shown here whether or not the United States ever completed this work of construction.

Chesapeake Transit Co. v. Walker & Son, 158 Fed. 850; *United States v. Corwine*, 1 56 L. ed.

Bond, 339, Fed. Cas. No. 14,871; *United States v. Case*, Fed. Cas. No. 14,743.

The contract with the New York Dredging Company was unenforceable against it for uncertainty and want of mutuality.

7 Am. & Eng. Enc. Law, 114, 116; 9 Cyc. 248, 327, 328; *Pulliam v. Schimpf*, 109 Ala. 179, 19 So. 428; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L.R.A. 357, 53 N. W. 625; *Dorsey v. Packwood*, 12 How. 126, 13 L. ed. 921; *Morrow v. Southern Exp. Co.* 101 Ga. 810, 28 S. E. 998; *Jordan v. Indianapolis Water Co.* — Ind. App. —, 61 N. E. 12; *Crane v. C. Crane & Co.* 45 C. C. A. 96, 105 Fed. 869; *Harvester King Co. v. Mitchell, L. & S. Co.* 89 Fed. 173; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Dennis v. Slyfield*, 54 C. C. A. 520, 117 Fed. 474; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 81; *Vogel v. Pekoe*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386.

*Mr. Justice Holmes delivered the [467 opinion of the court:

This is a suit upon a contract for dredging and a bond made part of the contract, both executed by the New York Dredging Company as principal and by the defendants in error as sureties. The plaintiff got judgment in the circuit court, but in the circuit court of appeals the judgment was reversed on the ground that the time for performance had been extended, and was ordered to be entered for the defendants. 93 C. C. A. 96, 167 Fed. 460. The contract provided that if, during the progress of the work, any changes in the plans or specifications should be deemed desirable by the government, the changes in compensation should be ascertained in stated ways. The work was to begin within thirty days from the date of the contract, October 25, 1897, and to be completed in sixteen calendar months from the same date. In case of unavoidable delays, through accident, storm, or other act of Providence, the contractor was to notify the officer in charge of the occurrence, etc., to provide for an investigation. In case of avoidable delays no extension of time would be recommended except on condition that the contractor bear specified costs and other expenses, to be deducted from the money coming due to it under the contract. No extension of time was to be granted except upon the authority of the Secretary of the Navy. In case of delay beyond the period fixed by the contract, deductions of \$50 per day might be made, in the discretion of the Secretary of the Navy, as liquidated damages. In case of the con-

tractor's failure in any respect to perform the contract, the United States reserved the option to declare it void without prejudice to its right "to recover for defaults herein or violations hereof," and might recover as liquidated damages a sum equal to the penalty of the bond (30,000).

The contractor began its preparations on 468]the spot on *November 26, 1897, and began actual dredging in the following March. It was bound to finish by February 25, 1899. In January, 1899, it asked for an extension of time on account of storms, accidents, unforeseen hardness of material, and other difficulties. On February 15 the time was extended by the Secretary of the Navy to December 30, 1899. But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. This was refused. There was another application and refusal and further correspondence, and finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 25, 1901, the Navy Department declared the contract void, and a new contract was made, after advertisement in the required way, by which a third party was employed to complete the work at the lowest rate that the government could get by such a bid. The damages allowed in the circuit court were the difference in cost between the old contract and the new; *viz.*, \$25,588.02, with interest, or \$33,389.52 in all.

The defense is rested mainly on the extension of time, it not appearing that the sureties assented to the change otherwise than by the contract, which, it is said, merely recognizes what was true without it,—that the contractor might ask for more time, and the government grant it, if so minded. It is argued that the expression of the obvious does not alter the general rule of law. But the question is not what was possible, but what was contemplated as not improbable, and we are of opinion that the sureties were not discharged. There is no sacrosanct prohibition of change against them; the law has no objection to it if they assent. Whether they have done so or not is simply a question of construction and good sense, taking words and circumstances into account. If we should assume in their favor that in this case there could be no change without mutual agreement, still, in our 469]opinion, this contract so *definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time, that the sureties must be taken to have contemplated it also as permissible against themselves. In *United States v. Freely*, 186 U.

S. 309, 317, 46 L. ed. 1177, 1181, 22 Sup. Ct. Rep. 875, it was recognized that a clause similar to the one to which we have referred concerning the case of the United States deeming changes desirable would authorize some changes of plan without discharging the sureties. It is true that that contract contained a proviso that no change of the kind should affect the validity of the contract, which, of course, it would not in any event if the contractor agreed to it. But the sureties, so far as appears, signed the bond only and were sued upon that. The proviso did not affect their case. See also *United States Fidelity & G. Co. v. Golden Pressed Brick & Fire Co.* 191 U. S. 416, 424, 48 L. ed. 242, 245, 24 Sup. Ct. Rep. 142.

It is urged that the last-mentioned section, dealing with changes deemed desirable by the government, requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the government to make a change, but requires a writing as a condition of going on. See *Rev. Stat. § 3744*, *U. S. Comp. Stat. 1901*, p. 2510. The same motion is repeated in the specifications with even more definite assumption that the government may make changes if it sees fit. "Should it be to the interest of the government to make any changes in the plans . . . the . . . compensation is to be determined," etc. So again, the government reserves an unqualified right to change the limits of the dredging and the points of deposit. Moreover, comparing the clause with the specifications, which more or less repeat the provisions, as we have said, and deal with the contractor *eo nomine*, we should be inclined to construe *the word "parties" as[470 meaning the contractor and the United States. But we do not delay upon this, as the case must be decided on the provisions dealing expressly with extension of time; and we have referred to the other clauses simply to show that in other particulars, as well as time, the sureties were going into an undertaking which was subject to contingencies of several sorts. It was limited by the appropriations available. It might be modified in plan. The limits of dredging might be changed. Necessity or convenience might require an extension of time.

We should be inclined to suppose that the extension was allowed as an unavoidable delay. But if it was allowed as an

avoidable one, it does not appear that the government did not enforce the condition as to the costs to be borne by the contractor, and if it took no steps to collect them, the sureties were not concerned. The contract was not altered, and insistence by the United States would have done them no good.

The construction that we adopt is fortified by the provision for deductions of \$50 per day for delay beyond the period fixed for the end of the work. For even though this fell only on the contractor, it created a necessity for extension in possible cases, to which the sureties must be deemed to have assented rather than expose their principal to such a risk. Manifestly, if the construction now contended for by them had been written in, it would have created a strong motive against relaxations that would have let them off. We deem what we had said sufficient to justify our conclusions without considering the argument of the Solicitor General, that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract, rather than as representing the United States. See *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228. Of 471]course, if the Secretary *be so regarded, the contractor's right is made out, as the extension would be independent of the will of the other party to the contract, the United States.

The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word "annul" has been adverted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 340, 14 L. ed. 157, 171; *United States v. O'Brien*, 220 U. S. 321, 328, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406. At the time when the notice was given, it was merely a ceremony to mark the point of default as a preliminary to employing someone else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get someone else to complete the work, and to charge the defendants with the reasonable difference in cost. Indeed, this right was expressly stipulated in the specifications, if, during the progress of the work,

a board should recommend that the contract be "annulled" on the ground that it would not be completed in time. The cost to the United States was the least for which it could get the work done under the conditions upon which the government was bound to contract, and must be assumed to have been reasonable, in the absence of any evidence to the contrary. *New York v. Second Ave. R. Co.* 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905; *Baer v. Sleicher*, 82 C. C. A. 281, 153 Fed. 129. It was less than the sum stipulated as liquidated damages. *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240. *United States v. Bethlehem Steel Co.* 205 U. S. 105, 119, 51 L. ed. 731, 736, 27 Sup. Ct. Rep. 450.

The objection that the second contract does not appear to have completed the work intended to be accomplished *by the[472 first, that is, to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.

As little need be said in answer to the argument that there was no enforceable contract for want of certainty and mutuality. The power to change details, reserved by the United States, did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper. There was nothing warranting an enlargement of the plan beyond the channel of Beaufort river, or the purpose indicated. The contract estimated the amount of material to be removed, and as there were different prices per yard for earth and rock, this amount was expressly made subject to the appropriations, as without expression would have been implied. See *Rev. Stat. § 3733*, *U. S. Comp. Stat. 1901*, p. 2505. There was some suggestion at the bar that the contract was not signed by the United States. The answer does not deny it, but by implication admits it. The contract says that it is made by the United States by E. O. Matthews, Chief of the Bureau of Yards and Docks, and it is signed by E. O. Matthews, Chief of the Bureau of Yards and Docks, which is enough. The matter

does not seem to us to need discussion at greater length.

Judgment of Circuit Court of Appeals reversed.

Judgment of Circuit Court affirmed.

473]*CUBA RAILROAD COMPANY, Petitioner,

v.

WALTER E. CROSBY.

(See S. C. Reporter's ed. 473-482.)

Evidence — presumptions — foreign laws.

The Federal courts cannot assume without proof that, under the law of Cuba, like that of the forum, a promise to repair or replace defective machinery, when notified by an employee of the defect, throws upon the master the risk of injury to such employee from such defect until the time for performance has expired, or that it does away with or leaves to the jury what otherwise would be negligence as a matter of law.

[For other cases, see Evidence, II. a; Conflict of Laws, I., in Digest Sup. Ct. 1908.]

[No. 124.]

Argued December 18, 1911. Decided January 9, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of New Jersey in favor of plaintiff in an action by an employee against his employer to recover damages for injuries alleged to have been caused by a defective machine. Reversed.

See same case below, 95 C. C. A. 539, 170 Fed. 369.

The facts are stated in the opinion.

Mr. Howard Mansfield argued the cause and filed a brief for petitioner:

The courts of the United States should not take cognizance of an alleged cause of action for a foreign tort where the rights of the parties under the foreign law cannot be certainly and definitely ascertained, and where the foreign tribunal is equally available to both parties.

Slater v. Mexican Nat. R. Co. 194 U. S. 120, 129, 48 L. ed. 900, 904, 24 Sup. Ct. Rep. 581.

The rule is that the *lex loci delicti* de-

NOTE.—As to determination of case properly governed by law of foreign country which is not proved—see note to Parrot v. Michigan C. R. Co. 34 L.R.A. (N.S.) 261.

termines whether or not there is a cause of action.

Machado v. Fontes [1897] 2 Q. B. 231, 66 L. J. Q. B. N. S. 542, 76 L. T. N. S. 588, 45 Week. Rep. 565; Phillips v. Eyre, L. R. 6 Q. B. 1, 10 Best & S. 1004, 40 L. J. Q. B. N. S. 28; Coyne v. Southern P. Co. 155 Fed. 683; Minor, Conf. L. § 202; Dicey, Conf. L. Am. Notes by J. B. Moore, pp. 659, 667; Cooley, Torts, 3d ed. p. 900; Mexican C. R. Co. v. Chantry, 69 C. C. A. 454, 136 Fed. 316; Mexican C. R. Co. v. Eckman, 205 U. S. 538, 51 L. ed. 920, 27 Sup. Ct. Rep. 791.

There can be no presumption that the common law extends to Cuba.

Davison v. Gibson, 5 C. C. A. 543, 12 U. S. App. 362, 56 Fed. 443; Savage v. O'Neil, 44 N. Y. 298; Aslanian v. Dostumian, 174 Mass. 328, 47 L.R.A. 495, 75 Am. St. Rep. 348, 54 N. E. 845; Crashley v. Press Pub. Co. 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; Mexican C. R. Co. v. Chantry, 69 C. C. A. 454, 136 Fed. 316.

There can be no presumption, nor any ruling, in the absence of pleading of proof, that the act alleged gave rise to a cause of action.

Mexican C. R. Co. v. Chantry, 69 C. C. A. 454, 136 Fed. 316; Farrell v. Farrell, 142 App. Div. 605, 127 N. Y. Supp. 764; McLeod v. Connecticut & P. River R. Co. 58 Vt. 727, 6 Atl. 648; Mexican C. R. Co. v. Eckman, 205 U. S. 538, 51 L. ed. 920, 27 Sup. Ct. Rep. 791; Chouquette v. Mexican C. R. Co. 84 C. C. A. 678, 156 Fed. 1022; Mexican C. R. Co. v. Eckman, 84 C. C. A. 679, 156 Fed. 1023; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A. (N.S.) 261, 93 N. E. 590; Story, Conf. L. 8th ed. § 637.

Where the act complained of happened in a foreign jurisdiction, and a right of action is alleged to have arisen therefrom, the law of the forum and the remedy of the forum must in some degree resemble the law of the wrong and its remedy.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

The precise presumptions requisite to sustain the judgments below have no proper legal basis.

Labatt, Mast. & S. § 428, p. 1210; District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 567, 121 Fed. 451; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Cincinnati, N. O. & T. P. R. Co. v. Robertson, 71 C. C. A. 335, 139 Fed. 519; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 680; H. D. Williams Cooper-

age Co. v. Headrick, 86 C. C. A. 548, 159 Fed. 680.

Mr. Benjamin M. Weinberg argued the cause, and, with Mr. Edwin Kalish, filed a brief for respondent:

In the absence of proof of the foreign law, the law of the forum must furnish the rule of decision.

Jones, Ev. 2d ed. § 84; Wharton, Confli. L. § 778, p. 1531; 13 Am. & Eng. Enc. Law, 2d ed. 1060, 1061; Monroe v. Douglass, 5 N. Y. 447; Lloyd v. Guibert, L. R. 1 Q. B. 129, 6 Best & S. 100, 35 L. J. Q. B. N. S. 74, 12 Week. Rep. 953, 5 Eng. Rul. Cas. 870; Savage v. O'Neil, 44 N. Y. 298; Sokel v. People, 212 Ill. 238, 72 N. E. 382; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; Brown v. Gracey, Dowl. & R. N. P. 41, note; Linton v. Moorhead, 209 Pa. 646, 59 Atl. 264; Scott v. Seymour, 1 Hurlst. & C. 219, 1 New Reports, 129, 32 L. J. Exch. N. S. 61, 9 Jur. N. S. 522, 8 L. T. N. S. 511, 11 Week. Rep. 169, 1 Eng. Rul. Cas. 533; The Halley, L. R. 2 P. C. 193, 7 Moore, P. C. C. N. S. 263, 37 L. J. Prob. N. S. 33, 18 L. T. N. S. 879, 16 Week. Rep. 998; Whitford v. Panama R. Co. 23 N. Y. 465; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Mackey v. Mexican C. R. Co. 78 N. Y. Supp. 966; Pratt v. Roman Catholic Orphan Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035, affirmed in 166 N. Y. 593, 59 N. E. 1120; Carpenter v. Grand Trunk R. Co. 72 Me. 388, 39 Am. Rep. 340; Woodrow v. O'Connor, 23 Vt. 776; McLeod v. Connecticut & P. River R. Co. 58 Vt. 727, 6 Atl. 648; State v. Morrill, 68 Vt. 60, 54 Am. St. Rep. 870, 33 Atl. 1070; Loaiza v. Superior Ct. 85 Cal. 11, 9 L.R.A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; Wickersham v. Johnson, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89; Chase v. Alliance Ins. Co. 9 Allen, 311; Aslanian v. Dostumian, 174 Mass. 328, 47 L.R.A. 495, 75 Am. St. Rep. 348, 54 N. E. 845; Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190; Davison v. Gibson, 5 C. C. A. 543, 12 U. S. App. 362, 56 Fed. 443; Mexican C. R. Co. v. Marshall, 34 C. C. A. 133, 91 Fed. 933; Mexican C. R. Co. v. Glover, 46 C. C. A. 334, 107 Fed. 356; Crashley v. Press Pub. Co. 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; Mexican C. D. Co. v. Chantry, 69 C. C. A. 454, 136 Fed. 316; Chouquette v. Mexican C. R. Co. 84 C. C. A. 678, 156 Fed. 1022; Mexican C. R. Co. v. Eckman, 84 C. C. A. 679, 156 Fed. 1023; Mexican C. R. Co. v. Eckman, 205 U. S. 538, 51 L. ed. 920, 27 Sup. Ct. Rep. 791; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; The M. Moxham, L. R. 1 Prob. Div. 107, 46 L. J. 56 L. ed.

Prob. N. S. 17, 24 L. T. N. S. 559, 24 Week. Rep. 650; Phillips v. Eyre, L. R. 4 Q. B. 225, 9 Best & S. 343, 38 L. J. Q. B. N. S. 113, 19 L. T. N. S. 770, 17 Week. Rep. 375, L. R. 6 Q. B. 1, 10 Best & S. 1004, 40 L. J. Q. B. N. S. 28, 22 L. T. N. S. 869; Machado v. Fontes, 66 L. J. Q. B. N. S. 542 [1897] 2 Q. B. 233, 76 L. T. N. S. 588, 45 Week. Rep. 565; Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for the loss of a hand through a defect in machinery, in connection with which the defendant in error, the plaintiff, was employed. The plaintiff had noticed the defect and reported it, and, according to his testimony, had been promised that it should be repaired or replaced as soon as they had time, and he had been told to go on in the meanwhile. The jury was instructed that if that was what took place, the defendant company assumed the risk for a reasonable time, and, in effect, that if that time had not expired, the plaintiff was entitled to recover. The jury found for the plaintiff. The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the *lex fori*, it was for the defendant to allege and prove it, and that as it had pleaded only the general issue, the verdict must stand. 158 Fed. 144. The judgment was affirmed by a majority of the circuit court of appeals. 95 C. C. A. 539, 170 Fed. 369.

The court below went on the ground that, in the absence of evidence to the contrary, it would "apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum." We regard this statement as too broad, and as having been wrongly applied to this case.

*It may be that, in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person, or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900,

902, 24 Sup. Ct. Rep. 581. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co. v. United Fruit Co.* 213 U. S. 347, 356, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047. See *Bean v. Morris*, 221 U. S. 485, 486, 487, 55 L. ed. 821, 823, 31 Sup. Ct. Rep. 703. That, and that alone, is the foundation of their rights.

The language of Mr. Justice Bradley in *The Scotland (National Steam Nav. Co. v. Dyer)*, 105 U. S. 24, 26 L. ed. 1001, with regard to the application of the *lex fori* to a case of collision between vessels belonging to different nations, and so subject to no common law, referred to that class of cases and no others, and was used only in coming to the conclusion that foreign vessels might take advantage of our limited liability act. See also *The Chattahoochee*, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491. Other exceptional cases are referred to in *American Banana Co. v. United Fruit Co.* *ubi supra*, such as those arising in regions having no law that civilized countries would recognize as adequate. But as to causes of action arising in a civilized country, the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The principle adopted by the decisions of this court is clear. See also *Dicey, Conf. L.* 2 ed. 647 et seq.

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt, he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* 164

Fed. 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common-law territory for that where a different system prevails, obviously the limits must be narrower still. *Savage v. O'Neil*, 44 N. Y. 298; *Crashley v. Press Pub. Co.* 179 N. Y. 27, 32, 33, 71 N. E. 258, 1 A. & E. Ann. Cas. 196; *Aslanian v. Dostumian*, 174 Mass. 328, 331, 47 L.R.A. 495, 75 Am. St. Rep. 348, 54 N. E. 845.

Even if we should presume that an employee could recover in Cuba if injured by machinery left defective through the negligence of his employer's servants, which *would be going far, that would not be[480 enough. The plaintiff recovered, or, under the instructions stated at the beginning of this decision, at least may have recovered, notwithstanding his knowledge and appreciation of the danger, on the strength of a doctrine the peculiarity and difficulties of which are elaborately displayed in the treatise of Mr. Labatt. 1 Labatt, Mast. & S. chap. 22, esp. § 424. To say that a promise to repair or replace throws the risk on the master until the time for performance has gone by, or that it does away with or leaves to the jury what otherwise would be negligence as matter of law, is evidence of the great consideration with which workmen are treated here, but cannot be deemed a necessary incident of all civilized codes. It could not be assumed without proof that the defendant was subject to such a rule.

There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. *The Maggie Hammond*, 9 Wall. 435, 19 L. ed. 772. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt.

Judgment reversed.

481]*PORTO RICO SUGAR COMPANY,
Plff. in Err.,

v.

BAUTISTA VISO LORENZO.

(See S. C. Reporter's ed. 481, 482.)

Parol evidence — explaining terms — grinding season.

1. A contract to grind all the sugar cane raised by a lessee upon certain specified plantations leased to him for a certain number of grinding seasons is a contract to grind in the grinding season, and parol evidence is admissible to show what that season is.

[For other cases, see Evidence, 1610-1626, in Digest Sup. Ct. 1908.]

Contracts — delay in performance — excuse.

2. Failure to perform an absolute undertaking to grind sugar cane during the grinding season is not excused by the repeated breaking down of the machinery.

[For other cases, see Contracts, 523-535, in Digest Sup. Ct. 1908.]

[No. 154.]

Argued December 22, 1911. Decided January 9, 1912.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiff in an action for breach of a contract to grind sugar cane. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 96.

The facts are stated in the opinion.

Mr. Hannis Taylor argued the cause, and with Mr. C. M. Boerman, filed a brief for plaintiff in error:

Parol evidence is never admissible to vary the conditions of a contract, or to add to them, or to explain them, where there is no latent ambiguity, or where there is only a patent ambiguity; that is to say, where the parties knowingly left the matter undefined, because it is supposed that they did not care to make it more specific, and the so-called ambiguity, if there is any, was intentional.

Hearne v. New England Mut. M. Ins. Co. 20 Wall. 492, 22 L. ed. 397; Shore v. Wilson, 9 Clark & F. 565, 5 Scott, N. R. 958; Mallan v. May, 13 Mees. & W. 517; 14 L. J. Exch. N. S. 48, 9 Jur. 19; Moran v. Prather, 90 U. S. 501, 23 L. ed. 123; Garrison v. Memphis Ins. Co. 19 How. 316, 317, 15 L. ed. 657, 658, 29 Am. & Eng. Enc. Law,

NOTE.—On excuses for nonperformance of contract—see notes to United States v. Peck. 26 L. ed. U. S. 46; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 40 L. ed. U. S. 515; and Stewart v. Stone, 14 L.R.A. 215.
56 L. ed.

2d ed. 391, note 1; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534.

No brief was filed for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action upon notarial contracts to grind all the plaintiff's sugar cane raised upon specified plantations let to him for a certain number of zafras or grinding seasons, ending in 1912. The breaches alleged are failure to grind the cane, "during the months of January to June," 1908, and to furnish the necessary cars and men to handle the cane, as agreed. At the trial it was proved that the cane was ready to be ground and should have been ground between the months of January and the first weeks of June, but that a large part of the crop was ground in the latter part of June, and through July, *to the great dam-[482 age of the plaintiff. A failure to furnish the proper number of cars for a part of the time also was established. The contract did not fix a period within which the grinding should be done otherwise than by reference to the zafras to which it extended, and it was objected by demurrer, requests for rulings, and exceptions to evidence, that, as the written agreement was silent, it could not be made more definite by parol. But the court ruled the other way and sustained a verdict of \$15,000 for the plaintiff, whereupon the case was brought to this court.

It appears to us not to need extended argument to show that the court was right. A contract to grind sugar cane implies on its face, if read with any knowledge of the business, that it has reference to seasons, and that it is more definite than a simple grammatical interpretation of the words would express. An illustration suggested at the argument brings it home to those of us whose experience has been in the North. A contract to reap a field of wheat, with no mention of time, would not leave the contractor free to choose his own time. The grinding of cane must be done in the grinding season, and a contract to grind is a contract to grind in the grinding season. Parol evidence may be necessary to show what that season is in a given place, as it constantly is in order to translate the words and the implications of words into things; but the season, when ascertained, is the limit by the very meaning of the words used, when used in a business contract made with regard to one of the great industries of the world.

A part of the delay seems to have been caused by the repeated breaking down of the machinery, but nothing appears to take the case out of the ordinary rule that per-

formance of an absolute undertaking is not excused by facts of that sort. Nothing else, in the case seems to us to call for remark. The trial was conducted fairly and intelligently, and the defendant must bear the loss. Judgment affirmed.

483]*RICHARD G. PETERS, Appt.,
v.

ALBERT W. GILCHRIST† et al.

(See S. C. Reporter's ed. 483-495.)

Statutes — expression of subject in title.

1. A statute entitled "an act to incorporate" a particular railway company does not, under the decisions of the Florida courts, bear a title sufficiently broad to embrace a grant of public land in aid of the construction of the authorized railway. [For other cases, see Statutes, I. e, in Digest Sup. Ct. 1908.]

Statutes — entitling — legislative journals.

2. The legislative journal title must, under the decisions of the Florida courts, control, where there is a variance between such title and the title of the bill as enrolled and promulgated.

[For other cases, see Statutes, I. e, in Digest Sup. Ct. 1908.]

Federal courts — following decisions of state courts — validity of statute under state Constitution.

3. Federal courts must follow the adjudications of the courts of a state upon the question as to whether a particular law of that state has been passed in such a manner as to become a valid law under the state Constitution.

[For other cases, see Courts, VII. c, 3, in Digest Sup. Ct. 1908.]

Federal courts — following decisions of state courts — existing rights.

4. An independent judgment upon the question of the validity of a grant of lands by a state statute which the highest court of the state has held invalid because the title of the act, as shown in the legislative journals, differing in this respect from the published session laws, was not broad enough to include such grant, cannot be exercised by the Federal courts, upon the theory that such decision was rendered after rights under such grant had arisen, where the state court, long before the statute was passed, had laid down the rule that if the legislative journals should show that a law had not been validly enacted, this fact would be fatal.

[For other cases, see Courts, VII. c, 3, in Digest Sup. Ct. 1908.]

†Albert W. Gilchrist and Park Trammel substituted November 6, 1911, for Napoleon B. Broward and W. B. Lamar as parties appellees herein.

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Over-*

[No. 49.]

Argued November 8, 1911. Decided January 9, 1912.

APPEAL from the Circuit Court of the United States for the Northern District of Florida to review a decree dismissing, upon demurrer, a bill seeking to enforce a trust in certain lands. Affirmed.

The facts are stated in the opinion.

Mr. John Stevens Maxwell argued the cause, and, with Mr. Thomas F. McGarry, filed a brief for appellant:

Even if plaintiff's rights are to be determined entirely by the validity or invalidity of the act of May 24, 1893, and the journals of the legislature are to control or furnish the evidence of its title and the regularity of its enactment, or otherwise, it is clear that proof must be taken as to what constitutes the journals and the entries required to be made therein by the Constitution of the state; and we submit that any errors or mistakes may be shown in order to conform the journals to the exact facts.

State ex rel. *Morris v. Mason*, 43 La. Ann. 590, 9 So. 776; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 742, 15 N. W. 609.

We believe, under the facts stated in the bill and admitted by the demurrers, that the rule announced by this court in the case of *Marshall Field & Co. v. Clark*, 143 U. S. 649-700, 36 L. ed. 294-312, 12 Sup. Ct. Rep. 495, should be declared the law, and control this case.

In those jurisdictions where resort may be had to the legislative journals, and where enrolled bills signed by the presiding officers and governor are not conclusive when it appears from the journals that some constitutional requirement was not observed, which was not required to be entered on the journal, it will be presumed that what was commanded to be done was in fact done.

26 Am. & Eng. Enc. Law, 541; State ex rel. *Turner v. Hocker*, 36 Fla. 358, 18 So. 767; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Potter v. Lainhart*, 44 Fla. 647, 33 So. 257; *Cooley*, Const. Lim. p. 168.

The Constitution does not require any legislative proceeding to be entered on the jour-

man *Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

nal except the yeas and nays on the final passage of every bill or joint resolution.

Potter v. Lainhart, 44 Fla. 663, 33 So. 251.

If the former judgment is neither pleaded nor put in evidence, the court or jury must find according to the very truth of the issue, uninfluenced by the proceedings in the former suit.

1 Freeman, Judgm. §§ 283, 284.

To go outside of the record of the case before the court, to see if it can find something to establish that the facts alleged and admitted to be true in this record are not true, would certainly be an anomalous proceeding.

Story, Eq. Pl. 10th ed. § 452, note 3, p. 414; Barber v. Barber, 4 Drew. 666, 29 L. J. Ch. N. S. 49, 5 Jur. N. S. 1197, 1 L. T. N. S. 21, 8 Week. Rep. 16; Re Duncan, 139 U. S. 449, 457, 35 L. ed. 219, 223, 11 Sup. Ct. Rep. 573; People ex rel. Scott v. Chenango, 8 N. Y. 324; South Ottawa v. Perkins, 94 U. S. 268, 24 L. ed. 157.

If defendants could plead *res judicata* in respect to the act having been constitutionally passed, but, for reasons of their own, prefer not to rely upon that judgment, but desire or are willing to reopen the question on the real merits, certainly it cannot be the duty of this court to prevent them from so doing if it could.

1 Freeman, Judgm. 4th ed. § 284, pp. 517, 518; Bryar v. Campbell, 177 U. S. 654, 44 L. ed. 928, 20 Sup. Ct. Rep. 794.

Indeed, defendants in the present suit may lose absolutely all their rights, if any, gained in the former suit, if they fail to set them up by plea in this suit.

1 Freeman, Judgm. § 332; Union & Planters' Bank v. Memphis, 49 C. C. A. 455, 111 Fed. 561; United States v. Bliss, 172 U. S. 321, 326, 43 L. ed. 463, 465, 19 Sup. Ct. Rep. 216.

It is competent also for plaintiff to prove that the short abbreviated title to the bill was the result of a mistake or omission.

Walnut v. Wade, 103 U. S. 683-692, 26 L. ed. 526-529.

A judgment or decree upon demurrer is an adjudication only of the rights of the parties upon the allegations of the pleading demurred to, and will not preclude the assertion of the right under other material allegations not appearing in the former suit.

Gilman v. Rives, 10 Pet. 301, 9 L. ed. 433; Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416; Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 410, 35 L. ed. 1060, 12 Sup. Ct. Rep. 188; 3 Rose's Notes (U. S.) 572; 8 Rose's Notes (U. S.) 719; 12 Rose's Notes (U. S.) 87; Florida Southern R. Co. v. Brown, 23 Fla. 104, 1 So. 512.

This court is not bound by the finding of the supreme court in the Atlantic Lumber

Company Case, that the act was not in fact validly passed.

State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776.

The journals cannot be held conclusive evidence of the title of the bill as introduced, without depriving us of the opportunity of showing the real facts.

Cooley, Taxn. 356; Black, Tax. Titles, § 253; Kelly v. Herrall, 10 Sawy. 161, 20 Fed. 365; Abbott v. Lindenbower, 42 Mo. 162; Bannon v. Burnes, 39 Fed. 895; Ewart v. Davis, 76 Mo. 129; McCreedy v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214.

Where the title of an act provides for the incorporation of a railroad company, the construction of a railroad is to be deemed the object of the act, and any provision therein for granting state, municipal, or county aid is germane to the object of the act.

State ex rel. Lamar v. Jacksonville Terminal Co. 41 Fla. 363, 27 So. 221; Hope v. Gainesville, 72 Ga. 246; Connor v. Green Pond, W. & B. R. Co. 23 S. C. 427; Schuyler County v. People, 25 Ill. 183; Mahomet v. Quackenbush, 117 U. S. 511, 29 L. ed. 983, 6 Sup. Ct. Rep. 858; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; People ex rel. Drake v. Mahaney, 13 Mich. 481; Cooley, Const. Lim. 205, 206; State v. Arnold, 140 Ind. 628, 38 N. E. 820.

Every reasonable doubt should be resolved in favor of the constitutionality of the act.

Holton v. State, 28 Fla. 308, 9 So. 716; Duval County v. Jacksonville, 36 Fla. 196, 29 L.R.A. 416, 18 So. 339; State ex rel. Turner v. Hocker, 36 Fla. 358, 18 So. 767.

The state and trustees are equitably estopped, under the circumstances set out in the bill, and admitted by the demurrers.

Pleasant Twp. v. Aetna L. Ins. Co. 138 U. S. 67, 72, 73, 34 L. ed. 864, 866, 867, 11 Sup. Ct. Rep. 215; Burgess v. Seligman, 107 U. S. 20-23, 27 L. ed. 359-361, 2 Sup. Ct. Rep. 10.

Where there had been no decision at all of a state court as to the constitutionality of an act before rights had been acquired thereunder, the Federal court will exercise its own independent judgment as to the validity and obligation of contracts made under the act before the state court held it unconstitutional.

Anderson v. Santa Anna Twp. 116 U. S. 356-362, 29 L. ed. 633-635, 6 Sup. Ct. Rep. 413.

This court will respect the decisions of state courts, but will not give them a retroactive effect, and allow them to render invalid contracts which, in the judgment of this court, were lawfully made.

Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; Ohio Life Ins. & T. Co. v. Debolt, 16

How. 416, 14 L. ed. 997; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *State ex rel. Burlington & M. River R. Co. v. Wapello County*, 13 Iowa, 388; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416.

This court will not follow decisions of a state if thereby contracts which have accrued under earlier rulings will be injuriously affected.

Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008.

Where contracts have been entered into on the basis of a certain construction of the law of the state, justly supposed settled, whether from judicial decisions, or action of the state authorities, or long usage, United States courts will hold them valid, notwithstanding the decisions by the courts of the state, made subsequent to the making of the contracts, settling the law of the state to the contrary.

M'Keen v. Delaney, 5 Cranch, 22, 3 L. ed. 25; *Gardner v. Collins*, 2 Pet. 85, 7 L. ed. 356; *Patterson v. Jenks*, 2 Pet. 230, 7 L. ed. 407; *Sedgw. Stat. & Const. Law*, p. 290.

This court has refused to follow the decisions of the supreme court of a state upon construction of the validity of a statute of the state where there was no contrary decision inconsistent therewith, basing this refusal upon a general construction of the statute by the state authorities and by the people, on the faith of which contracts, whose validity they were to determine, had been entered into.

Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800; *Truly v. Wanzer*, 5 How. 141, 12 L. ed. 88; *Sims v. Hundley*, 6 How. 1, 12 L. ed. 319; *Pease v. Peck*, 18 How. 595, 15 L. ed. 518; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Butz v. Muscatine*, 8 Wall. 575, 19 L. ed. 490; *Pine Grove Twp. v. Talcott*, 19 Wall. 678, 22 L. ed. 233; *Pleasant Twp. v. Ætna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968.

Mr. W. S. Jennings argued the cause and filed a brief for the trustees of the Internal Improvement Fund:

Only such portions of a bill as were included in the subject as expressed in the title when it passed the two houses, and when approved by the governor, will acquire the force of law.

Sutherland, Stat. Constr. 2d ed. § 126; *Binn v. Weber*, 81 Ill. 288; *Stein v. Leeper*, 78 Ala. 517; *Re Executive Communication*, 23 Fla. 297, 6 So. 925; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 154, 18 So. 334.

The granting of title to lands is not a matter properly connected with the subject of the creation of a corporation in a legislative enactment. A land grant from the state requires an act of the legislature, and, in the nature of things, cannot be a matter of, germane to, or properly connected with, a subject of statutory incorporation.

Carr v. Thomas, 18 Fla. 747; *Ex parte Wells*, 21 Fla. 280; *State ex rel. McQuaid v. Duval County*, 23 Fla. 483, 3 So. 193; *State ex rel. Atty. Gen. v. Knowles*, 16 Fla. 577; *Wade v. Atlantic Lumber Co.* 51 Fla. 633, 41 So. 72, 51 Fla. 638, 41 So. 75.

"Subject," as used in a constitutional requirement that laws shall contain but one subject, which shall be plainly expressed in their title, is a very indefinite word. A phrase may state a subject in a general or indefinite manner or with minute particularity, yet it would nevertheless be true that the subject is described in the title.

Ex parte Thomas, 113 Ala. 1, 21 So. 369; *State v. Ferguson*, 104 La. 249, 81 Am. St. Rep. 123, 28 So. 917.

If an act embraces two or more subjects, and two or more of the same are expressed in the title, the whole act is void.

1 *Sutherland*, Stat. Constr. p. 250; *Ballentyne v. Wickersham*, 75 Ala. 539; *Builders' & P. Supply Co. v. Lucas*, 119 Ala. 202, 24 So. 416; *Pennington v. Woolfolk*, 79 Ky. 13; *State v. Ferguson*, 104 La. 249, 81 Am. St. Rep. 123, 28 So. 917; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331; *Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311; *State ex rel. Miller v. Lancaster County*, 17 Neb. 87, 22 N. W. 228; *Re Elizabeth*, 49 N. J. L. 488, 10 Atl. 363; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *Cooley*, Const. Lim. 147.

The journals of the house and of the senate, both of which showed that the title of the bill as introduced and passed by them was merely, "An Act to Incorporate the Atlantic, Suwanee River, & Gulf R. Co.," are conclusive evidence of the real title of the bill, and the fact that the bill, as ingrossed, enrolled, and signed by the presiding officers of both branches of the legislature, and by the governor, bore the longer and broader title, does not in the least operate to constitute such longer title the true and legal title of the bill.

Wade v. Atlantic Lumber Co. 51 Fla. 633, 41 So. 72; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Atty. Gen. v. Rice*,

64 Mich. 385, 31 N. W. 203; *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953; *Detroit v. Board of Assessors* (*Detroit v. Rentz*) 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787.

The decision of the supreme court upon the construction of a state statute is binding upon the Federal courts.

Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 143, 22 L. ed. 334; *Erie R. Co. v. Pennsylvania*, 21 Wall. 497, 22 L. ed. 598; *State Railroad Tax Cases*, 92 U. S. 604, 23 L. ed. 670; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 704, 28 L. ed. 570, 4 Sup. Ct. Rep. 663; *Texas & P. R. Co. v. Johnson*, 151 U. S. 99, 38 L. ed. 87, 14 Sup. Ct. Rep. 250; *Fairfield v. Gallatin County*, 100 U. S. 52, 25 L. ed. 546; *Mason v. Missouri*, 179 U. S. 334, 45 L. ed. 219, 21 Sup. Ct. Rep. 125; *Wiley v. Sinkler*, 179 U. S. 66, 45 L. ed. 89, 21 Sup. Ct. Rep. 17; *Williams v. Eggleston*, 170 U. S. 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617; *McCain v. Des Moines*, 174 U. S. 177, 43 L. ed. 939, 19 Sup. Ct. Rep. 644; *Orr v. Gilman*, 183 U. S. 283, 46 L. ed. 200, 22 Sup. Ct. Rep. 213; *Noble v. Mitchell*, 164 U. S. 372, 41 L. ed. 473, 17 Sup. Ct. Rep. 110; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 154, 41 L. ed. 387, 17 Sup. Ct. Rep. 56; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 165, 38 L. ed. 398, 14 Sup. Ct. Rep. 506; *Pelton v. Commercial Nat. Bank*, 101 U. S. 144, 25 L. ed. 901; *Bucher v. Cheshire R. Co.* 125 U. S. 583, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Gormly v. Clark*, 134 U. S. 348, 33 L. ed. 913, 10 Sup. Ct. Rep. 554; *Stutsman County v. Wallace*, 142 U. S. 306, 35 L. ed. 1022, 12 Sup. Ct. Rep. 227; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Kentucky R. Tax Cases*, 115 U. S. 322, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Noble v. Mitchell*, 164 U. S. 372, 41 L. ed. 473, 17 Sup. Ct. Rep. 110.

The doctrine of the Florida courts was announced long prior to the enactment of complainant's land grant.

State ex rel. Markens v. Brown, 20 Fla. 407; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Mathis v. State*, 31 Fla. 303, 12 So. 681.

Mr. William A. Blount argued the cause, and, with Mr. A. C. Blount, Jr., filed a brief for appellees Wade and Southern Timber & Naval Stores Company:

There was no grant by the legislature of Florida to the Atlantic, Suwanee River, & G. R. Co. of any lands, or of the right to earn any.

Wade v. Atlantic Lumber Co. 51 Fla. 632, 640, 41 So. 72, 75.
56 L. ed.

This court is bound by the decision of the Florida supreme court as to whether a bill was so passed as to conform to the constitutional requirements and thus become a law.

South Ottawa v. Perkins, 94 U. S. 268, 24 L. ed. 157; *Wilkes County v. Coler*, 180 U. S. 519, 524, 533, 45 L. ed. 650, 652, 655, 21 Sup. Ct. Rep. 458; *Re Duncan*, 139 U. S. 455, 35 L. ed. 222, 14 Sup. Ct. Rep. 573; *Leeper v. Texas*, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577.

The supreme court of Florida has decided that even though the Constitution may not require the statement in the journals of certain facts connected with the passage of a bill, yet, when the journals do affirmatively show such facts, the statement of the journals is indisputable and uncontrollable.

Wade v. Atlantic Lumber Co. 51 Fla. 632, 640, 41 So. 72, 75; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 172, 18 So. 334; *State ex rel. Markens v. Brown*, 20 Fla. 421.

United States courts will take judicial notice of the decisions of the highest state court, holding an act of the legislature to have been passed in accordance with the requirements of the Constitution of the state, or the contrary, and of the legislative journals of the state, whose courts take such notice, and will follow such decisions, and will give to the journals the effect given by the state courts to them, and both the state courts of Florida and this court will take such notice upon demurrer.

South Ottawa v. Perkins, 94 U. S. 260, 267, 268, 24 L. ed. 154, 157, 158; *State ex rel. Markens v. Brown*, 20 Fla. 420; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 168, 18 So. 334; *Wade v. Atlantic Lumber Co.* 51 Fla. 628, 638, 41 So. 72, 75.

The Constitution of the United States does not prevent a state from declaring its legislative journals conclusive of the manner of the passage of an act of the legislature.

South Ottawa v. Perkins, 94 U. S. 269, 24 L. ed. 158; *Leeper v. Texas*, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577.

There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties.

South Ottawa v. Perkins, 94 U. S. 267, 24 L. ed. 157; *Wilkes County v. Coler*, 180 U. S. 506-520, 45 L. ed. 642-650, 21 Sup. Ct. Rep. 458.

Mr. Justice Lurton delivered the opinion of the court:

The complainant, Richard G. Peters, through mesne conveyances, asserts an equitable title to some 200,000 acres of swamp or overflowed lands in the state of Florida, being a part of the congressional grant of September 28, 1850 [9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1586], to the state of Florida. By state legislation the title to the lands so granted was vested in the governor of the state and four other state officials and their successors in office, as trustees, for the purposes set forth in an act of June 6, 1855, entitled, "An Act to Provide for and Encourage a Liberal System of Internal Improvement in This State."

The title asserted is based upon a grant in 488]aid of the *construction of a railroad, found in a legislative act of May 24, 1893, printed in the Session Laws of Florida for 1893. That act purports to incorporate the Atlantic, Suwanee River, & Gulf Railway Company, and authorizes it to construct and operate a railway between certain points within the state. The 9th and 10th sections read as follows:

"Sec. 9. That the state of Florida, for the purpose of aiding the construction of said railroad, its branches and extensions, hereby grants unto said company 10,000 acres of land for each mile of railroad it may construct, of the lands granted to the state of Florida, under the act of Congress of September 28th, 1850, and which are commonly known as the swamp and overflowed lands, said lands to be deeded to the said company by the trustees of the internal improvement fund, as fast as each 5 miles of said road or any of its branches are graded, cross-tied, and rails laid thereon.

"Sec. 10. That upon the filing of a certificate of the completion of any 5 miles of said road or any of its branches, signed by the engineer and president of the said company, it shall be the duty of the trustees of the internal improvement fund to require the state engineer or such other competent person to examine and inspect each 5 miles of road so completed; and on such person's or the state engineer's report that the 5 miles are completed as certified, it shall be the duty of the trustees of the internal improvement fund to issue deeds to the said corporation, as required in the foregoing section; Provided, That the said corporation, its successors and assigns, shall have the privilege of requiring and having from the trustees of the internal improvement fund a certificate authorizing and entitling it to locate the lands which it may at any time have earned and

become entitled to as aforesaid; and whenever and as often as the said corporation shall file with the trustees of the internal improvement *fund a plot and survey[489 of the lands located by it in pursuance of a certificate given it by the trustees, as herein provided, the said trustees shall set apart and upon demand execute unto said corporation, its successors and assigns, a deed conveying unto it the lands described in said plot and survey, from the swamp and overflowed lands granted to the state of Florida by the act of Congress of September 28, 1850; Provided, That nothing in this act contained shall make the state of Florida liable by reason of any deficiency there may exist in the public lands belonging to the state under and by virtue of the act of Congress of September 28, 1850."

By the 18th section of said act it was provided that the railway company should receive the same quota of land on account of the construction of any part of the projected line by the Atlantic, Suwanee River, & Gulf Railroad Company, theretofore incorporated for the same general purpose, upon receiving a conveyance of such constructed railroad.

The bill avers that the said railway company constructed 20 miles of railway, including about 5 miles conveyed to it by the predecessor company above referred to, which had been inspected and certified to the trustees of the internal improvement fund by the state engineer, and that the company, in the exercise of the privileges conferred by the 10th section of the act, had demanded and received from said trustees certificates "authorizing and entitling it to locate lands" so earned, and to receive from the said trustees a deed conveying to it, its successors or assigns, the lands so located. It is then averred that the certificates, together with survey and map of locations, had been regularly filed with the trustees, and a deed demanded, but that the trustees refused to make such deed, and later conveyed the lands so located, or the greater part thereof, to the defendant Neil G. Wade, who had full notice of appellant's title, and who *sub-[490 sequently conveyed the same to the defendant the Southern Timber & Naval Stores Company, who, it is alleged, also had full notice of the prior right of the said Atlantic, Suwanee River, & Gulf Railway Company, and its assigns, including the present complainant.

The prayer of the bill is that the Southern Timber & Naval Stores Company be adjudged to hold same in trust for complainant, and required to convey same to him. In the alternative, the bill asks a decree against the trustees of the internal im-

provement fund for the value of said lands, or for the money received by the trustees for said lands, and for general relief.

The bill was dismissed upon demurrer.

It is evident from the facts stated that the origin and foundation of the title asserted by the bill to the state lands now held by the Southern Timber & Naval Stores Company is the land grant made or proposed in the Florida act of May 24, 1893. But that act, in another litigation between different parties, was held null and void in so far as its land grant clauses are concerned. *Wade v. Atlantic Lumber Co.* 51 Fla. 628, 41 So. 72. The ground of this holding was that the title of the act, as shown by the journals of the two houses, was not broad enough to include a grant of public lands. The Constitution of the state includes a provision against more than one subject in the same bill, that subject to be indicated by the title. Thus, the 16th section of article 3 of the Florida Constitution reads as follows:

"Each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The title of the act in question, as it is found in the published Session Acts of 1893, is as follows:

"An act to incorporate the Atlantic, Suwanee River, & Gulf Railway, to grant such corporation certain privileges, and to aid the construction thereof."

491] *The title, as shown by the journals of both houses, was in these words:

"A bill to be entitled 'An Act to Incorporate the Atlantic, Suwanee River, & Gulf Railway Company.'"

Thus, the title, as shown by the journals, gives no notice that the bill grants public lands as an aid to construction, but purports to be no more than an incorporating act, while the act, as officially promulgated, bears a title expressing its contents.

But when there is a variance between the title of a bill as enrolled and promulgated and the title of the act as shown by the journals, the latter will control, under the express decision of the highest court of the state of Florida. *Wade v. Atlantic Lumber Co.* supra.

In that case the Atlantic Lumber Company asserted title to certain swamp lands located under certificates issued to the Atlantic, Suwanee River, & Gulf Railway Company, by authority of this act of May 24, 1893, which lands had been deeded to the defendant Neil G. Wade by the trustees of the internal improvement fund. The defendant Wade demurred to the bill upon the ground that the act of May 24, 1893, the sole source of the superior title asserted

by the Atlantic Lumber Company, was invalid in so far as it included a land grant, because the title of the act did not express that purpose of the bill.

The Florida court took judicial notice of the journals of the Florida legislature, and finding the journal title to be as set out above, held the title of the act insufficient under the Constitution to embrace a grant of public lands in aid of the company incorporated.

We shall pass by the suggestion that the judgment in the case referred to is an adjudication binding upon the parties to this suit as to the title or equities here in litigation, it not sufficiently appearing that the parties or the lands in suit are the same. Neither shall we stop to consider the effect of that decision and opinion as absolutely *determining the invalidity[492 of the act of May 24, 1893, as against parties not then before the court. It is enough for the purposes of this case that we shall hold that case to be an authoritative announcement of the law of Florida in these respects: first, that under the Constitution of that state, an act entitled an act to incorporate a particular railway company does not bear a title sufficiently broad to embrace a grant of public land in aid of the construction of the authorized railway; and, second, that when the journals speak and show a variance between the journal title and the title of a bill as enrolled and promulgated, the journal title must control.

The question as to whether a particular law has been passed in such manner as to become a valid law under the Constitution of the state is a state, and not a Federal, question. Courts of the United States are therefore under obligation to follow the adjudications of the courts of the state whose law is in question. *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Leeper v. Texas*, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577; *Wilkes County v. Coler*, 189 U. S. 511, 47 L. ed. 923, 23 Sup. Ct. Rep. 857.

The only authority which the trustees of the internal improvement fund had for the issuance of the certificates now held by the appellant, or for their location upon the public land of the state, or the execution of a deed to the locator, proceeds from this act. If that enactment be invalid, the trustees had no authority to issue such certificates, and no authority to make the deed which was demanded for lands located by means of such certificates. Yet this very enactment has been declared invalid by the highest court of the state upon an examination by that court of the journals of the legislature, showing a variance be-

tween the title of the bill as enrolled and the title shown by the journal. It would be a most remarkable occurrence if now, upon the same journals, we should hold that the bill had a sufficient title and was a valid law.

It is true that the issues in the case of 493] *Wade v. Atlantic Lumber Co.* were raised by demurrer. But the question of whether the enactment was a valid law is a judicial question. In the case of the State ex rel. *Markens v. Brown*, 20 Fla. 407, a case decided ten years before this act was passed, it was held that the courts would examine the journals of the legislature, and would hold a law invalid if, from such journals, it appeared that the law in question had not been constitutionally enacted. See also State ex rel. *Atty. Gen. v. Green*, 36 Fla. 154, 18 So. 334. In view of the cases cited, we find the Florida court saying, in *Wade v. Atlantic Lumber Co.* that "this court is firmly committed to the holding that when the journals speak, they control."

The suggestion that the rights of the appellant, or his assignors, arose before the decision in *Wade v. Atlantic Lumber Co.* and that the case is therefore one in which this court should exercise an independent judgment under the authority of such cases as *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, is without merit.

The rule appealed to is not applicable, because the highest court of the state had, before the acquirement of any rights, laid down the rule that if the journals of the legislature should show that a law had not been validly enacted, the fact would be fatal. It was therefore incumbent upon persons proposing to rely upon the act of May 24, 1893, to examine the journals. Indulgence cannot be claimed because they did not know the law or did not make such examination. There is, therefore, no reason for declining to follow the case of *Wade v. Atlantic Lumber Co.* In *South Ottawa v. Perkins*, cited above, Mr. Justice Bradley, speaking for this court upon a similar question, said:

"But the law under consideration has been passed upon by the supreme court of Illinois and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue 494] on the subject, except *by demurrer to the declaration. This court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law unless, by the journals

of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."

But appellant says that the bill alleges that the title of the bill when introduced was that shown by the enrolled bill, and that it retained that title throughout each legislative stage, and that the other title indorsed on the bill and spread upon the journals was one made through inadvertence or mistake. He further says that the demurrer admits this to be true. But in point of law, evidence of the facts stated would not help the matter. The Florida court, in *Wade v. Atlantic Lumber Co.* 51 Fla. 638, 41 So. 75, denied a rehearing of the original case, sought for the purpose of inducing a modification of the opinion and decree, to enable the complainant, *Wade*, to show the very facts now averred in the present bill. To this that court said:

"The appellee also asks that the decree be modified to enable the petitioner to show that the title to the bill as actually introduced into the House and at all subsequent stages was in the form as now published, and that the fact of the shorter form appearing in the journals was due to the mistake or carelessness of the clerks. To grant this request would be to permit uncertain parol evidence to countervail the legislative journals, and would produce overwhelming uncertainty as to the validity, force, or effect of every law upon the statute books; if admitted *for the purpose of sustain-[495] ing an act, it would be equally admissible to overthrow an act, and cannot be permitted."

We need not deal with the argument that the grant operated to pass the title to the lands located, without more, since the invalidity of the act disposes of every right which might otherwise proceed from it.

Neither does the bill state any facts which authorize us to hold that the trustees of the internal improvement fund made any contract in reference to granting aid in the construction of the Atlantic, Suwannee River, & Gulf Railway by virtue of their general power under the act of September 28, 1850, vesting title to the state swamp lands in them. Every act averred to have been done by them was but a step in pursuance of the power which was sought to be conferred by the act of May 24, 1893. Their subsequent conveyance of the lands upon which the certificates issued

by them to the railway company was in pursuance of a sale made by them to Neil G. Wade, and their refusal to make a deed of the same lands to the railway company, or its assigns, was based upon the invalidity of the enactment under which such deed was claimed. They incurred, neither personally nor officially, any responsibility for their conduct in the matter.

The case of the railway company and their assigns is a hard one. They went forward under an enactment which was invalid, and have made large expenditures upon the faith of a law which they assumed was valid. But the consequences are not remediable save by an appeal to the legislative power. The proceeds of the sale of the lands located under the void certificates to Wade are not charged with any lien or equity by any of the facts stated in the bill.

The decree of the Circuit Court must be in all things affirmed.

496] *JESSE B. HUSE, Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 496-505.)

Postoffice — screen-wagon mail service.

1. The service contemplated by a screen-wagon mail service contract for carriage between the postoffice and railway mail stations at Omaha must be deemed to include the mails to and from all the railroads using the union station at that point, although some of such railroads were not specifically named in the contract, where it had long been been the practice of the government and the screen-wagon contractors to regard such service as a part of the contract, and the public advertisement for proposals, expressly made a part of the contract, warned bidders to familiarize themselves with the situation by personal investigation and inquiry.

[For other cases, see Postoffice, II. c, in Digest Sup. Ct. 1908.]

Appeal — objections not raised below — pleading.

2. A contractor for screen-wagon mail service whose petition for compensation from the government has been dismissed by the court of claims cannot avail himself of the objection, first raised on appeal, to the absence of any pleading setting up as a counterclaim or set-off the difference between the cost of the service under a reletting and the entire contract price for the full term under his contract.

[For other cases, see Appeal and Error, VIII. j, 4, in Digest Sup. Ct. 1908.]

[No. 74.]

Argued November 17, 1911. Decided January 9, 1912.

56 L. ed.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a contractor for screen-wagon mail service for compensation from the government. Affirmed.

See same case below, 44 Ct. Cl. 19.

The facts are stated in the opinion.

Mr. E. C. Brandenburg argued the cause, and, with Messrs. Clarence A. Brandenburg and F. Walter Brandenburg, filed a brief for appellant:

Additional service is merely an increase in the particular service covered by the contract. Thus, if a greater number of trips should have been necessary to carry the mails arriving over the four roads specifically mentioned, the Postmaster General might require such service as additional service, without compensation.

Woolverton v. United States, 27 Ct. Cl. 292; Knox v. United States, 30 Ct. Cl. 59; Woolverton v. United States, 34 Ct. Cl. 247.

Even where the services required are precisely of the same nature as those contemplated by the contract, and between the same points, and therefore might justly be considered "additional services," yet, where the amount of such additional service increases unreasonably the burden assumed, such services are treated as extra services, for which compensation has been allowed.

Utah, N. & C. Stage Co. v. United States, 39 Ct. Cl. 420, affirmed in 199 U. S. 422, 50 L. ed. 254, 26 Sup. Ct. Rep. 69.

At the time the Postmaster General annulled this contract, the government itself was in default in respect of the only obligation it assumed; to wit, the payment of the stipulated compensation; and being in default, it had no right to annul the contract.

Mason v. Edward Thompson Co. 94 Minn. 472, 103 N. W. 507; Graf v. Self, 109 N. Y. 372, 16 N. E. 551; Hatton v. Johnson, 83 Pa. 222; Myers v. Gross, 59 Ill. 439.

Assistant Attorney General Thompson argued the cause, and, with Mr. George M. Anderson, filed a brief for appellee:

Whenever an act is done or statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence.

Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. ed. 618, 619.

The service required of the appellant in carrying mails to and from the three roads, cannot be considered either as new, extra, or additional service.

Utah, N. & C. Stage Co. v. United States,

39 Ct. Cl. 435; *Proffit v. United States*, 42 Ct. Cl. 248.

The Postmaster General was made the judge of the proper equipment to be furnished by appellant before commencing the services, and, in the absence of bad faith, his right to annul the contract upon appellant's refusal to provide suitable equipment cannot now be assailed.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

Mr. Justice **Lurton** delivered the opinion of the court:

The appellant had a four-year contract, 500]commencing *July 1, 1902, for screen-wagon mail service between the postoffice and railway mail stations at Omaha, Nebraska. On May 20, 1903, the Postmaster General canceled the contract and relet it to other parties. Thereupon appellant brought this suit in the court of claims, asserting that he had faithfully performed his agreement, but that he had been required to carry mails to and from three railway companies not included in his contract. That his equipment was ample for the service he contracted to render, but that he had been ordered to provide equipment adequate to the excessive service demanded, and that the cancelation of his contract was therefore unauthorized. His suit was to recover, first, the balance due under the contract as construed by the Department; second, the reasonable value of the excess service he had, under protest, been compelled to render; third, the loss of profit resulting from the wrongful annulment of his contract; and, finally, the loss sustained in disposing of equipment which had been bought for the purpose of carrying out his contract.

As is the case with mail contracts, the manner and means of performance were carefully prescribed, and power was reserved to the Postmaster General to require other and further facilities if it should be found necessary for the good of the service. The power of the Postmaster General to supervise and the duty of the contractor to conform to his regulations were plainly written down. That vigilant and prompt service might be enforced, he was given the right to make deductions, by way of fines, from compensation earned, for defects in equipment or negligence in the performance of the service. For repeated failures in performance, or acts of neglect, or disobedience to orders, he was given power to annul the contract without impairing the right of the government to recover damages for nonperformance.

The findings of the court below as to the repeated *failures of the appellant in[501 the performance of his contract, the inadequacy of his equipment, and his disobedience to the requirements that he should enlarge and improve his facilities, make it clear that the Postmaster General did not act arbitrarily, nor exceed the power reserved, by the inflicting of fines or the final cancelation of the agreement on May 20, 1903. When the contract was canceled, it was directed that compensation due should be withheld and the contract relet at the contractor's expense. This reletting was at a price of some \$14,-000 in excess of what the cost would have been if appellant had performed his agreement. The court below found that when the contract was annulled there was due appellant \$2,984.72. For this a judgment was asked, but denied, the court below finding that the loss to the government as a result of reletting the contract was greatly in excess of the amount due to appellant. His petition was therefore dismissed.

If the contract, fairly construed, exacted the amount of service which the Department claimed, the case of appellant must fail, in view of the facts found as to his insufficient performance, and the loss resulting to the government from the necessity of reletting the unfinished term of the agreement.

The Postmaster General construed the contract as requiring appellant to receive from and deliver to all railroads using the Union Station at Omaha. This construction required him to receive from and deliver to three railroad companies not specified in the contract; namely, the Wabash, the Chicago & Northwestern, and the Chicago, Milwaukee, & St. Paul. The case must therefore turn upon the question as to whether the service contemplated by his contract included mails to and from the railways mentioned.

Coming, then, to the service required by the contract. The proposal for the Omaha mail-wagon service and its acceptance were according to a printed official form. This *proposal and acceptance,[502 making the contract proper, refer to and make the public advertisement of the Postmaster General for proposals a part of the agreement, and from it the service contemplated is discovered. That advertisement included certain "instructions to bidders," of which they were required to take notice. Among other things, these "instructions" included the following provision:

"The foregoing schedules show approximately the service as performed during the week named in the statement of service for each route. Bidders, however, must per-

sonally inform themselves of the amount and character of the service that will be required during the contract term, beginning with July 1, 1902. Bidders and their sureties are warned that they should familiarize themselves with the terms of the contract, schedules of service, and instructions contained herein before they shall assume any liabilities as such bidders or sureties, to prevent misapprehension or cause of complaint thereafter."

Under the heading "Union Station," in the schedule referred to, there appear the names of four railroad companies opposite the words "Union Station," applicable to each of the named companies, thus:

"Union Station:

Illinois Central R. R. Co. (143,077).

Union Pacific R. R. Co. (157,001).

Chicago, Rock Island, & Pacific Rwy. Co. (157,064).

Missouri Pacific Rwy. Co. (157,075)."

It will be noticed that the named railroads bringing mail into the Union Station do not include the Wabash, the Chicago & Northwestern, or the Chicago, Milwaukee, & St. Paul. Notwithstanding this omission, appellant was required to carry to and from the Union Station the mails delivered there by these three companies, and to be delivered there from the post-office, to be carried by the same companies. This appellant did under protest, and upon this his suit is grounded.

But the explanation and answer is simple: Originally, *the contract routes of these companies terminated at the Union Pacific transfer at Council Bluffs, Iowa, where the mail was transferred to the Union Pacific Railway and carried into Omaha. After the construction of the Union Station, each of these companies procured the right to carry their mail over the Union Pacific Railway into the Union Station. This saved delay in transfer. The court below found that "the trains so performing said service were known and treated by the Postoffice Department as mail trains of the Union Pacific Railroad Company, route No. 157,001, and were operated under the rules of said Union Pacific Railroad Company, and payment was made therefor to the said Union Pacific Company. All weights of mail carried by said three roads were credited to the Union Pacific Railroad route and weighed thereon. The screen-wagon contractor under the preceding advertisement and contract, which were similar to the one in this case, carried mails to and from the trains of said three roads as part of his contract, and these facts were known to persons having knowledge of the service."

This had for many years been the method of handling the mails carried by the three companies referred to when appellant made his proposal. True, he says he did not know it; but the advertisement warned him of the necessity of making himself familiar with the "terms of the contract, schedule of services and instruction herein, before they should assume any liabilities as such bidders or sureties, to prevent misapprehension." Among the facts found is this:

"Prior to submitting said proposal the claimant carefully read the advertisement and instructions to bidders, and familiarized himself with their terms, and knew that the trains of the Chicago & Northwestern Railroad, the Chicago, Milwaukee, & St. Paul Railroad, and the Wabash Railroad entered the Union Station at Omaha, and to further inform himself as to the amount and character *of the service[504 to be performed he consulted the postmaster and superintendent of mails at Omaha, who called his attention to the Instructions to Bidders; also a Mr. Anderson, who had been in charge of the work under a former contract, who explained to him the three depots, including the Union Station, and the mail to be taken from them, and the number of wagons it would take to perform the service."

Knowing of the manner in which the mails carried by the three railroads in question were handled, acquired after the contract was signed, is not, of course, fatal to his contention that the contract did not include that mail matter. It does, however, appear that after his proposal had been accepted, and before the beginning of performance, he actually took a temporary contract for the carriage of the identical mails, so that when he entered upon his own regular contract he was fully aware of the conditions. This must, at least, weaken the force of his going forward under protest. But aside from this information, the advertisement and instructions warned him to familiarize himself with the situation by personal investigation and inquiry. This he asserted he had done, for in his printed proposal he stated that "this proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service, and also after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby."

But it is urged that appellant is at least entitled to a judgment for \$2,984.72, which the court below found to be the amount due when the contract was terminated. This contention is based upon the absence of any pleading setting up as a

counterclaim or set-off the difference between the cost of the service under the reletting and the entire contract price for the full term under appellant's contract. But no such objection seems to have been made in the court of claims. That court 505] had all the facts before *it. It found that there was due on May 20, 1903, for services under the contract prior thereto, \$2,984.72. But it found, on the other hand, that at that date the contract had been lawfully annulled, and that the necessary reletting had resulted in a loss to the government of a very much larger sum. Upon this showing it properly concluded that the amount due was more than offset by the loss resulting from reletting at a higher price. How it might be if this objection had been seasonably made, it is not an error for which this court will reverse when not made until upon appeal. In *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 212, 41 L. ed. 399, 407, 17 Sup. Ct. Rep. 45, a like objection was made as to claims coming from the court of claims, and this court said:

"The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the \$12,532.43 out of moneys due petitioner, which was therefore entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclosed that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the court of claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand."

Judgment affirmed.

506]*CLARENCE D. ROBINSON, Plff. in Err.,
v.

BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 506-512.)

Carriers — remedy for discrimination in rates — necessity of action by Interstate Commerce Commission.

1. Investigation by the Interstate Commerce Commission and an appropriate finding and order are prerequisite to the right of a shipper to maintain an action to recover from a carrier the excess which he claims

to have paid under a regularly established and published rate which is attacked as unjustly discriminatory, notwithstanding the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 22, that nothing therein contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

[For other cases, see *Carriers*, 241, 242, in Digest Sup. Ct. 1908.]

Judicial notice — decision of Interstate Commerce Commission.

2. Judicial notice of a decision of the Interstate Commerce Commission, authoritatively published in its reports, need not be taken by a state court because of the provision of the act of February 4, 1887, § 14, making the authorized publications of the Commission competent evidence without further proof or authentication, where such decision was not mentioned in the pleadings nor in the agreed statement of facts, since the purpose of the statute is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions, and it does not otherwise change the rules of evidence.

[For other cases, see *Evidence*, I. c, in Digest Sup. Ct. 1908.]

[No. 17.]

Submitted April 28, 1911. Decided January 9, 1912.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a judgment which affirmed a judgment of the Circuit Court of Marion County, in that state, dismissing an action by a shipper to recover from a carrier the excess which he claims to have paid under a rate attacked as unjustly discriminatory. Affirmed.

See same case below, 64 W. Va. 406, 63 S. E. 323.

The facts are stated in the opinion.

Mr. Charles H. Leeds submitted the cause for plaintiff in error.

Messrs. Hugh L. Bond, Jr., and W. Irvine Cross submitted the cause for defendant in error. Mr. A. Hunter Boyd, Jr., was on the brief.

Mr. Justice Van Devanter delivered the opinion of the court:

In February, March, and May, 1903, Robinson, the plaintiff in error, shipped

NOTE.—As to jurisdiction of courts pending proceedings before Interstate Commerce Commission—see note to *Sandusky-Portland Cement Co. v. Baltimore & O. R. Co.* 111 C. C. A. 443.

On judicial notice—see note to *Olive v. State*, 4 L.R.A. 33.

eleven carloads of coal from Fairmont, West Virginia, to points in other states, over the railroad of the Baltimore & Ohio Railroad Company, the defendant in error, and paid the rate thereon which was prescribed in a schedule published and filed conformably to the act to regulate interstate commerce, and then in full force. By this schedule the rate was 50 cents more per ton when the coal was loaded into the car from wagons than when the loading was from a tippie. Robinson's shipments came under the higher rate, and the charges paid by him were \$150 in excess of what would have been exacted if his coal had been loaded from a tippie. Conceiving that the schedule unjustly discriminated between shipments loaded from tipples and those loaded from wagons, he brought, in the circuit court of Marion county, West Virginia, on April 19, 1906, an action against the railroad company to recover the excess so paid. The case was heard upon an agreed statement of facts, which set forth, with some detail, the matters just stated, and recited that it embodied "all the facts and evidence in the cause." But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission, or had been found by the Commission to be unjustly discriminatory, or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule, or to make reparation to Robinson or any other shipper because of prior exactions thereunder. Being of opinion that, upon the agreed statement, Robinson was not entitled *to recover, the court entered a judgment dismissing his action, and that judgment was affirmed by the supreme court of appeals of the state. 64 W. Va. 406, 63 S. E. 323. He then sued out this writ of error upon the ground that, by the judgment of affirmance, he was denied rights specially set up under the act to regulate interstate commerce.

The first question to be considered is whether, consistently with the provisions of that act, Robinson could maintain his action for reparation in the absence of an order by the Interstate Commerce Commission finding that the established schedule whereby the additional 50 cents per ton was exacted was unjustly discriminatory, determining what reparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the reparation indicated. It was contended by him in the supreme court of appeals of the state, and is contended now, that the question should be answered in the affirmative because of the provision in § 22 56 L. ed.

that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." But it must be ruled otherwise, and for these reasons:

The act, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154; chap. 382, 25 Stat. at L. 855, U. S. Comp. Stat. 1901, p. 3158; chap. 61, 28 Stat. at L. 643, U. S. Comp. Stat. 1901, p. 3171; chap. 708, 32 Stat. at L. 847, U. S. Comp. Stat. Supp. 1909, p. 1138, whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them *while they remained in effect, invest-[509] ed the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation by an action in the circuit court of the United States if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such

an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared 510]*rule that a rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure.

In the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 440, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, where such a right was asserted and denied, it was said by this court:

"Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with the power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on 511]*this subject, there might *be divergence between the action of the Commission

and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance, and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same,—one is as likely to become the subject of diverging opinions and conflicting decisions as is the other; and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory upon both carrier and shipper.

Of course, the provision in § 22, as also the provision in § 9, must be read in connection with other parts of the act, and be interpreted with due regard to its manifest purpose; and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* supra, pp. 442, 446.

The next question to be considered is whether judicial notice should have been taken of the decision of the Commission in *Glade Coal Co. v. Baltimore & O. R. Co.* wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28, 1904, and authoritatively published in 10 Inters. Com. Rep. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the supreme *court of appeals of [512 the state it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in § 14 of the act, which reads: "The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be *competent evidence* of the reports and decisions of the Commission contained therein, in all courts of the United States and of the several states, without any further proof or authentication thereof."

Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed, or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute.

The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here.

It follows that the judgment must be affirmed, and it is so ordered.

Affirmed.

513]*UNITED STATES, Plff. in Err.,
v.

B. H. BARNES and F. D. Barnes.

(See S. C. Reporter's ed. 513-522.)

**Internal revenue — oleomargarin act —
expressio unius est exclusio alterius.**

1. The express extension of the provisions of U. S. Rev. Stat. §§ 3232-3241, and 3243, U. S. Comp. Stat. 1901, pp. 2091, 2095, which deal with special taxes, to the special tax on oleomargarin, made by § 3 of the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), imposing such tax, and not purporting to be complete in itself, is not an implied exclusion of the general provisions of § 3177 (U. S. Comp. Stat. 1901, p. 2069), for the entry by revenue officers of any building or place where any articles or objects subject to tax are made, produced, or kept, for the purpose of examining such articles or objects.

[For other cases, see Internal Revenue, III. k, in Digest Sup. Ct. 1908.]

Statutes — repeal by implication.

2. Subsequent legislation upon a general subject covered by a code or systematic

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey*, 4 L.R.A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235. 56 L. ed.

collection of general rules dealing with such subject in a comprehensive way carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.

[For other cases, see Statutes, III. b, in Digest Sup. Ct. 1908.]

[No. 565.]

Argued October 24, 1911. Decided January 9, 1912.

IN ERROR to the District Court of the United States for the Western District of Kentucky to review a judgment sustaining a demurrer to an indictment for forcibly obstructing the entrance by revenue officers of a building where oleomargarin is kept. Reversed.

The facts are stated in the opinion.

Assistant Attorney General **Harr** argued the cause and filed a brief for plaintiff in error:

Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain.

United States v. Fisher, 2 Cranch, 386, 2 L. ed. 313.

Upon principle, as well as because of the untoward consequence referred to, the oleomargarin act of 1886, being a revenue act (*Re Kollock*, 165 U. S. 526, 536, 41 L. ed. 813, 816, 17 Sup. Ct. Rep. 444), should be construed together with the general statutes relating to collection of and the prevention of frauds upon the revenue; especially as it contains no adequate provisions on that subject, and would be practically inoperative otherwise.

Saxonville Mills v. Russell, 116 U. S. 13, 21, 29 L. ed. 554, 556, 6 Sup. Ct. Rep. 237.

The departmental construction is in accordance with the contention that general internal-revenue statutes apply in oleomargarin cases.

Treasury Decisions, Internal Revenue, No. 1266; 26 Ops. Atty. Gen. 282.

There are authorities holding general internal-revenue statutes apply in oleomargarin cases.

United States v. Fitzsimmons (1909; D. C. E. D. Mich.); *Hastings v. Herold*, 184 Fed. 759.

Mr. **Henry M. Johnson** argued the cause and filed a brief for defendants in error:

Congress did not intend the machinery of U. S. Rev. Stat. §§ 3173-3177, U. S. Comp. Stat. 1901, pp. 2065-2069, to apply to the oleomargarin law, for if it had, it would have unmistakably indicated its intention.

Re Archer, 9 Ben. 428, Fed. Cas. No.

506; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. ed. 1048; *Re Kearns*, 64 Fed. 481; *Re Kinney*, 102 Fed. 468; *Schafer v. Craft*, 144 Fed. 908, 82 C. C. A. 349, 153 Fed. 176, 83 C. C. A. 677, 154 Fed. 1002; *Grier v. Tucker*, 150 Fed. 658, 87 C. C. A. 513, 160 Fed. 611.

The Commissioner of Internal Revenue cannot, by a construction which he places upon an act, extend a penal statute by implication. Penalties are never extended by implication.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; *Elliott v. East Pennsylvania R. Co.* 99 U. S. 573, 25 L. ed. 292; *Erskine v. Milwaukee & St. P. R. Co.* 94 U. S. 619, 24 L. ed. 133; *The Ben R.* 67 C. C. A. 290, 134 Fed. 785; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

No mere omission or failure to provide for contingencies will justify judicial addition to a statute.

United States v. Goldenberg, 168 U. S. 103, 42 L. ed. 398, 18 Sup. Ct. Rep. 3; *Glover v. United States*, 164 U. S. 295, 41 L. ed. 440, 17 Sup. Ct. Rep. 95; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92.

The construction of the tariff act by the Treasury Department was not conclusive upon either party, and the collector was not justified by such instructions in imposing duties not warranted by law.

Lennig v. Maxwell, 3 Blatchf. 125, Fed. Cas. No. 8,243; *Balfour v. Sullivan*, 17 Fed. 233.

The construction given to the internal revenue act by commissioners of internal revenue, even though published, is not a construction of so much dignity that the re-enactment of the statute, subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction.

Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80.

Nor is there any force in the argument that "in case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive." There is no ambiguity in the oleomargarin law, and the Supreme Court of the United States made summary disposition of the ruling placed by the Treasury Department on the applicability of § 3176 to the succession tax law, which it held provided a specific penalty, necessarily exclusive.

Wright v. Blakeslee, 101 U. S. 174, 25 L. ed. 1048.

Mr. Justice **Van Devanter** delivered the opinion of the court:

The sole question presented for decision

by this writ of error is whether Rev. Stat. § 3177, U. S. Comp. Stat. 1901, p. 2069, is applicable to the collection *or en-[517]forcement of the specific tax imposed on oleomargarin by the act of August 2, 1886, chap. 840, 24 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 2228. In the district court a negative answer to the question was given, and an indictment drawn and returned upon the contrary view was held bad upon demurrer. To a right appreciation of the question it is essential that a brief outline be given of the internal revenue laws, of which § 3177 is a part, and of the later oleomargarin act.

Title 35 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2038) is a codification and consolidation, according to an orderly arrangement, of all the then-existing laws relating to internal revenue. It is subdivided into chapters, each embracing cognate sections bearing upon a particular branch of the general subject. The first two chapters, one dealing with the officers of internal revenue and the other with assessments and collections, are, with minor exceptions, general in their terms and application. The third chapter deals with "special taxes" exacted of those who engage in designated classes of business, such as rectifying or selling distilled spirits and manufacturing or selling cigars; other chapters deal separately with specific taxes imposed upon particular articles or objects, such as distilled spirits and cigars, and the final chapter comprises provisions common to several objects of taxation. Section 3177 is a part of the second chapter, dealing with assessments and collections, and reads:

"Any collector, deputy collector, or inspector may enter, in the daytime, any building or place where *any articles or objects subject to tax* are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers *may enter[518] them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting

in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court."

It will be perceived that the section is comprehensive in its terms and evidently designed to promote the enforcement of the revenue laws as to "any articles or objects subject to tax."

The act of August 2, 1886, is a revenue law of the same class as those embodied in title 35 of the Revised Statutes. It imposes a specific tax on oleomargarin and "special taxes" on those who engage in its manufacture or sale, and contains several administrative and penal provisions. But it does not purport to be independent of other legislation or complete in itself. On the contrary, it plainly contemplates the existence of an established system of revenue laws to which resort shall be had in carrying it into effect. Section 3, which imposes the special taxes, declares that §§ 3232 to 3241, and 3243, of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 2091 to 2094, and 2095), "are, so far as applicable, made to extend to . . . the special taxes imposed by this section and to the persons upon whom they are imposed."

It is the express extension of those sections to the special taxes imposed by the oleomargarin act which gives rise to the question before stated. The position taken by the defendants in error, and sustained by the district court, is, that that extension of particular sections is an implied exclusion of all others. *Expressio unius est exclusio alterius*.

519] *We are unable to assent to that position. The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not. In the instance now before us too much is claimed for it. The sections named in § 3 of the oleomargarin act are a part of chapter 3 of title 35 of the Revised Statutes. They relate exclusively to special taxes, and are so restricted in their terms that it is at least doubtful that they could be applied to any special taxes not imposed by that chapter, unless expressly extended to them. To illustrate, § 3232, which precedes the others and is more or less a key to their meaning, declares: "No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided." On the other hand, the sections in chapters 1 and 2 are, with minor exceptions, so

general in their terms as to leave no doubt of their applicability to taxes imposed by subsequent legislation containing no provision to the contrary. In other words, the difference between the sections named and those in chapters 1 and 2 discloses an occasion for affirmatively extending the operation of the former, and no occasion for mentioning the latter. It also is apparent that the oleomargarin act will measurably fail of its purpose if the general provisions of chapters 1 and 2 are not applicable to the taxes which it imposes; for, as before indicated, it does not in itself provide a complete or effective scheme for their enforcement. Neither does it contain any provision for the redress of those from whom such taxes are erroneously or illegally exacted, although the settled policy of the government long has been to afford relief from all such exactions, as is shown by §§ 3220, 3226, 3227, and 3228 in chapter 2 (U. S. Comp. Stat. 1901, pp. 2086, 2088, 2089). These omissions are cogent evidence that it is intended that recourse shall be had to the "general provisions of[520 chapters 1 and 2, save as, in the oleomargarin act, it may be provided otherwise.

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood v. United States*, 16 Pet. 342, 363, 10 L. ed. 987, 995, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: "And it may be added that, in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the customhouse officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is, that the legislature intend the new laws to

be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former." In *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 29 L. ed. 554, 556, 6 Sup. Ct. Rep. 237, it was said, in disposing of a 521]like *question: "It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." And in *Catholic Bishop v. Gibbon*, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779, where the question was whether general statutes defining the powers of the officers of the Land Department were applicable to a grant of public lands by a subsequent act of Congress, it was said: "While there may be no specific reference in the act of 1848 [9 Stat. at L. 323, chap. 177] of questions arising under this grant to the Land Department, yet its administration comes within the scope of the general powers vested in that Department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary."

We conclude that, while the express extension of particular sections in chapter 3, dealing with special taxes, to the like taxes imposed by § 3 of the oleomargarin act, may operate as an implied exclusion of the other sections in that chapter, it does not in any wise restrict or affect the operation of any of the general sections in chapters 1 and 2. And as § 3177 is a part of chapter 2, is general in its terms, and does not appear to be repugnant to any provision in the oleomargarin act, we think the question 522]*first above stated must be answered in the affirmative.

The cases of *Craft v. Schafer*, 83 C. C. A. 677, 154 Fed. 1002; *Tucker v. Grier*, 87

C. C. A. 513, 160 Fed. 611, and *Hastings v. Herold*, 184 Fed. 759, although not involving § 3177, disclose some contrariety of opinion in the lower Federal courts upon the matter principally discussed herein, and we deem it appropriate to observe that our conclusion has been reached only after a careful consideration of those cases.

Reversed.

M. E. SOLIAH, W. H. M. Lyche, and J. O. Staupé, Plffs. in Err.,
v.

SVEN HESKIN, K. T. Petersen, and Hans Kringlen, Constituting the Board of County Drain Commissioners in and for Traill County, North Dakota.

(See S. C. Reporter's ed. 522-524.)

Constitutional law — due process of law — local officers.

1. The power of a state to determine what duties may be performed by local officers, and whether they shall be appointed or elected by the people, was not taken away by the due-process-of-law clause of the 14th Amendment to the Federal Constitution.

[For other cases, see *Constitutional Law*, IV. b, 1, in *Digest Sup. Ct.* 1908.]

Constitutional law — due process of law — public improvements.

2. A state statute authorizing an appointed drainage board to determine whether a proposed drain will be a public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, is not invalidated by the due-process-of-law clause of the 14th Amendment to the Federal Constitution, if notice is given, and an opportunity to be heard is afforded the landowner before the assessment becomes a lien against his property. [For other cases, see *Constitutional Law*, 559-581, in *Digest Sup. Ct.* 1908.]

Constitutional law — due process of law — taxation.

3. The power of a state to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of a drain, was not taken away by the due-process-of-law clause

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 523-553, in Digest Sup. Ct. 1908.]

[No. 76.]

Argued December 5, 1911. Decided January 9, 1912.

IN ERROR to the District Court of Traill County, in the State of North Dakota, to review a decree affirmed by the Supreme Court of the State, sustaining a demurrer to and dismissing the complaint in a suit to enjoin a drainage board from making and collecting special assessments for benefits conferred by a drain. Affirmed.

See same case below in supreme court, 17 N. D. 393, 117 N. W. 125.

Mr. Edward Engerud argued the cause, and, with Mr. P. G. Swenson, filed a brief for plaintiffs in error:

The establishment of a local improvement, such as a drain, and the laying of the tax or assessment therefor, are acts pertaining and belonging to the legislative department of the government.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The exercise of this legislative power, however, obviously involves in its exercise acts of an administrative and quasi judicial nature. These administrative and quasi judicial acts involved in the exercise of this legislative power include the adoption of the plan for the work, the letting of contracts for construction, and the equalization or apportionment of the burden of the cost amongst the lands or persons affected according to the relative benefits received, etc. All these administrative or quasi judicial powers which are necessary incidents to the exercise of the legislative power may be delegated to such officers or tribunals as the legislature may deem fit.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The only limitation upon such delegation of power with respect to acts of this character is that the officer or board or tribunal to whom such power is delegated

must afford a hearing upon adequate notice to those affected.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 711, 28 L. ed. 573, 4 Sup. Ct. Rep. 663; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

But as to those features of the legislative power to authorize or require a local improvement payable by tax or special assessment, which are not administrative or judicial in character, and which require the exercise of what may be termed purely legislative judgment, different considerations apply. The duty and the right to exercise such purely legislative judgment is, in our form of government, exclusively intrusted to the legislative department, and the legislature cannot rightfully surrender it to others, or refuse to exercise that power itself. It cannot be delegated to any other officer, board, or tribunal. The only exception to the principle mentioned is that the full legislative power in this respect may be delegated to local representative bodies with respect to matters of local concern. This exception is one that is necessarily implied as necessary to local self-government which is essential to our form of government.

1 Cooley, Taxn. 3d ed. pp. 95-101; Bradshaw v. Lankford, 73 Md. 428, 11 L.R.A. 582, 25 Am. St. Rep. 602, 21 Atl. 66; State v. Armstrong, 3 Sneed, 654; Bernards Twp. v. Allen, 61 N. J. L. 228, 39 Atl. 716.

Nowhere has this principle been more fully recognized and firmly adhered to than in North Dakota.

State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; Valletly v. Park Comrs. 16 N. D. 25, 15 L.R.A. (N.S.) 61, 111 N. W. 615; Morton v. Holes, 17 N. D. 154, 115 N. W. 256.

In a republican form of government there can be no taxation without representation.

1 Cooley, Taxn. 3d ed. pp. 85-101; Bradshaw v. Lankford, 73 Md. 428, 11 L.R.A. 582, 25 Am. St. Rep. 602, 21 Atl. 66; State v. Armstrong, 3 Sneed, 654; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People ex rel. Atty. Gen. v. Lothrop, 24 Mich. 235; People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; People ex rel. Atty. Gen.

v. Detroit, 29 Mich. 108; *People ex rel. Park Comrs. v. Detroit*, 29 Mich. 344; *Schultes v. Eberly*, 82 Ala. 242, 2 So. 345; *State, Gaines, Prosecutor, v. Hudson County*, 37 N. J. L. 12; *People v. Parks*, 58 Cal. 624; *Houghton v. Austin*, 47 Cal. 646; *Harward v. St. Claire & M. Levee & Drainage Co.* 51 Ill. 130; *People ex rel. McCogg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Hinze v. People*, 92 Ill. 406; *Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416; *Parks v. Wyandotte County*, 61 Fed. 436; *State ex rel. Howe v. Des Moines*, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; *Barnes v. Dyer*, 56 Vt. 469; *Bernards Twp. v. Allen*, 61 N. J. L. 228, 39 Atl. 716.

The legislature cannot levy a special assessment unless the probable benefit equals or exceeds the probable cost.

Williams v. Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; *Walsh v. Barron*, 61 Ohio St. 15, 76 Am. St. Rep. 354, 55 N. E. 164; *State, Agens, Prosecutor, v. Newark*, 18 Am. Rep. 729, 37 N. J. L. 415.

The act deprives those affected by the proceedings of the drain commissioners of the only protection which the law of the land affords against the oppressive exercise of such power.

Schultes v. Eberly, 82 Ala. 242, 2 So. 348; *Vallely v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615; *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 606; *Lovington v. Wider*, 53 Ill. 302.

The principle that purely legislative power cannot be delegated is just as true of the police power or any other form of legislative power as it is of the power of taxation.

State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; *Bradshaw v. Lankford*, 73 Md. 428, 11 L.R.A. 582, 25 Am. St. Rep. 602, 21 Atl. 66; *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 11 L.R.A. 285, 15 S. W. 56; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *State ex rel. Luley v. Simons*, 32 Minn. 540, 21 N. W. 750.

Special assessments for local improvements are an exercise of the taxing power.

Cooley, Taxn. 3d ed. p. 1181; *Hamilton, Special Assessments*, p. 38, § 49; *Desty, Taxn.* p. 1117, 1265, 1266; 2 Dill. Mun. Corp. 4th ed. § 752; *Cooley, Const. Lim.* pp. 213-216; *Burroughs, Taxn.* pp. 458-463; 25 Am. & Eng. Enc. Law, 2d ed. 458-468.

The provision of this act for notice and hearing is not sufficient to make the proceedings comply with the requirements of "due process."

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 173, 41 L. ed. 393, 17 Sup. Ct. Rep. 56; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

A perusal of the cases sustaining statutes providing for taxation or assessment for local improvements will disclose that they all reserve to some competent representative body the decision of the question as to whether a local improvement shall or shall not be constructed; so that only powers of an administrative or judicial nature are delegated to the officer or board created to execute the work.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Holt v. Somerville*, 127 Mass. 408; *Maddux v. Newport*, 12 Ky. L. Rep. 657, 14 S. W. 957; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Ruggles v. Collier*, 43 Mo. 353; *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662; *Voigt v. Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 711, 28 L. ed. 573, 4 Sup. Ct. Rep. 663; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Re Banta*, 60 N. Y. 165; *Dennison v. Kansas*, 95 Mo. 416, 8 S. W. 429; *Covington v. Nelson*, 35 Ind. 532; *Corry v. Gaynor*, 22 Ohio St. 584; *Rogers v. St. Paul*, 22 Minn. 494; *State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216;

Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846; Blake v. People, 109 Ill. 504.

The decisions of the United States Supreme Court establish: (1) That the apportionment of a tax or assessment for a local improvement may be committed for final decision to any board, tribunal, or officer which the legislature may see fit to designate for such purpose; (2) that if the apportionment or any other administrative or quasi judicial function is committed to an administrative board or officer, its decision cannot be made final unless there is a hearing provided for upon adequate notice, which hearing may be either before the administrative officer or board itself, or before some other tribunal; (3) the question as to the necessity or propriety of any given work, to be paid for either by general taxation or special assessment, is a purely legislative question; (4) a purely legislative question of that character may be finally decided without notice or hearing.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Wurtz v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Paulsen v. Portland, 149 U. S. 37, 37 L. ed. 640, 13 Sup. Ct. Rep. 750; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 167, 41 L. ed. 391, 17 Sup. Ct. Rep. 56; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Williams v. Eggleston, 170 U. S. 308, 42 L. ed. 1048, 18 Sup. Ct. Rep. 617; Parsons v. District of Columbia, 170 U. S. 50, 42 L. ed. 945, 18 Sup. Ct. Rep. 521; Bauman v. Ross, 167 U. S. 553, 42 L. ed. 275, 17 Sup. Ct. Rep. 966; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Voigt v. Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

None of these cases hold that purely legislative power, as distinguished from administrative and quasi judicial power, may be committed to a nonrepresentative administrative officer or board.

None of these cases are authority for the broad statements made by the court below, to the effect that the power to make local improvements and levy assessments therefor may be delegated by the legislature to any agency it sees fit to select, provided only a hearing upon notice is provided for

as to the apportionment of the assessment.

The following are cases where the principle we invoke was violated in acts delegating the taxing power, and the statute in each instance held void as an infraction of the law of the land:

Vallelly v. Park Comrs. 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615; Schultes v. Eberly, 82 Ala. 242, 2 So. 345; Marr v. Enloe, 1 Yerg. 452; Hope v. Deaderick, 8 Humph. 1, 47 Am. Dec. 597; Waterhouse v. Cleveland Public Schools, 8 Heisk. 857; Lipscomb v. Dean, 1 Lea, 546; People ex rel. Atty. Gen. v. Lothrop, 24 Mich. 235; People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; People v. Detroit, 29 Mich. 108; People ex rel. Park Comrs. v. Detroit, 29 Mich. 343; State, Gaines, Prosecutor, v. Hudson County, 37 N. J. L. 12; Bernards Twp. v. Allen, 61 N. J. L. 228, 39 Atl. 716; People v. Parks, 58 Cal. 624; Houghton v. Austin, 47 Cal. 646; People ex rel. McCogg v. Chicago, 51 Ill. 17, 2 Am. Rep. 278; Harward v. St. Clair & M. Levee & Drainage Co. 51 Ill. 130; Hessler v. Drainage Comrs. 53 Ill. 105; Lovington v. Wider, 53 Ill. 302; Foss v. Chicago, 56 Ill. 354; Leveeing Wabash River v. Huston, 71 Ill. 318; Hinze v. People, 92 Ill. 406; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; Wyandotte County v. Abbott, 52 Kan. 148, 34 Pac. 416; Parks v. Wyandotte County, 61 Fed. 436.

The court declined to hear Mr. J. S. Watson for defendants in error:

Although referable to the taxing power, local assessments are not, strictly speaking, taxes.

Independence v. Gates, 110 Mo. 374, 19 S. W. 728; Martin v. Tyler, 4 N. D. 303, 25 L.R.A. 838, 60 N. W. 392.

The legislature may confer upon local boards or officers, whether elective or appointive, the functions of assessing and apportioning the benefits for local improvements.

Martin v. Tyler, 4 N. D. 303, 25 L.R.A. 838, 60 N. W. 392; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; Sheboygan County v. Parker, 3 Wall. 93, 18 L. ed. 33; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County Drain Comrs. 11 N. D. 514, 92 N. W. 852; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; People ex rel. Hardy v. Drainage Comrs. 143 Ill. 417, 32 N. E. 688; 2 Cooley, Const. Lim. 3d ed. pp. 1237, 1241; Foster v. Rowe, 128 Wis. 326, 107 N. W. 635, 8 Ann. Cas. 595; Hamilton, Special Assess-

ments, § 553; 25 Am. & Eng. Enc. Law, 1219, 1220; O'Brien v. Baltimore County, 51 Md. 15; Crawford v. People, 82 Ill. 557; People ex rel. Cook v. Nearing, 27 N. Y. 306; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Territory ex rel. Smith v. Scott, 3 Dak. 357, 20 N. W. 401; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; Turner v. Detroit, 104 Mich. 326, 62 N. W. 405; State ex rel. Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Arnold v. Knoxville, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881.

Where, by the construction of a drain, an entire city, town, or township receives special benefit therefrom, we see no valid reason why such corporation cannot be required, as such, to contribute its share toward the cost of such local improvement.

Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; Muskego v. Drainage Comrs, 78 Wis. 40, 47 N. W. 11; Re Kingman, 153 Mass. 566, 12 L.R.A. 417, 27 N. E. 778.

The act in question does not take property without due process of law.

Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; Turnquist v. Cass County Drain Comrs. 11 N. D. 514, 92 N. W. 852; Jacobson v. Massachusetts, 197 U. S. 11, 24, 25, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 22, 28 L. ed. 889, 894, 5 Sup. Ct. Rep. 441; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 460, 49 L. ed. 831, 834, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 584, 587, 592, 50 L. ed. 596, 605, 607, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 355, 356, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; Walston v. Nevin, 128 U. S. 578, 582, 32 L. ed. 544, 546, 9 Sup. Ct. Rep. 192; Lent v. Tillson, 140 U. S. 316, 328, 35 L. ed. 419, 425, 11 Sup. Ct. Rep. 825; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 198, 199, 37 L. ed. 132, 134, 135, 13 Sup. Ct. Rep. 293; Paulsen v. Portland,

149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 157, 158, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56.

Counsel for plaintiffs in error have failed to recognize the distinction between general taxes and special assessments.

Rolph v. Fargo, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242; Webster v. Fargo, 9 N. D. 208, 56 L.R.A. 156, 82 N. W. 732, affirmed in 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Arnold v. Knoxville, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881; Kilgour v. Drainage Comrs. 111 Ill. 342, 350; Davidson v. New Orleans, 96 U. S. 97, 107, 24 L. ed. 616, 621; Bauman v. Ross, 167 U. S. 548, 589, 591, 593, 42 L. ed. 270, 288, 289, 17 Sup. Ct. Rep. 966; People ex rel. Lehigh Valley R. Co. v. Buffalo, 147 N. Y. 675, 42 N. E. 344.

Whether the estimate of damages and the assessment of benefits shall be intrusted to the same or to different commissioners is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. And there are many precedents for intrusting the performance of both duties to the same persons.

Barbier v. Connolly, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; New Iberia v. New Iberia & B. C. Drainage Dist. 106 La. 651, 31 So. 308; People ex rel. Sels v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1018.

The legislature must designate the rule of taxation, but the method of executing the law in accordance with the rule is administration, and not legislation.

State, King, Prosecutor, v. Reed, 43 N. J. L. 186; Cooley, Taxn. 50.

This court has recognized and sustained the right to impose special assessments against municipalities, as well as the determination of the amounts, through appointive agents.

Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

The legislature may delegate power to determine facts upon which the law makes or intends to make its operation depend.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; Slack v. Maysville & L. R. Co. 13 B. Mon. 1; San Antonio v. Jones, 28 Tex. 19; Johnson v. Martin, 75 Tex. 33, 12 S. W. 321; State ex rel. Dome v. Wilcox, 45 Mo. 458; Picton v. Cass County, 13 N. D. 242, 100 N. W. 711, 3 Ann. Cas. 345; State ex rel. Baltzell v.

Stewart, 74 Wis. 620, 6 L.R.A. 394, 43 N. W. 947; Huston v. Clark, 112 Ill. 344; Owners of Lands v. People, 113 Ill. 307; Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 763; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216.

Memorandum opinion by direction of the court. Mr. Justice Lamar:

Under the North Dakota statute the county commissions are authorized to appoint a drainage board in each county. On the petition of six persons, owning land to be affected, or of a sufficient number to show a public demand where the drain is intended to benefit a township, the board makes a preliminary examination. If it finds that the drain is for the public good and will cost less than the benefits, "notice containing a copy of the petition is published and an opportunity to be heard upon the matters pertaining thereto afforded the owners of all lands to be affected." "If it shall appear that there was sufficient cause for making the petition, and that the proposed drain will not cost more than the amount of the benefits," the board shall establish the drain. Their assessment of benefits is subject to review, but, when confirmed, is final, and is then extended on the tax list and collected as other taxes,—the amount assessed to any township is required to be included in its first general tax levy thereafter.

The plaintiffs in error, owning land in Mayville and Morgan townships, North Dakota, brought proceedings to enjoin a drainage board appointed by county commissioners from making and collecting special assessments against plaintiffs in error and the townships, for their proportion of the cost of a drain ordered to be constructed.

The supreme court of the state held that, while taxes could only be levied by elected 524] officers, special assessments *for benefits conferred by such drains might be imposed by appointed officers, and that the statute afforded due process of law. So far as the Federal questions are concerned, the judgment must be affirmed. For—

1. The 14th Amendment does not deprive a state of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people. Dreyer v. Illinois, 187 U. S. 72, (2) 83, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; Prentiss v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Mobile County v. Kimball, 102 U. S. 706, 26 L. ed. 242; Fallbrook Irrig. Dist. v. Bradley, 164 56 L. ed.

U. S. 112, 167, 41 L. ed. 369, 391, 17 Sup. Ct. Rep. 56.

2. Neither does that amendment invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the landowner before the assessment becomes a lien against his property. Ibid.

3. Nor does that amendment deprive a state of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing for the construction of the drain. Ibid.; Bauman v. Ross, 167 U. S. 548, 589-593, 42 L. ed. 270, 288, 289, 17 Sup. Ct. Rep. 966. Mobile County v. Kimball, 102 U. S. 703, 704, 26 L. ed. 241, 242.

Affirmed.

*FRED C. KEENEY, Individually and[525 as Administrator of the Estate of Susan A. Keeney, Deceased, Seth A. Keeney and Angie Keeney Schwegel, Plffs. in Err.,

v.

COMPTROLLER OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 525-537.)

Constitutional law — due process of law — inheritance tax — transfers inter vivos.

1. Property is not taken without due process of law, contrary to U. S. Const., 14th Amend., by the imposition of the tax authorized by N. Y. Laws 1896, chap. 908, when property is transferred by deed intended to take effect upon the death of the grantor.

[For other cases, see Constitutional Law, 554-556, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — inheritance tax — transfers inter vivos.

2. The tax measured by the value of the property, authorized by N. Y. Laws 1896, chap. 908, when property is transferred by deed intended to take effect upon the death of the grantor, is one in the nature of an excise tax on the transfer, and is not void as denying the equal protection of the laws guaranteed by U. S. Const., 14th Amend., because lacking in the elements of uniformity and equality required in the assessment of property taxes.

[For other cases, see Constitutional Law, 328-335, in Digest Sup. Ct. 1908.]

NOTE.—As to taxes on succession and collateral inheritances—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A.

Constitutional law — equal protection of the laws — classification — taxing transfers inter vivos.

3. Subjecting to the tax authorized by N. Y. Laws 1896, chap. 908, a transfer of property by deed intended to take effect at the death of the grantor, without taxing transfers intended to take effect upon the death of some person other than the grantor, or upon the happening of a certain or contingent event, does not involve such a discrimination as to deny the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

[For other cases, see *Constitutional Law*, 328-335, in *Digest Sup. Ct.* 1908.]

Statutes — who may question validity.

4. Children of a decedent, who, because of their relationship, are assessed at the lowest rate fixed by N. Y. Laws 1896, chap. 908, imposing a tax when property is transferred by deed intended to take effect at the death of the grantor, cannot urge that such statute operates to deny the equal protection of the laws because transfers to collaterals and strangers in blood are taxed a higher rate.

[For other cases, see *Statutes*, 53-60, in *Digest Sup. Ct.* 1908.]

Taxation — inheritance tax — transfers inter vivos — situs.

5. The transfer tax authorized by N. Y. Laws 1896, chap. 908, when personal property is transferred by a resident of the state by deed intended to take effect at her death, may validly be imposed, although, at the time of the grantor's death, when the payment of the tax is required, the property is in another state, in the hands of a trustee holding the title and possession by virtue of such deed.

[For other cases, see *Taxes*, 733-736, in *Digest Sup. Ct.* 1908.]

[No. 81.]

Argued December 6, 1911. Decided January 9, 1912.

IN ERROR to the Surrogate's Court of the County of Kings, in the state of New York, to review a judgment imposing a transfer tax, entered in pursuance of the mandate of the Court of Appeals of that state, which affirmed an order of the Appellate Division of the Supreme Court, Second Department, which had, in turn, af-

firmed a decree of the Surrogate's Court. Affirmed.

See same case below in Court of Appeals, 194 N. Y. 281, 87 N. E. 428.

Statement by Mr. Justice Lamar:

On June 13, 1903, Susan A. Keeney, a resident of New York, being in good health, executed in Kings county a deed, whereby she conveyed a cattle ranch in Texas and certain stocks and bonds to the Fidelity Trust Company of Newark, New Jersey, in trust, to hold the same during her lifetime, and to divide the net income equally between herself and her three children, two of whom reside out of the state of New York. The deed further provided that after her death the trustees should pay the entire income, or transfer the property, to her children, or their issue, on terms and limitations not material to this investigation. In the deed she "reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time after six months' notice in writing." She died March 29, 1907, being at the time a resident of Kings county, leaving an estate of the value of \$25,000 and the three children as sole heirs at law.

In tax proceedings the proper officers found that the stocks and bonds were of the then value of \$773,600, one fourth (\$193,400) being for the use of Mrs. Keeney for life, and the remainder to her children, being intended to take effect at her death. It was held that their interest was subject to the tax imposed by the [527] New York statute of 1896, which provides:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal . . . or of any interest therein or income therefrom, in trust or otherwise. . . . 3. When the transfer is of property made by a resident, or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death." [Laws of 1896, chap. 908, § 220.]

Mrs. Keeney's administrator and chil-

171; *Com. v. Ferguson*, 10 L.R.A. 240; *Re Romaine*, 12 L.R.A. 401; and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

As to the constitutionality of such taxes—see note to *Rodman v. Com.* 33 L.R.A. (N.S.) 592.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 300

24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to *Pugh v. Pugh*, 32 L.R.A. (N.S.) 954.

dren appealed on the ground that the taxable transfer act of New York, in so far as it imposes a tax upon property transferred *inter vivos*, violated the 14th Amendment, in that it took the property without due process of law, and the different rates of taxation and classification were of such discriminatory a character as to deny the equal protection of the law.

The judgment was affirmed. The case is here on writ of error from the final order of the surrogate court, entered in pursuance of the mandate of the court of appeals. 194 N. Y. 281, 87 N. E. 428.

Mr. George F. Canfield argued the cause, and, with Mr. Karl T. Frederick, filed a brief for plaintiff in error:

Assuming for the purpose of argument, that the court of appeals was right in saying that the state was taxing a transfer of property (an assumption contrary to fact, as hereinafter contended), the transfer in this case was strictly a conveyance *inter vivos*, and was in no sense testamentary. The tax must therefore be sharply distinguished from an inheritance tax.

Ridden v. Thrall, 125 N. Y. 572, 11 L.R.A. 684, 21 Am. St. Rep. 758, 26 N. E. 627; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Re Brandreth, 169 N. Y. 437, 58 L.R.A. 148, 62 N. E. 563; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

The tax in this case upon all remainders limited to take effect in possession after the death of the grantor is not imposed under the taxing power proper of the state, and cannot be upheld as an exercise thereof, because it is based upon a classification which has no reasonable relation to taxation.

Fraser v. McConway & T. Co. 82 Fed. 257; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; Re Brandreth, 169 N. Y. 437, 58 L.R.A. 148, 62 N. E. 563.

The tax cannot be upheld under the general regulative or police power of the state, because it is not imposed for the purpose of regulating or promoting any of those interests of society which may be regulated or promoted under the police power.

Barbier v. Connolly, 113 U. S. 27, 28 L. 56 L. ed.

ed. 923, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Graves, 52 Misc. 433, 103 N. Y. Supp. 571; Re Edgerton, 35 App. Div. 125, 54 N. Y. Supp. 700, affirmed in 158 N. Y. 671, 52 N. E. 1124.

The assumption so far made, that the tax herein complained of is a tax upon the transfer of property, is contrary to fact. No such tax was imposed in this case, and the section of law under which the tax was imposed does not in effect provide for a tax upon "a transfer" of property, but only upon "a coming into possession" of property previously transferred.

Re Gould, 156 N. Y. 423, 51 N. E. 287; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Re Seaman, 147 N. Y. 69, 41 N. E. 401; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; Re Brandreth, 169 N. Y. 437, 58 L.R.A. 148, 62 N. E. 563.

A tax upon the coming into possession of property is unconstitutional because it deprives appellants of their property without due process of law, and denies to them the equal protection of the laws.

Re Pell, 71 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

The tax upon the coming into possession of the property in this case is also bad, because the property was situated, and the coming into possession took place, in the state of New Jersey; and of the three persons beneficially interested in the property, two were nonresidents of the state of New York, one, Seth A. Keeney, being a resident of California, and the other, Angie Schwegel, being a resident of Austria. The state, therefore, had no jurisdiction over such property.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Re Pell, *supra*.

Mr. William Law Stout argued the cause and filed a brief for defendant in error:

The enactment of rules, regulations, and principles governing the transmission of property by will, intestacy, or other conveyances testamentary in character and effect, is within the exclusive province of the

state. The Supreme Court of the United States will look to the statutes of the state for the rules governing the descent and testamentary transfer, alienation, and succession of property. This court will not only adopt, but is bound by, the decisions of the highest courts of the states as to the effect and interpretation of wills and instruments of title.

Orr v. Gilman, 183 U. S. 278, 283, 290, 46 L. ed. 196, 200, 202, 22 Sup. Ct. Rep. 213; De Vaughan v. Hutchinson, 165 U. S. 566-570, 41 L. ed. 827-829, 17 Sup. Ct. Rep. 461; Clarke v. Clarke, 178 U. S. 186-190, 44 L. ed. 1028-1031, 20 Sup. Ct. Rep. 873; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580-583, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114-132, 46 L. ed. 830-841, 22 Sup. Ct. Rep. 552; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.)—, 30 Sup. Ct. Rep. 676; Leffingwell v. Warren, 2 Black, 599-603, 17 L. ed. 261, 262; Randall v. Brigham, 7 Wall. 523-541, 19 L. ed. 285-293; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 163, 167, 36 L. ed. 925, 927, 928, 13 Sup. Ct. Rep. 54; Moffitt v. Kelly, 218 U. S. 400-405, 54 L. ed. 1086-1088, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79.

This court will also be bound by the decision of the highest court of the state that there is nothing in the statute or its enforcement in conflict with the Constitution of the state, and that the proceedings taken therein for its ascertainment did not deprive the plaintiffs in error of their property without due process of law, within the meaning of the state Constitution.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1-47, 50 L. ed. 65-79, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Orr v. Gilman, 183 U. S. 278-283, 46 L. ed. 196-200, 22 Sup. Ct. Rep. 213; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580-583, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729.

The interpretation and construction placed by the highest court of the state upon its statutes is conclusive upon this court.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Watson v. Maryland, 218 U. S. 173-175, 54 L. ed. 987-989, 30 Sup. Ct. Rep. 644; Kentucky Union Co. v. Kentucky, 219 U. S. 140-151, 55 L. ed. 137-154, 31 Sup.

Ct. Rep. 171; Tilt v. Kelsey, 207 U. S. 43-56, 52 L. ed. 95-101, 28 Sup. Ct. Rep. 1; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114-122, 46 L. ed. 830-834, 22 Sup. Ct. Rep. 566; Moffitt v. Kelly, 218 U. S. 400-405, 54 L. ed. 1086-1088, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79; Chanler v. Kelsey, 205 U. S. 477, 51 L. ed. 888, 27 Sup. Ct. Rep. 550; Cahen v. Brewster, 203 U. S. 551, 51 L. ed. 313, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215.

In a long line of decisions of the courts of New York it will be seen that the intention of the grantor, vendor, or donor must be found. This is the test of the alleged gift. The enjoyment for life of the former owner is a determining feature; necessarily the character of the gift is determined by the acts of the owner; the withholding of this possession and enjoyment of the corpus or any determinate part thereof determines how much thereof is applicable to the statute.

Re Brandreth, 169 N. Y. 437, 58 L.R.A. 148, 62 N. E. 563; Re Green, 153 N. Y. 223, 47 N. E. 292; Re Cruger, 54 App. Div. 405, 66 N. Y. Supp. 636; Re Cornell, 170 N. Y. 423, 63 N. E. 445; Re Patterson, 130 N. Y. Supp. 970; Re Skinner, 106 App. Div. 217, 94 N. Y. Supp. 144; Re Palmer, 117 App. Div. 360, 102 N. Y. Supp. 236; Re Bullard, 76 App. Div. 207, 78 N. Y. Supp. 491; Re Bostwick, 160 N. Y. 489, 55 N. E. 208; Re Keeney, 194 N. Y. 281, 87 N. E. 428.

As to findings of fact and conclusions of law, the determination of the state court raises no question of error under the Constitution of the United States.

Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566.

The 14th Amendment does not affect or control the states in the exercise of their sovereign authority to regulate inheritances and to determine the persons or objects upon which an inheritance tax shall be imposed.

Campbell v. California, 200 U. S. 94, 50 L. ed. 387, 26 Sup. Ct. Rep. 182.

The tax upon the right to testamentary successions is not in contravention or in violation of any provision of the Constitution of the United States.

Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Nagoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Blackstone v. Miller, 188 U. S. 189-201, 47 L. ed. 439-443, 23 Sup. Ct. Rep.

277; *Billings v. Illinois*, 188 U. S. 97-104, 47 L. ed. 400-403, 23 Sup. Ct. Rep. 272; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Moffitt v. Kelly*, 218 U. S. 400-405, 54 L. ed. 1086-1088, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79.

The right to take property by devise or descent is a creature of the law, and not a natural gift; since it is a privilege granted and conferred by the state, the state may confer particular rights of succession, but with them impose conditions, limitations, classifications, and impositions upon the right of each particular succession granted.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283-288, 42 L. ed. 1037-1041, 18 Sup. Ct. Rep. 594; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *United States v. Perkins*, 163 U. S. 625-628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 107; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 184; *Re Hoffman*, 143 N. Y. 331, 38 N. E. 311; *Re Cullum*, 145 N. Y. 593, 40 N. E. 163.

The court of appeals of the state of New York has construed the statute imposing this tax as a tax upon the right to particular successions, and not upon the property.

Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Re Merriam*, 141 N. Y. 480, 36 N. E. 505; *Re Hoffman*, 143 N. Y. 329, 38 N. E. 311; *Re Cullum*, 145 N. Y. 593, 40 N. E. 163; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032; *Re Dows*, 167 N. Y. 232, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439; *Re Vanderbilt*, 172 N. Y. 72, 64 N. E. 782.

This interpretation of the tax as a tax upon the right of testamentary successions has been uniformly recognized by the Supreme Court of the United States.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 184; *United States v. Perkins*, 163 U. S. 625, 628, 630, 41 L. ed. 287-289, 16 Sup. Ct. Rep. 1073; *Knowlton v. Moore*, 178 U. S. 41, 55, 57, 59, 44 L. ed. 969, 975-977, 20 Sup. Ct. Rep. 747; *Blackstone v. Miller*, 188 U. S. 189, 203, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277; *Plummer v. Coler*, 178 U. S. 115, 119, 121, 122, 44 L. ed. 998, 1002, 1003, 20 Sup. Ct. Rep. 829; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676; *Billings v. Illinois*, 188 U. S. 97-104, 47 L. ed. 400-403, 23 Sup. Ct. Rep. 272; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

And this court will take it to have been found that the possession or enjoyment of the property passed to the plaintiffs in error at the death of Susan A. Keeney, and that the statute was applicable to the right of succession of the plaintiffs in error to the remainders therein, which vested in possession and enjoyment at her death.

Blackstone v. Miller, 188 U. S. 189-203, 47 L. ed. 439-444, 23 Sup. Ct. Rep. 277; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Board of Education v. Illinois*, 203 U. S. 553-563, 51 L. ed. 314-319, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283-296, 42 L. ed. 1037-1044, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 55, 83, 44 L. ed. 969, 975, 986, 20 Sup. Ct. Rep. 747; *Cohen v. Brewster*, 203 U. S. 552, 51 L. ed. 314, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; *Billings v. Illinois*, 188 U. S. 97-104, 47 L. ed. 400-403, 23 Sup. Ct. Rep. 272.

The classification of remainders which take effect in possession and enjoyment at or after the death of the grantor, donor, or vendor, wherein the beneficial enjoyment of the property is reserved to the grantor, donor, or vendor, is not unreasonable, unjust, or arbitrary.

Moffitt v. Kelly, 218 U. S. 400, 403, 54 L. ed. 1086, 1087, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79; *Cahen v. Brewster*, 203 U. S. 543-549, 51 L. ed. 310-313, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; *Board of Education v. Illinois*, 203 U. S. 553-563, 51 L. ed. 314-319, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; *Louisville & N. R. Co. v. Melton*, 218 U. S. 37, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *Watson v. Maryland*, 218 U. S. 173-178, 54 L. ed. 987-990, 30 Sup. Ct. Rep. 644; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892,

10 Sup. Ct. Rep. 533; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 296, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; *Orr v. Gilman*, 183 U. S. 278, 287, 46 L. ed. 196, 201, 22 Sup. Ct. Rep. 213; *Knowlton v. Moore*, 178 U. S. 41, 55, 83, 44 L. ed. 969, 975, 986, 20 Sup. Ct. Rep. 747; 33 L. ed. 892, 10 Sup. U. S. 251, 52 L. ed. Billings v. Illinois, 188 U. S. 97, 104, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; *Provident Inst. for Sav. v. Malone*, 221 U. S. 661-666, 55 L. ed. 900-903, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661.

The statute imposing a tax upon the transfer of this class of remainders, limited to vest in possession and enjoyment at the death of the donor, the former owner of the property, and which cannot vest at any other time or upon any other contingency, does not deprive the plaintiffs in error of any of their rights or any of the privileges and immunities of citizens of the United States, nor does it violate the 14th Amendment or any provision of the Constitution of the United States.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Billings v. Illinois*, 188 U. S. 97-104, 47 L. ed. 400-403, 23 Sup. Ct. Rep. 272; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

So much of the New York statute as imposes an inheritance tax was sustained in *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, and in several decisions of the court of appeals of that state. But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers *inter vivos*. The first, they say, is an excise imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. They argue that inheritance taxes have been sustained on the ground (*United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073) that no one has the natural right to acquire property by will or descent, and if the state permits such acquisition, it may require the payment of

a tax as a condition precedent to the right of using that privilege. On the other hand, they contend that the right to convey or come into possession does not depend upon a statutory or taxable privilege, but is a right incident to the ownership of property, and that the tax imposed by this statute on that right is in effect a tax on the property itself, and void because lacking in the elements of uniformity and equality required in the assessment of property taxes.

But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever.

This was true under the internal revenue act of 1864 [13 Stat. at L. 223, chap. 173]. It imposed a succession tax on "all dispositions of real estate, taking effect upon the death of any person." It was not apportioned, and would have been void if a tax on property. But it was held that "it was not a tax on land," since "the succession or devolution of the real estate is the subject-matter of the tax . . . whether . . . effected by will, deed, or law of descent." *Scholey v. Rew*, 23 Wall. 347, 23 L. ed. 101, cited and followed, *Knowlton v. Moore*, 178 U. S. 78-81, 44 L. ed. 984-986, 20 Sup. Ct. Rep. 747.

Wherever the amount of a tax is, as here, to be measured by the value of property, it has been earnestly argued that it was to tax the property itself, and that to ignore that feature is to put the name above the fact. But when the state decides to impose such a tax, the amount must be determined by some standard. To require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. An excise on transfers, therefore, does not lose that character because the amount to be paid is determined by

the values conveyed. In view of the decisions in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and the other cases already cited, it is unnecessary to review the arguments pro and con, and again point out the distinction which has been made and sustained between excises and ad valorem taxes. We therefore accept the conclusion of the court of appeals of New York, that the statute of *that state imposing a tax on the transfers of property "intended to take effect in possession or enjoyment at or after the death of grantor" is "not a property tax, but in the nature of an excise tax on the transfer of property." 194 N. Y. 281, 87 N. E. 428.

The validity of the tax must be determined by the laws of New York. The 14th Amendment does not diminish the taxing power of the state, but only requires that, in its exercise, the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the state of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*New York ex rel. Hatch v. Reardon*, 204 U. S. 159, 51 L. ed. 422, 27 Sup. Ct. Rep. 188), that it must tax all transfers, or that all must be treated alike.

It is true that in New York it is as lawful to create an estate for life, with remainder after the death of grantor, as it is to convey in fee, or with remainder after the death of a third person, or on the happening of a particular event. But there is a difference in law as well as in practical effect between these various estates. Every encouragement is given to making conveyances in fee. But, from an early date, public policy has been opposed to the private interest which impelled men to withdraw property from the channels of trade and tie it up with limitations, intended, among other things, to secure to the beneficiary the use of the property, while at the same time removing it, to some extent, from liability for his debts. The favored transfers in fee need not be taxed with the latter, even though the law permits their creation. These latter estates also differ among themselves. Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey v. Rew*, supra, be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power 536] during *his own lifetime, the remainder does fall in at his death, and such conveyances would not be so often resorted

to as a means of evading the inheritance tax. 194 N. Y. 287, 87 N. E. 428. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiary, at and after his death.

The New York statute recognizes this difference. It imposes a tax on transfers by descent, or will, which take effect at the death of the testator; and then a tax upon transfers made in contemplation of death. It was but logical to take the next step, and tax transfers intended to take effect at or after the death of the grantor, even though that event was not actually impending when the deed was signed.

There can be no arbitrary and unreasonable discrimination. But when there is a difference, it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the 14th Amendment is concerned, the state could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will, or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event.

As to the other discriminatory features which, it is alleged, operate to deny the equal protection of the law, it is sufficient to say that it is now well settled that the state may impose a graduated tax in this class of cases. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 298, 42 L. ed. 1044, 18 Sup. Ct. Rep. 594. The plaintiffs in error, being children of the grantor, were assessed at the lowest rate. They are therefore not in a position to take advantage of the fact that transfers to collaterals and strangers in blood are, by this act, taxed at a higher rate. The entire statute would not be invalidated *even if that feature should ultimately 537] be held to be discriminatory and void. 194 N. Y. 286, 87 N. E. 428.

The real estate and tangible property in Texas were not within the taxing jurisdiction of the state of New York, and there was no effort to tax the transfer of that property. *St. Louis v. Wiggins Ferry Co.* 21 Wall. 430, 20 L. ed. 194; *State Tax on Foreign-held Bonds*, 15 Wall. 319, 21 L. ed. 186. It is urged that, on the same principle, the stocks and bonds could not be taxed because they were in New Jersey, in the hands of a trustee, holding title and possession by virtue of a deed made three years before the grantor died.

But the statute does not impose a tax

on the property, but on the transfer. The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made. At that time the grantor was a resident of the state of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the state to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made, in 1903, and that payment was not required until the death of grantor, in 1907, does not present any Federal question.

Affirmed.

538] *M. B. JOHNSON and William
Chandler, Pliffs in Err.,
v.
B. T. COLLIER.

(See S. C. Reporter's ed. 538-540.)

**Bankruptcy — collection of assets —
suit by bankrupt.**

A voluntary bankrupt has sufficient title, prior to the election of the trustee, to the personal property included in his schedule of assets, to enable him to bring, and in case the trustee neither sues nor intervenes, to prosecute to judgment, a suit for damages occasioned by the alleged unlawful judicial sale of a portion of such property after he had filed a claim of exemption.

[For other cases, see Bankruptcy, VI. c, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued December 14, 15, 1911. Decided
January 9, 1912.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Gadsden, in that state, in favor of plaintiff in an action by a bankrupt for damages occasioned by the alleged unlawful judicial sale of a portion of the property included in his schedule of assets after he had filed a claim of exemption. Affirmed.

See same case below, 161 Ala. 204, 49 So. 761.

Statement by Mr. Justice Lamar:

M. B. Johnson, as executor, recovered judgment against B. T. Collier, in the city

court of Gadsden, Alabama. Execution thereon was levied July 20, 1906, on certain personal property.

Under a provision of the Alabama statute, Collier immediately filed with the sheriff a claim of exemption. On the same day he filed, in the proper district court of the United States, a voluntary petition in bankruptcy, including this property in his schedule of assets. Notwithstanding the claim of exemption, the sheriff sold the property at public outcry on July 30, 1906.

Thereafter, on a date not shown by the record, Collier was adjudicated a bankrupt. On August 8, 1906, before a trustee was elected, he brought suit against both Johnson and the sheriff for damages, on the theory that the sale of the property after the filing of the claim of exemption made them trespassers *ab initio*. The defendants filed a plea, in which they set up the pendency of the bankruptcy proceedings, and alleged that Collier had no title to the cause of action, which was *in gremio legis* until the election of the trustee, and for that reason he could not maintain a suit *for dam- [539] ages occasioned by the unlawful sale of property included in the schedule of assets. A demurrer to this plea was sustained. The jury found a verdict in favor of Collier, which the trial court refused to set aside. This ruling was affirmed, and the case is here on writ of error from that judgment of the supreme court of Alabama.

Mr. George D. Mottley argued the cause and filed a brief for plaintiffs in error:

The adjudication of bankruptcy by a court of competent jurisdiction, declaring the defendant in error a bankrupt, *eo instanti* put the title in a trustee thereafter to be appointed. The bankruptcy of defendant in error and the scheduling in the bankrupt court of the property alleged to have been converted put the property *in custodia legis*. The property having been placed in the bankrupt court, it was *in gremio legis*. The property was in the possession, control, and custody of the bankrupt court.

Collier, Bankr. 6th ed. 588; Keegan v. King, 3 Am. Bankr. Rep. 79.

The bankrupt himself has no standing in court after adjudication in regard to his property or estate.

Pickens v. Roy, 187 U. S. 177-180, 47 L. ed. 128-130, 23 Sup. Ct. Rep. 78.

The assignment related back to the commencement of the proceedings, which was by filing the petition, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date.

International Bank v. Sherman, 101 U. S. 403-405, 25 L. ed. 866, 867.

Upon the adjudication of a bankrupt, title to his property passes from him at once, and is conditionally vested in the court, pending the appointment of a trustee, or until the estate is finally closed or abandoned by the creditors.

Rand v. Sage, 94 Minn. 344, 102 N. W. 864.

The filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law, which is equal in rank to seizure on attachment or execution.

Re Rodgers, 60 C. C. A. 567, 125 Fed. 169.

Mr. Amos E. Goodhue argued the cause and filed a brief for defendant in error:

If this court finds that a Federal question is presented by this record, it will find little difficulty in deciding that question adversely to plaintiffs in error.

Rand v. Iowa C. R. Co. 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 Ann. Cas. 542; 1 Remington, Bankr. §§ 1, 113; Gordon v. Mechanics' & T. Ins. Co. 120 La. 441, 15 L.R.A.(N.S.) 827, 124 Am. St. Rep. 434, 45 So. 384, 14 Ann. Cas. 886; Thatcher v. Rockwell, 105 U. S. 468, 26 L. ed. 950.

The title to exempt property did not pass to the trustee.

Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751.

The creditors and the bankrupt court have not seen fit to accept this suit as assets of the estate, subject to the administration of the court of bankruptcy, but have allowed the bankrupt to press this suit either for his own benefit, or as a quasi trustee for the benefit of his creditors.

3 Remington, Bankr. pp. 228, 229, §§ 933-935; Dushane v. Beal, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; Rand v. Iowa, C. R. Co. 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 Ann. Cas. 542; Gordon v. Mechanics' & T. Ins. Co. 120 La. Ann. 441, 15 L.R.A.(N.S.) 827, 124 Am. St. Rep. 434, 45 So. 384, 14 Ann. Cas. 886.

Until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it may be, remains in the bankrupt.

Hampton v. Rouse, 22 Wall. 263, 22 L. ed. 755; Conner v. Long, 104 U. S. 228, 26 L. ed. 723; Boonville Nat. Bank v. Blakey, 47 C. C. A. 43, 107 Fed. 891.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The trustee, with the approval of the
56 L. ed.

court, may prosecute any suit commenced by the bankrupt prior to the adjudication. (§ 11c.) But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Rand v. Iowa C. R. Co., 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 A. & E. Ann. Cas. 542; Gordon v. Mechanics' & T. Ins. Co., 120 La. 444, 15 L.R.A.(N.S.) 827, 124 Am. St. Rep. 434, 45 So. 384, 14 A. & E. Ann. Cas. 886.

While for many purposes the filing of the petition operates in the nature of an attachment upon closes in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes "vested by operation of law with the title of the bankrupt" as of the date of adjudication. (§ 70.)

Until such election the bankrupt has title, —defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. *There must[540 always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. Thatcher v. Rockwell, 105 U. S. 469, 26 L. ed. 950.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property

is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. *Rand v. Iowa C. R. Co.* 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 A. & E. Ann. Cas. 542; *Southern Exp. Co. v. Connor*, 49 Ga. 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon.

Affirmed.

541]*INTERSTATE COMMERCE COMMISSION, Appt.,

v.

UNION PACIFIC RAILROAD COMPANY et al. (No. 451.)

INTERSTATE COMMERCE COMMISSION, Appt.,

v.

NORTHERN PACIFIC RAILWAY COMPANY et al. (No. 452.)

INTERSTATE COMMERCE COMMISSION, Appt.,

v.

GREAT NORTHERN RAILWAY COMPANY et al. (No. 453.)

(See S. C. Reporter's ed. 541-555.)

Interstate Commerce Commission — review of order fixing rates — facts.

1. The courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order.

[For other cases, see *Interstate Commerce Commission*, 8-14, in *Digest Sup. Ct. 1908.*]

Interstate Commerce Commission — review of order fixing rates — facts.

2. An order of the Interstate Commerce Commission reducing rates cannot be said to have been made without substantial evidence to support it, where, although there is no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.

[For other cases, see *Interstate Commerce Commission*, 8-14, in *Digest Sup. Ct. 1908.*]

Interstate Commerce Commission — review of order fixing rates — mistake of law.

3. The Interstate Commerce Commission cannot be said to have based its order reducing rates upon a mistake of law in regarding the long maintenance by the carriers of a lower rate while earning dividends as raising a presumption of reasonableness,

where the reduced rate fixed by the Commission was higher than such earlier rate.

[For other cases, see *Interstate Commerce Commission*, 8-14, in *Digest Sup. Ct. 1908.*]

Interstate Commerce Commission — fixing rates — short and long hauls.

4. Fixing rates under substantially similar traffic conditions so as to allow a higher rate for a shorter route is not so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the power of the Interstate Commerce Commission, where the Commission was simply maintaining the same ratio of difference as that made by the carriers themselves.

[For other cases, see *Interstate Commerce Commission*, 15-19, in *Digest Sup. Ct. 1908.*]

Interstate Commerce Commission — fixing rates — considering effect on business.

5. The Interstate Commerce Commission cannot be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the Commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory power to condemn unjust and unreasonable rates and fix reasonable ones.

[For other cases, see *Interstate Commerce Commission*, 15-19, in *Digest Sup. Ct. 1908.*]

[Nos. 451, 452, 453.]

Argued October 18 and 19, 1911. Decided January 9, 1912.

THREE APPEALS from the Circuit Court of the United States for the District of Minnesota to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, reducing rates. Reversed.

Statement by Mr. Justice Lamar:

These three appeals are brought by the Interstate Commerce Commission from a decree enjoining a reduction of lumber rates named in tariffs filed by the Great Northern, the Northern Pacific, and the Union Pacific Railroads.

The tariffs under consideration involve rates on lumber from the coast, Spokane district, and Montana-Oregon points to St. Paul, Omaha, and Chicago. It is admitted that the rates on shingles, hemlock, cedar, and other forest products have a fixed relation to those on fir lumber, and that the differentials from Spokane and the Montana-Oregon territory have a like fixed relation to those from the coast.

The summary of these very lengthy records will therefore be limited to a statement of those facts bearing directly on the pivotal question as to the validity of the order fixing a rate of 45 cents per hun-

dred pounds on fir lumber from the coast to St. Paul.

In 1893 the rate, from the coast, on fir lumber, over the two northern lines to St. Paul, was fixed at 40 cents, and since 1901 the rate to Omaha at 50 cents.

In 1907 the three carriers concurrently filed new tariffs, making the rate from the coast to St. Paul 60 cents, to Omaha 55 cents, and to Chicago 60 cents. Thereupon 543] various corporations filed complaints before the Commission, alleging that the proposed rates were unreasonable and would seriously affect the lumber industry. The carriers emphatically denied both of these allegations, and, in explanation of the causes leading up to the advance, showed that when the Great Northern was completed to the coast, about 1893, almost all of the freight shipped over its line went from the East to the West,—cars being hauled back empty to St. Paul, its eastern terminus. In order to correct this expensive and unremunerative situation, the Great Northern decided to put in a rate on lumber so low that mill men on the Pacific coast might compete with dealers in white and yellow pine, in the Chicago market, 2,500 miles distant. It thereupon reduced the existing rate to 40 cents. That cut was met by the Northern Pacific, which also reached St. Paul, but the Union Pacific at that time made no change in its rate. The reduction opened up new markets, and was soon followed by heavy shipments of lumber to the East. The business grew steadily, and prior to the filing of the tariffs in 1907, the empty-car movement had been completely reversed,—many cars being hauled empty from St. Paul to the coast, and returning to the East loaded with lumber.

Traffic increased to such an extent that it became necessary to open up new tunnels, construct additional passing tracks, and reduce grades and curves. There was a constant increase in gross earnings, but the carriers contended that there had been such an enormous and disproportionate increase in the cost of operation, that it was absolutely necessary to discontinue the unremunerative 40-cent rate and advance it to 50 cents, which they insisted was just and reasonable.

There was no finding as to the effect on gross earnings which would result from the proposed advance of 10 cents. But, as the Great Northern, in one year, hauled 1,765,095,997 tons one mile, equivalent to 544] about 30,000 *cars, of the average load of 58,000 pounds, transported 2,000 miles from the coast to St. Paul, the advance of 10 cents per hundred, or \$58 per car, would

represent a gross annual increase, for that company alone, of \$1,740,000.

An immense amount of evidence was offered by both parties in support of their respective contentions. The Commission rendered an elaborate opinion (14 Inters. Com. Rep. 1), and concluded by finding that the old rates were just and reasonable and should be restored to all points on and west of the Pembina line, which ran from the Canadian line almost due south through Fargo, Omaha, to Port Arthur, Texas. As Omaha was on this line, the effect of that part of the order was to prohibit the 55-cent advance, and to restore the old rate of 50 cents to Omaha, which had been in force since 1901. As to rates east of the Pembina line, the Commission held that "they might reasonably be somewhat increased, but not more than 5 cents per hundred, to be graded up so as to reach the maximum increase at . . . St. Paul; . . . the rate from the Missouri river crossing should be graded up, the maximum increase of 5 cents reached at the Mississippi river. Chicago rates should apply to all points between the Mississippi . . . and Chicago."

The carriers thereupon filed separate bills to enjoin this order, and repeated therein the contentions made before the Commission; averred that the old 40-cent rate to St. Paul and the 50-cent rate to Omaha were not only unremunerative, but proportionately so much lower than rates on other merchandise as to amount to an unjust discrimination; alleged that the prosperous condition of the lumber business did not require or justify a further maintenance of this low rate; and, among other things, insisted (1) that the order was beyond the power of the Commission, because entered without any evidence, or finding, that the rates fixed by the carriers were unjust or unreasonable; and (2) was void because the Commission *erroneously held, as a matter of law, that the long continuance of the old rate, during a period when the carriers' total income was sufficient to pay dividends, raised the presumption that the old rates were reasonable.

The Commission demurred, and, in its answer, averred that evidence was introduced showing, and tending to show, that the advanced rates were unreasonable; and that, after a full hearing, it was of opinion that the rates complained of were unreasonable, and entered its order accordingly; that the determination of that question involved the exercise of a discretion committed solely to the Commission, and that the "courts ought not and could not review its judgment and finding, unless it be made clearly to appear that the orders com-

plained of transcend the pale of legitimate regulation."

The cases were referred to a master, who reported that the allegations of discrimination were not only too general, but that there was no evidence upon which any ruling could be predicated on that subject; that the substance of the bill was that the rates put in by the Commission were confiscatory, and, as to that, held that the evidence was not sufficient to warrant the court in setting aside so much of the order as restored the rates to, and west of, the Pembina line. There was some evidence that the cost of hauling freight over the Union Pacific was greater than over the Northern lines, because it crossed the mountains at a point 2,000 feet higher than they did. But the master found, as a fact, that the traffic conditions were substantially the same over the three roads, and that the distance from the coast to Omaha was 1,800 miles and to St. Paul 2,052 miles. He thereupon held, as a matter of law, that when the Commission fixed 50 cents as a reasonable rate to Omaha over the shorter route, it necessarily followed that the lower rate of 45 cents, over the longer route to St. Paul, was not only unreasonable, but unjust.

And even "though the rate might not be 546]confiscatory, *yet an order which, on its face, is inherently inconsistent with the fundamental principles of rational justice, and perverts the spirit and intent of the interstate commerce act, though in form within the limits of delegated power, is, in fact, beyond those limits and is an unlawful order, and one which results in the taking of property without due process of law." He recommended that the court should enjoin so much of the order as permitted an advance of only 5 cents to points east of that line.

The Commission, and each of the carriers, filed many exceptions to the report, as to which the circuit court passed the following order: "All the exceptions to the report of the master must be overruled. Those which challenge his finding that the reduction, by the Interstate Commerce Commission, of the 50-cent rate on lumber to St. Paul and other points east of the Pembina line, was arbitrary, and so palpably unjust and unreasonable, and so discriminatory, that it was beyond the power of the Commission, are overruled; on the ground that this action of the Commission was beyond its power, or so palpably and gravely unjust and unreasonable as to be beyond the substance, if not beyond the form, of its power."

Mr. Luthur M. Walter, Special Assistant to the Attorney General, and Mr. Jesse C. Adkins, argued the cause and filed a brief for appellant:

Whenever the Commission shall be of the opinion that the carriers' rates are unreasonable, it is their duty to fix reasonable rates. Whether those rates so fixed by the Commission are, as between the carrier and shipper, fair and reasonable,—that is, whether the court upon the same testimony would have fixed the same rates,—is not the question.

Regan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 5 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The rates must stand unless the court can say that they are confiscatory, or that it was impossible for a fair-minded board to have established them.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

Whether a particular rate is reasonable or a particular discrimination is unjust is a question of fact.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Matters of fact are within the exclusive competency of the Commission, and its decision thereon is final.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

In determining such questions, the Commission should consider any fact proper to be considered by the carrier in fixing the rate.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The presumption is that the action of the Commission was correct (Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336), and the court will not interfere unless it is impossible to say that a fair-minded Commission could not have reached that conclusion (San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571).

Mr. **Hale Holden** argued the cause, and, with Messrs. Charles Donnelly and F. C. Dillard, filed a brief for appellees:

There is no presumption that an advance in rates is wrongful, unjust, or unreasonable. The carrier in such case is required upon proper inquiry, however, to explain its reasons for the advance, and support its explanation by proof.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; *Memphis Cotton Oil Co. v. Illinois C. R. Co.* 17 Inters. Com. Rep. 313.

There can be no other conclusion from the record in these cases, taking into consideration the character of the competition the Pacific coast lumber had to meet as a new and untried product, and the low prices then prevailing, that the 40-cent rate then put into effect was considered by both carrier and lumbermen as an abnormally low rate.

Schumacher Mill. Co. v. Chicago, R. I. & P. R. Co. 4 Inters. Com. Rep. 378; *Re Louisville & N. R. Co.* 1 I. C. C. Rep. 69.

Conditions have been reversed; expense has enormously increased, and the excuse for the rate in previous years no longer holds good.

Tift v. Southern R. Co. 10 Inters. Com. Rep. 586.

The entire financial situation and operations of a carrier should not be taken into consideration in passing upon a single rate.

Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 539.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

These appeals raise the single question as to whether, in making the 45-cent rate, the Commission acted within or beyond its power. As the statute makes its finding prima facie correct (*Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 154, 51 L. ed. 1000, 27 Sup. Ct. Rep. 648), it will be more convenient 547] *to consider the case from the standpoint of the carriers, who first insist that the order was void because made without evidence or finding that the 50-cent rate was unreasonable.

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an or- 56 L. ed.

der, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois C. R. Co.* 215, U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; *Interstate Commerce Commission v. Northern P. R. Co.* 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417; *Interstate Commerce Commission v. Alabama Midland R. Co.* 163 U. S. 146, 174, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; *not that its[548 decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

2. We proceed, then, to a consideration of the carriers' contention that the order was void because made without any testimony that the 50-cent rate of 1907, to St. Paul, was unreasonable. We find that, as far back as 1893, the rate on fir lumber was reduced to 40 cents, on the theory that after a carrier had been paid for transporting a carload of freight from the East to the West, it was better to haul it back loaded with lumber at 40 cents, thereby earning something, than to take it back empty and get nothing. But if, after the empty-car movement had been reversed, the carrier had to be at the expense of hauling cars empty to the West for the purpose of

returning them loaded with lumber at the unremunerative rate of 40 cents, there would be a double loss,—it got nothing for hauling the empty car from St. Paul to the coast, and it derived no profit for hauling it back at the low rate. They contend that this situation, in connection with the enormous increase in the cost of operation, not only justified, but required, an advance over the 40-cent rate. And this view of the testimony seems to have been taken by the two commissioners who dissented. If there was no other evidence, the Commission's order could not be sustained.

But these facts do not stand alone. In the first place there was no appeal from the master's finding that:

"The carriers concede that they are unable to determine the cost of this traffic, in and of itself; and that they are unable to say, with any satisfactory accuracy, whether or not they make a profit upon it; but they have all conceded that, in their judgment, speaking as experts, the lumber traffic has not been confiscatory, and has not been performed for less than cost."

549] *This concession, of course, does not cover the question at issue, but it does fix a starting point. It establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to

be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics, and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. There was evidence that during the fourteen years when the forty-cent rate was in force, the carriers had, by proper management and without wasteful economics, kept their properties in a high state of efficiency, and after paying all the costs of operation, maintenance, depreciation, fixed charges, and sinking funds, had been able to pay reasonable dividends.

There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load.

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. There was then, under the statute, nothing for the companies to do except to comply with the order, or act on the suggestion thrown out in the Commission's answer, and apply for a rehearing, in reliance upon its power and duty to modify its order if the new evidence warranted such change.

3. When the bills were filed, the carriers insisted that the order was the result of a mistake of law, in that the Commission held that the long maintenance of the 40-cent rate raised a presumption that it was reasonable, because the carriers had been earning a reasonable profit. But we need not consider whether, under such circumstances, the maintenance of the admittedly low rate raised any presumption of reasonableness; or, if so, whether it is not neutralized by the presumption of right conduct by the carrier as primary rate maker (*Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493). For whatever influenced the Commission in restoring the rates to the Pembina line,—

551]*as to which there is now no appeal,—it is evident that, as to points east of that line, they did not act on any presumption that the old 40-cent rate was reasonable. On the contrary, they acted directly contrary to any such presumption, and instead of maintaining the old rate, allowed a new and higher rate to St. Paul, permitting an advance of 5 cents per hundred, or 12½ per cent, or between \$500,000 and \$1,000,000 per annum, to the Great Northern road alone.

4. And this brings us to a consideration of the master's finding, approved by the circuit court, that in fixing a rate of 45 cents to St. Paul, the order on its face was void, because, with traffic conditions over the three roads practically the same, the Commission allowed the high rate of 50 cents to the short road and the low rate of 45 cents to the long route. It was argued that when the Commission had adjudged that a rate of 50 cents for 1,800 miles was reasonable, it was manifestly unreasonable to allow a rate of 45 cents for 2,052 miles, and that such order was so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the Commission's power.

It does not follow, as a matter of law, that rates should be the same for the same distance over two different roads, and this would be especially true if the cost of transportation was greater over the Union Pacific than over the Northern lines, because it crossed the mountains 2,000 feet higher than they.

But, with the master's finding that traffic conditions were practically the same, it might be that the order would appear unreasonable on its face, if it fixed the high rate over the short route, and the low rate, with less revenue per ton, per mile, over the long route. But the order cannot be considered by itself alone. It must be read in the light of the entire record, including the important fact that the carriers themselves, in making their rates, made a similar difference between the long and the 552]short line. *By their own tariffs they clearly show that they did not consider mere distance a controlling factor in fixing the rates now under attack. And this is not exceptional, for it appears that they make rates from basing points to common points, with the result that two cars of lumber, of the same weight, may be shipped from the same place, over the same line, at the same rate, to different points, although the distance one car is hauled may be several hundred miles greater than the other.

But the fact that the carriers themselves, in 1893, 1901, and 1907, charged more to Omaha than to St. Paul, is a much weight-

ier fact in considering this attack on the order. In making the difference between these two cities the Commission only did what the carriers themselves had done, under their old and new rates. After 1901, the rate to Omaha was 50 cents and the rate to St. Paul, over the longer route, was 40 cents. In the 1907 tariff, now under consideration, the rate to Omaha, over the short route, was fixed by them at 55 cents; and that to St. Paul, for the longer route, was fixed at 50 cents. This was a difference of 5 cents in favor of the short route. The Commission made the same difference in favor of the same road.

This difference is supported by what the record shows as to rates to points on the Pembina line. Inasmuch as no appeal was taken from the refusal to enjoin their restoration, we may assume that all parties admit these rates to be reasonable. But there was a difference as to rates to points on this line which shows that the per mile ratio cannot be regarded as a necessary standard. For example, the rate to Omaha, on the lower part of this line, was 50 cents, while the rate to points on the northern end was 40 cents. This was a difference of 20 per cent in favor of Omaha, although there was no such difference in the distance. Again, timber shipped from the coast to St. Paul passed through this 40-cent point on the northern end of *the[553 Pembina line. The distance from the coast to St. Paul was one-eighth greater, and the advance allowed was one eighth, or 5 cents, over the 40-cent rate.

It is quite true that the carriers may do what they could not be compelled to do. But it is not to be assumed that they made and continued these different rates between these two cities arbitrarily and without reason. It was proper for the Commission to consider the weight and the character of these reasons and the causes which prompted and justified the carriers in charging these different rates. When the Commission maintained the same ratio of difference as that made by the carriers themselves, it cannot be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form, of its power.

5. A final point remains to be considered, although it involves an issue not presented by the pleadings, not included in the master's report, and not passed on by the circuit court. It is, however, argued that on this appeal the record may be searched and the decree affirmed because, in making its order, the Commission was influenced solely by a consideration of the effect of

the advance in rates on the lumber industry.

It does appear that the lumber men, in their complaints before the Commission, alleged that the advanced rates were unreasonable; and, approved on the theory that the injurious effect on their business would sustain that contention, they alleged that the new rate would destroy the lumber industry. In the Willamette Case joined on both propositions, and there were mutual criminations and recriminations of prosperity,—the lumber men insisting that the railroads had made large profits under the old rate, and did not need the advance, which would destroy the ability of the lumber men to ship lumber to the East.

The carriers, on the other hand, contended that the 40-cent rate had opened up new [554]markets and developed the *lumber business to a point where it had become enormously profitable, and would continue so under the advanced rates, because white pine had practically disappeared from the market, and that the increased price of lumber more than made up for the increased cost of timber and labor.

It is true, also, that the Commission examined into the effect of the old and the new rate on carrier and lumber men alike. But we do not find that it made the order because of the effect on the lumber industry. In the Willamette Case (219 U. S. 445, 55 L. ed. 287, 31 Sup. Ct. Rep. 288), counsel for the mill men admitted that the rate there under attack was reasonable in and of itself, but insisted that statements of officers and action of the carrier operated to estop the road from raising a low rate up to a reasonable rate.

Nothing of the sort is found here. The rates were attacked as unreasonable, and, on evidence already referred to, the Commission found that the old rates to the Pembina line were reasonable and could not be changed, but that there might be a reasonable increase to points east of that line, not to exceed 5 cents.

While there is language in the opinion which, looked at alone, might suggest that the Commission was attempting to decide more than the single question as to what was a reasonable rate, yet, taking the opinion as a whole, it affirmatively appears that the Commission confined itself to the exercise of its statutory powers to fix rates. In its opinion it did discuss the issue of prosperity presented by mill men and carriers alike, but held that—

“ . . . This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years, and that interests have been built up thereunder, and that loss of

business investments, profits, and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. . . . If the old *rates were too low [555 to be just and reasonable, complainants [mill men] cannot urge their loss as a ground for maintaining them; if the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business.”

Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumption arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power, and, in view of the statute, its lawful orders cannot be enjoined. The decree, therefore, must be reversed.

GERALD PURCELL FITZ GERALD, Plff.
in Err.,
v.

JOSIAH V. THOMPSON, as Trustee for
Lida Eleanor Purcell Fitz Gerald et al.

(See S. C. Reporter's ed. 555-557.)

Error to state court — frivolousness of Federal question.

No real Federal question which will support a writ of error from the Federal Supreme Court to a state court is raised by the contention that the state court denied a Federal right in overruling an application to remove the cause to a Federal circuit court, where the granting of such application would have necessitated the aligning on the side of the plaintiff, in a suit founded on an express trust, a trustee who was charged with a repudiation of his obligations as trustee by a refusal to apply the trust funds as required by the trust

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

As to necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

agreement, and as to whom not only was an accounting asked and an injunction prayed to prevent him from disposing of the trust property, but his removal as trustee was also sought.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 849.]

Submitted December 18, 1911. Decided January 15, 1912.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Fayette County in that state refusing an application to remove the cause to a Federal circuit court. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

See same case below, — Pa. —, 82 Atl. 212.

Mr. William A. Stone submitted the cause for plaintiff in error. Messrs. Michael J. Ryan and James Gay Gordon were on the brief.

Mr. Samuel Untermeyer submitted the cause for defendants in error. Messrs. William J. Sturgis and Irwin Untermeyer were on the brief.

Memorandum opinion by direction of the court. By Mr. Chief Justice White:

The object of this suit was to enforce a trust created by the plaintiff in error for the benefit of his wife and three minor children, to declare a lien on certain property dedicated to the purposes of the trust for the removal of two trustees, etc. Josiah V. Thompson, one of the trustees, was a plaintiff, and joined with him were the wife and minor children of Fitz Gerald, the latter represented by their guardian *ad litem*. The remaining trustees were made defendants, individually and in their capacity as trustee and as partners.

All the plaintiffs except the minor children were citizens of Pennsylvania. The minor children were aliens and resided in Ireland. Lenhart, one of the defendants, was a citizen of Pennsylvania, while Fitz Gerald, his codefendant, was an alien and a British subject. Fitz Gerald applied to remove to the United States court on the ground that, on properly aligning the parties to the controversy, his codefendant Lenhart was a plaintiff, and that, as the residence of the guardian *ad litem* was

controlling so far as the interest of the minors was concerned, the controversy was one between citizens of Pennsylvania on the one hand and Fitz Gerald, an alien, on the other. The further contention was urged that the cause was embraced in the clause of § 1 of the removal acts of 1887-88 [24 Stat. at L. 553, chap. 373, 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 509], conferring original jurisdiction *upon circuit courts of controver-[557 sies "between citizens of a state and foreign states, citizens, or subjects," and that the following clause of the 2d section of the act was applicable:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

The trial court denied the application, and subsequently granted the relief prayed by the bill. On appeal the supreme court of the state of Pennsylvania affirmed the decree, and in the opinion delivered held that no error was committed in denying the application to remove. Because of this latter ruling the cause was brought here. The defendants in error now move to dismiss the writ.

The right to remove from the state court which was asserted had no legal foundation. Lenhart was charged with a repudiation of his obligations as trustee by a refusal to apply the trust funds as required by the trust agreement. Not only was an accounting by him asked and an injunction prayed to prevent him from disposing of the partnership property which was dedicated to the trust, but his removal as trustee was also sought. Under these circumstances it is plain on the face of the record that no possible rearrangement of the parties could have been made converting Lenhart into a party plaintiff which would be consistent with the relief which it was the object of the suit to obtain. In this state of the case the assertion that there was a denial of a Federal right by the overruling of the application to remove is so manifestly frivolous and devoid of merit as not to form the basis of jurisdiction, and to render it necessary to grant the motion to dismiss.

Writ of error dismissed.

558]*COSME BLANCO HERRERA and José Blanco Herrera, Doing Business under the Firm Name of Herrera Nephews, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 558-574.)

Prize — enemy's property — liability to capture.

1. Neither the capitulation of Santiago and the cessation of active military operations in the Santiago district, nor the President's proclamation of July 13, 1898, with reference to the rights of private property, changed the character of a Spanish merchant vessel lying in the harbor as enemy's property, nor exempted it from liability to capture by the military authorities for military purposes.

[For other cases, see Prize and Capture, 145-151, in Digest Sup. Ct. 1908.]

Claims — against the United States — contract or tort.

2. The United States is not suable in the court of claims upon a claim for the value of the use by the military authorities of a Spanish merchant vessel captured in the harbor of Santiago, since, even under the mistaken assumption that the vessel was immune from capture because of the prior capitulation of Santiago, and the President's proclamation of July 13, 1898, with respect to the rights of private property, the claim would be one "sounding in tort" within the meaning of the Tucker act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), excluding cases of that character from the jurisdiction of the court of claims.

[For other cases, see Claims, 128-144, in Digest Sup. Ct. 1908.]

[No. 89.]

Argued December 11 and 12, 1911. Decided January 15, 1912.

APPEAL from the Court of Claims to review a judgment dismissing a claim for the value of the use by the military authorities of a Spanish merchant vessel captured in the harbor of Santiago. Affirmed.

See same case below, 43 Ct. Cl. 430.

The facts are stated in the opinion.

Messrs. Howard Thayer Kingsbury and Crammond Kennedy argued the cause, and, with Mr. Frank D. Pavey, filed a brief for appellants:

The words of the Tucker act—"not sounding in tort"—do not limit the jurisdiction

of the court of claims except as to "damages liquidated and unliquidated."

United States v. Lynah, 188 U. S. 474-476, 47 L. ed. 550, 551, 23 Sup. Ct. Rep. 349.

Where a part of the country which has been the scene of war has been reduced to subjection, the general rule respecting the appropriation of property and payment for it prevails.

Philippine Sugar Estates Development Co. v. United States, 40 Ct. Cl. 33; Re Ships, 4 C. Rob. 388; The Venice (United States v. Cooke) 2 Wall. 258, 17 L. ed. 866; The Baigorri, 2 Wall. 481, 17 L. ed. 881; The Reform, 3 Wall. 617, 18 L. ed. 105; The Peterhoff, 5 Wall. 60, 18 L. ed. 571; The Ouachita Cotton (Withenbury v. United States) 6 Wall. 531, 18 L. ed. 939; The Grapeshot, 9 Wall. 131, 19 L. ed. 653; United States v. Padelford, 9 Wall. 541, 19 L. ed. 791; Levy v. Stewart, 11 Wall. 253, 20 L. ed. 89; New Orleans Mail Co. v. Flanders (New Orleans & B. S. Mail Co. v. Fernandez) 12 Wall. 134, 20 L. ed. 250; Planters' Bank v. Union Bank, 16 Wall. 495, 21 L. ed. 478; Hamilton v. Dillin, 21 Wall. 94, 22 L. ed. 533; Desmare v. United States, 93 U. S. 611, 23 L. ed. 960; Burbank v. Conrad, 96 U. S. 301, 24 L. ed. 726; Clark v. United States, 99 U. S. 496, 25 L. ed. 482.

The whole modern development of the laws of war has been in the direction of greater immunities for noncombatants generally, and particularly for the inhabitants of occupied territory.

Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. ed. 473; Les Requisitions Militaires du Temps de Guerre, Ch. Pont, pp. 85, 86; Latif, Effect of War on Property, 1909, p. 30; Bernier, De l'Occupation Militaire, p. 108; Holland, Law of War on Land, London 1908, arts. 92, 106, 112, 113; 1 Kent, Com. 14th ed. p. 92; 3 Grotius, De Jure Belli ac Pacis, chap. 20, §§ 7, 50, ¶ 1.

Nothing can be clearer than the necessity of applying the doctrine of relation in determining the commencement of government and citizenship in times of revolution and political changes, such as have characterized the history of Cuba since 1895, in order to do justice and prevent the most absurd and iniquitous conclusions.

2 Bouvier's Dict. Rawle's Rev. p. 864; 24 Am. & Eng. Enc. Law, 2d ed. 275; Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Harcourt v. Gaillard, 12 Wheat. 524, 527, 6 L. ed. 716, 717; M'Ilvaine v. Coxe, 4 Cranch, 209, 212, 2 L. ed. 598, 599; Underhill v. Hernandez, 168 U. S. 250, 253, 42 L. ed. 456, 457, 18 Sup. Ct. Rep. 83; United States v. Rice, 4 Wheat. 246, 4 L. ed. 562; Fleming v. Page, 9 How. 603, 13 L. ed. 276; Thoring-

NOTE.—As to what claims constitute valid demands against a state—see note to Northwestern & P. Hypotheek Bank v. State, 42 L.R.A. 33.

ton v. Smith, 8 Wall. 1, 19 L. ed. 361; Ford v. Surget, 97 U. S. 594, 24 L. ed. 1018; Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632; Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617; Heny's Case, Ralston, Rep. 1903, p. 17; Puerto Cabello & V. R. Co. Case, Ralston, Rep. 1903, p. 458; Bovallins & H. Cases, Ralston, Rep. 1903, p. 952; 4 Moore, International Arbitration p. 4330; United States v. Trumbull, 48 Fed. 94; Dix's Case, Ralston, Rep. 1903, p. 8; Moore, Arbitration, 3712.

Assistant Attorney General **Thompson** argued the cause, and, with Mr. Franklin W. Collins, filed a brief for appellee:

If the reasons for dismissing the petition in the court below require further support, it may be found in the case of Juragua Iron Co. v. United States, 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. Rep. 385.

The President had not the power nor the authority, without being specially authorized by Congress, to create an obligation which is not recognized by the well-known principles of law. Nothing less than an act of Congress can be relied upon to change the rules and impose an obligation for the payment of captured property by the invading army. Therefore no protection is afforded by orders of the President, except in so far as such orders are warranted by law.

Little v. Barreme, 2 Cranch, 179, 2 L. ed. 246.

The capture of the vessel is in the nature of a tort.

Langford v. United States, 101 U. S. 341, 25 L. ed. 1010.

563] *Mr. Justice **McKenna** delivered the opinion of the court:

Petition in the court of claims for the recovery of \$88,200 for the value of the use and profits of which claimants were deprived, as it is alleged, by the taking and detention of a certain steamship by the United States during the war with Spain, and for the loss of certain property belonging to and a part of such steamship, alleged to be "fairly worth" the sum of \$5,000, amounting in all to the sum of \$93,200.

Claimants base their right to recover upon an implied contract arising from the facts which we shall presently detail. Opposing this view, the government contends that the property was enemy property seized for military uses, and that, besides, the record does not show a "convention between the parties" or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort, and claimants have no right of recovery.

The court found as a conclusion of law

from the facts, "on the authority of the case of *J. Ribas y Hijo v. United States*, 194 U. S. 315, 48 L. ed. 994, 24 Sup. Ct. Rep. 727, that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed."

The claimants, at the time the steamship was taken, composed a commercial partnership, doing business under the firm name of Herrera Nephews. They were born in Spain, and, under the Spanish régime in Cuba, were Spanish subjects residing in Havana. After the treaty they did not, in accordance with its terms, preserve their allegiance to Spain.

On the 16th day of July, 1898, the Spanish forces then occupying the territory constituting the division of Santiago, including the city and port of that name, capitulated to the United States in accordance with the terms of a military convention which provided that all hostilities between the American and the Spanish forces in that district should cease, and that the Spanish forces should be returned, at the expense of the United States, to Spain. Actual hostilities ceased with the surrender of Santiago.

The United States military authorities seized and captured the steamer San Juan on the 17th of July, 1898, she having been held in the harbor by its blockade by the United States naval authorities. Prior to that date she had been used to transport Spanish troops, munitions of war, and supplies for the Spanish troops from place to place. After her capture she was used for like service for American troops and indigent Cubans until November, 1898,—a period of 115 days. The reasonable value of her use was \$150 per day, amounting to the sum of \$17,250, no part of which has been paid to claimants.

After the surrender of Santiago and the seizure of the steamship, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued general order No. 101, which, among other things, provided that "private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. . . .

"Private property taken for the use of the Army is to be paid for, when possible, in cash, at a fair valuation, and when pay-

ment in cash is not possible, receipts are to be given."

This order was promulgated in Cuba, July 20, 1898.

On November 8, 1898, the Quartermaster General of the Army telegraphed to R. A. C. 565]Smith, the representative *and attorney-in-fact of claimants, that it was proposed to return the "captured steamer" to owners, and asked him to wire their names. Smith answered on the 12th "that claimants agreed to accept the vessel, reserving their right to make claim." On the 15th the War Department notified Smith that the government was ready to deliver the vessel to her owners upon condition that a receipt be given showing that she was accepted with full knowledge and understanding that the Secretary of War did not consider that any allowance was due the owners on account of her use, she being captured property, or for any damage sustained by her while she was in the possession of the United States, and that any claim subsequently made should be a matter for future consideration by the War Department. The terms were rejected, and she remained in the possession of the United States.

On April 25, 1899, the quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent that if they did not receive the steamer "in accordance with the conditions hereinafter expressed," she would be delivered to the Department of the Quartermaster of the Army and retained as property of the United States.

On the 17th claimants accepted her and gave the following receipt:

"Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship San Juan, which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States government, the return of the vessel being a generous act on the part of the United States government, and that any claim 566]subsequently *made for such use and damages shall be a matter for future consideration of the War Department.

"And we name and authorize our agents in Santiago de Cuba—Messrs. Gallego, Mesa, & Company, of said city—to receive and take possession of said steamship San Juan."

They also executed a paper which recited that it was given in consideration of the

prompt return of the vessel to claimants, and that released the government and its officers and agents "from all manner of actions, damages, claims, and demands whatsoever" on account of her seizure, detention, and use.

From the time that the Quartermaster General of the Army proposed to return the vessel until May 17, 1899, a period of 190 days, the vessel, though retained by the United States, was not used. During said period the United States kept a watchman on board, who was paid \$45 per month. The compensation claimants are entitled to, if any, for such period, taking into account that the vessel was not used, would be \$125 per day, or \$23,750.

Upon the return of the vessel to claimants, tools and implements of the value of \$232.50 were missing, but it is not shown by whom they were taken. No other property is shown to have been taken possession of by the United States. The steamer, when returned, appeared to have been in as good condition as when taken into possession, ordinary wear and tear excepted.

As we have seen, the court of claims rested its decision on the case of *J. Ribas y Hijo v. United States*, and that case also is the main reliance of the government's argument. Claimants, however, contend that the *J. Ribas y Hijo Case* is distinguishable from that at bar.

The action there was brought to recover the value of the use of a vessel belonging to Spanish subjects and taken by the United States in the port of Ponce, Porto Rico, when that city was captured by the United States Army and *Navy on July 28, 567 1898. The vessel was used by the quartermaster until some time in April, 1899, when she was ordered to be returned to the owner, if all claims for damages for use or detention should be waived. The condition was refused, and the vessel was subsequently abandoned, and was wrecked in a hurricane. We quote the following from the statement of facts in the opinion: "The vessel was never in naval custody nor condemned as prize. When seized it was a Spanish vessel, carried the Spanish flag, and its owner, captain, and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure set forth in the proclamation of the President of April 26, 1898. 30 Stat. at L. 1770. A claim filed in the War Department in February, 1900, for its use, was rejected."

The court of claims dismissed the petition on the ground that the vessel was properly seized as enemy property, and its use was by the war power, for war pur-

poses. This court sustained the judgment and the principles upon which it was based.

A question of jurisdiction became prominent in the case. The action was brought in the district court of Porto Rico, and the court could only have had jurisdiction under the Tucker act, so-called, which provides for the bringing of suits against the United States. 24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752. In other words, as expressed in the act, omitting grounds of action with which the case was not concerned, that court was given jurisdiction of suits "upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Considering whether the action was of that nature, this court said that there was no element of contract in the case, for nothing was done or said by the officers of the United States from which could be implied an agreement or obligation to pay for the use of the vessel; and de- 568]clared, further, that, according to *established principles of law, its owners, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations, and that therefore the vessel was to be deemed enemy's property. "It was seized," it was said, "as property of that kind, for purposes of war, and not for any purposes of gain." In further emphasis of this conclusion, it was added: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States."

It was also decided that the claim of the plaintiff in the action was embraced in the stipulation in the treaty of peace between Spain and the United States, by which they "mutually relinquished all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. . . ." [30 Stat. at L. 1757.] That effect, it was declared, must be given to the treaty, even though the Tucker act could have been construed to authorize the suit, upon the ground that each being equally the supreme law of the land, the last in date must prevail in the courts.

Before comparing that case with the case 56 L. ed.

at bar we may take a glance at *Juragua Iron Co. v. United States*, 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. Rep. 385, where it was decided that, Cuba being "enemy's country," even "an American corporation doing business in Cuba was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to *be[569 seized and confiscated by the United States in the progress of the war then being prosecuted."

The action in that case was in the court of claims to recover from the United States the alleged value of certain property destroyed in Cuba during the war with Spain, by order of the officer commanding the United States troops operating in the locality of the property, the purpose of the order being "to destroy all places of occupation or habitation which might contain fever germs." The buildings destroyed were sixty-six in number, and were used in connection with mining operations and the manufacture of iron and steel products.

The destruction of the buildings was considered as an act of war and sustained as such. It was also decided that, even on the supposition that such destruction was wrongful and unnecessary, a tort was committed, and though committed in the interest of the United States, there was no element of contract, and the action was not one of which the court of claims could "take cognizance, whatever other redress was open to the plaintiff."

We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property, and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government, and of the citizens or subjects of the other. The *Venice* (*United States v. Cooke*) 2 Wall. 258, 274, 17 L. ed. 866, 867; *White v. Burnley*, 20 How. 235, 249, 15 L. ed. 886, 889.

These consequences, it is insisted, are averted in the case at bar by two important circumstances: that Santiago, unlike Porto Rico, was not captured, but capitulated, *and by the explicit direction of[570 the proclamation of the President of July 13, 1898, promulgated in Cuba on the 20th.

The argument is that those circumstances modified the general rule, and that the property of claimant ceased to be "hostile," and passed "under the sovereignty" of the United States, and as inviolable as other property under the jurisdiction of the United States, and, if taken for public use, an obligation to make compensation would be implied. The *Venice* (United States v. Cooke) 2 Wall. 258, 17 L. ed. 866, and other cases are adduced to support the contention. It was decided in *The Venice* that after the surrender of New Orleans, its military occupation by the Federal forces "drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government." The limitation is important. The case is not as broad as the contention which it is cited to support. It was concerned with the restoration of the authority of the United States over a part of the United States which had been in a state of insurrection, and in such case, that is, in districts occupied by national troops, it was "the policy of the government not to regard such districts as in actual insurrection, or their inhabitants as subject in most respects to treatment as enemies." Such occupation, it was said, did not "restore peace, or, in all respects, former relations;" but it replaced "rebel by national authority," and recognized, "to some extent, the conditions and the responsibility of national citizenship." In emphasis of the same view, it was said: "As far as possible the people of such parts of the insurgent states as came under national occupation and control were treated as if their relations to the national government had never been interrupted."

The *Ouachita Cotton* (*Withembury v. United States*) 6 Wall. 521, 18 L. ed. 935, does not change the ruling in *The Venice* from an expression of the special policy of the government indicated by its legislation to a declaration of law necessarily following from the military occupation of even enemy country. It was an obvious

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Venice in United States v. Padelford, 9 Wall. 531, 19 L. ed. 788.

The case of *The Grapeshot*, 9 Wall. 129, 19 L. ed. 651, is also cited by claimants, and some of its language demands notice. The question involved was the legality of a provisional court for the state of Louisiana, established by the President after New Orleans and parts of the state had been occupied by the national troops. Expressing the purpose of the national government the court said that it was "neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority." It was further said that it was the duty of the government, "wherever the insurgent power was overturned, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice." To this was added the following: "The duty of the national government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as Commander-in-Chief, and intrusted as such with the direction of the military force by which the occupation was held."

But it was not intended to express a limitation upon "the undoubted belligerent[572] right to use and confiscate all property of an enemy and to dispose of it at will. *Miller v. United States* (Page v. United States) 11 Wall. 268, 305, 20 L. ed. 135, 144, *The Venice*, and cases like it, expressed and enforced limitations to a certain extent upon such right growing out of the policy of the government. It may be, as said by Kent (1 Kent, Com. 92), that "the general usage now is not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation." It may also be, as further said by the learned commentator, that "if the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, . . . he violates the modern usages of war." Id. 92 and 93.

If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which

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the learned commentator says all mankind would feel. It is certain that the court's power cannot be enlarged by its emotions. Besides, we must regard the seizure of the San Juan as an exertion of the war power, and by this we do not mean as mere "booty of war," and the comments made in *Planters' Bank v. Union Bank*, 16 Wall. 483, 495, 21 L. ed. 473, 478, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the national government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the Army,—a right recognized in that case, for we do not accept the view contended for by claimants, that, with the surrender of Santiago and the cessation of active operations in the Santiago district, enemy property lost such character and was not subject to such right of capture. The war 573]*was flagrant elsewhere, and in such case *Planters' Bank v. Union Bank* is authority for the right, not against it. It was there decided that the military commander at New Orleans "had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or the effect of congressional action." Such pledge and effect existed, it was held, citing the case of *The Venice*. It may be said the indebtedness was not absolutely exempt from confiscation as enemy's property, but only that it was not, under the particular circumstances, "subject to military seizure as booty of war." And "booty of war" was distinguished from "a seizure for immediate use of the Army." This is a distinction important to observe, and is recognized explicitly or implicitly in all of the cases and references contained in the able argument of counsel. It accommodates, when its full range is properly understood, the necessities of the conqueror and the personal and property rights, if they may be called such, of the conquered. And there is nothing in the President's proclamation of July 13, 1898, which militates against it. But suppose we should grant the contrary. Suppose we should grant to the San Juan the broadest immunity from seizure or detention. We are then brought to consider the quality of the act of the officers of the Army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation, if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the *Tucker* act against the jurisdiction of the court of 56 L. ed.

claims. They are in the situation of the claimant in *J. Ribas y Hijo v. United States*, and *Juragua Iron Co. v. United States*. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract, and the action is one of which the court of claims could not take jurisdiction, whatever *other redress is[574 open to claimants. Indeed, we might have rested this branch of the case on those cases, both for the requirements of the *Tucker* act and the rights and powers of belligerents, conqueror or conquered. We have restated the propositions declared only in deference to the earnestness and force of the argument of claimants' counsel. And we rest the case on those propositions, and do not enter into a consideration of the citizenship or claimants, whether born in Spain and Spanish subjects when their vessel was seized, or Cuban by relation to the time either of the declaration of Cuban independence or of its recognition by Congress, as contended. If Spanish subjects, under the authority of *J. Ribas y Hijo v. United States*, their right of indemnity for the seizure and use of their vessel was taken away by the treaty between Spain and the United States.

Judgment affirmed.

PASCASIO DIAZ, Enrique De Messa, and Robert Scott Douglas, Trading under the Firm Name of Gallego, Messa, & Company, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 574-578.)

This case is governed by the decision in *Herrera v. United States*, ante, 316.

[No. 90.]

Argued December 11 and 12, 1911. Decided January 15, 1912.

APPEAL from the Court of Claims to review a judgment dismissing a claim for the value of the use by the military authorities of a Spanish merchant vessel captured in the harbor of Santiago. Affirmed.

The facts are stated in the opinion.

Messrs. Howard Thayer Kingsbury and Crammond Kennedy argued the cause, and, with Mr. Frank D. Pavey, filed a brief for appellants.

Assistant Attorney General Thompson argued the cause, and, with Mr. Franklin W. Collins, filed a brief for appellee.

For contentions of counsel see their briefs as reported in *Herrera v. United States*, ante, 316.

Mr. Justice McKenna delivered the opinion of the court:

This case was argued and submitted with No. 89, *Herrera v. United States*, just decided. [222 U. S. 558, ante, 316, 32 Sup. Ct. Rep. 179.] As in that case the findings of fact recite the pendency of the war between the United States and Spain, the capitulation of Santiago and the cessation of hostilities in that district between the contending forces, the seizure and capture by the military authorities of the United States of the steamer *Thomas Brooks*, among other vessels and lighters, on the 17th day of July, 1898, she then being owned by claimants, and her use for the transportation of troops and munitions of war until September 6th of the same year, a period of fifty-seven days, the United States paying the cost of operating the steamer. Prior to her seizure she had been used to transport Spanish troops and munitions of war. The full and reasonable value of her use was \$125 per day, amounting to the sum of \$6,375, no part of which has been paid.

The other vessels seized and captured were small vessels and lighters, which were used for a time and later returned on the advice or opinion of the Judge Advocate General of the Army. Their use was paid 576]for by government on *some amicable terms. Also, after September 6, 1898, the claimants were, by some amicable agreement between them and the quartermaster in charge at Santiago, permitted to use and operate the *Thomas Brooks* at their own expense, they agreeing to transport in her troops and munitions of war and other supplies at one half the transportation rates. This was done, and the claimants were paid for the service.

On the 18th of January, 1899, after the vessel had been turned over to claimants, they executed a receipt and released all claims in the form set out in *Herrera v. United States*.

It was also found by the court as follows, being No. 5 of the findings:

"At the same time, to wit, July 17, 1898, the military forces of the United States took possession of two wharves, the *Muelle Lus* and the *San José*, with their warehouses and sheds, belonging to claimants, and used the same for the purpose of loading, unloading, and storing government supplies, and in facilitating the movements

of troops from July 17, 1898, to March 1, 1899, a period of seven and one-half months, for which use no rental was paid, though the claimants presented bills therefor monthly; and after the government had surrendered the possession of said wharves, the chief quartermaster, Department of Santiago, offered the claimants \$4,000 in full payment for the use thereof during said period, which was refused; and later payment was denied on the ground that the claim was for unliquidated damages (see opinion Judge Advocate General, Dec. 23, 1901, page 83, Senate Doc. 318, 57th Congress, 1st Sess.). During said period said wharves were not used exclusively by the United States, but commercial steamers were permitted to land there, and they were used by the merchants of the city of Santiago when such use did not interfere with the handling of government stores. It does not appear that claimants received any *compensation from commercial[577 steamers or merchants of the city for such use during said period.

"From time to time said wharves and warehouses were repaired by the United States, and claimant company was employed by the United States at \$32 per day to dredge alongside of same for about three months. Said wharves were returned to claimants in nearly as good condition as when the United States took possession of them.

"The reasonable value of the use of said wharves and warehouses for the period they were used by the United States forces, together with any damage caused thereto by reason of said use, was \$7,300."

The President's proclamation of July 18, 1898, is found as in the *Herrera Case*.

The court of claims dismissed the petition on the authority of *J. Ribas y Hijo v. United States*, 194 U. S. 315, 48 L. ed. 994, 24 Sup. Ct. Rep. 727, and the *Herrera Case*.

Claimants urge nothing in this case because one of them is a British subject, except on the principles expressed in *The Venice (United States v. Cooke)* 2 Wall. 258, 17 L. ed. 866, and of those principles we have commented in the *Herrera Case*. Nor can much be urged on account of the settlement made by the officers of the United States with claimants for the services rendered after the surrender of the vessel, and the settlement made for some smaller vessels and lighters, or the tender of payment of \$4,000 by the quartermaster at Santiago for the use of the wharves, as set out in finding V. Indeed, counsel say that "the intention to pay must be the officially declared intention of the government, evidenced in the cases at bar by the

rules and regulations prescribed by the President and promulgated by the Secretary of War in general orders No. 101, and not the mere temporary mental processes of this or that subordinate officer who happened to be quartermaster at the time and on the spot, and ignorant or disregarding of the law of the case as laid down by the President." The necessities of 578] the case required claimants to *take that position; but we need not repeat what we said in No. 89 of those orders or of the proclamation. It is not possible to hold that the proclamation of the President was intended to supersede the laws of war, and attach to every appropriation by the military officers conducting operations of war the obligations and remedies of contracts. It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction. For the reasons for this conclusion we refer to the opinion in the Herrera Case. Judgment affirmed.

IN THE MATTER OF THE APPLICATION OF THE LEAF TOBACCO BOARD OF TRADE OF THE CITY OF NEW YORK, Petitioner.

(See S. C. Reporter's ed. 578-581.)

Mandamus — prohibition — certiorari.

[No. —, Original.]

Submitted December 4, 1911. Decided December 11, 1911.

(ORIGINAL APPLICATION for leave to file petition, praying:

That a writ of mandamus issue to the judges of the Circuit Court of the United States for the Southern District of New York, directing them to vacate and set aside a decree entered pursuant to the mandate of the United States Supreme Court in *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, and to enter a decree in conformity with the opinion and mandate of the Supreme Court.

That a writ of prohibition issue directed to the said Judges, prohibiting them from proceeding to put the said decree into effect, and from granting the further and supplemental remedies and relief therein provided for.

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That a writ of certiorari issue requiring the said judges to return and certify to this court all the proceedings had before them in the said cause since the filing of the mandate of this court in the court below, with all documents and evidence on which they may have acted in determining the form of their said decree.

That a writ of mandamus issue requiring the said *judges to permit your petitioner to intervene in said cause, and to be joined as a party thereto, with the right to appeal from said decree, or otherwise proceed in said cause as such party.

That pending the hearing and decision of said petition, and of the return thereto, all proceedings by the defendants or any of them looking to the execution of the plan of dissolution described in said decree be stayed.

That your petitioner have such other and further relief as may be proper.

Messrs. Felix H. Levy and Benjamin N. Cordozo for petitioner.

Attorney General Wickersham in opposition.

Per Curiam:

Leave to file petition denied.

1. One who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard v. Lombard*, 9 How. 530, 13 L. ed. 245; *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.* 109 U. S. 168, 27 L. ed. 895, 3 Sup. Ct. Rep. 108; *Ex parte Cockcroft*, 104 U. S. 578, 26 L. ed. 856.

2. The action of the court below in refusing to permit the movers to become parties to the record is not susceptible of being reviewed by this court on appeal, or indirectly, under the circumstances here disclosed, by the writ of mandamus. *Ex parte Cutting*, 94 U. S. 15, 24 L. ed. 49; and see *Credits Commutation Co. v. United States*, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636.

3. The merely general nature and character of the interest which the movers allege they have in the papers here filed is not, in any event, of such a character as to authorize them in this proceeding to assail the action of the court below. This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record. *United States v. Union P. R. Co.* 105 U. S. 263, 26 L. ed. 1021; *Elwell v. Fosdick*, 134 U. S. 500, 33 L. ed. 998, 10 Sup. Ct. Rep. 598.

582]***OMAHA & COUNCIL BLUFFS
STREET RAILWAY COMPANY et al.,
Appts.,**

v.

**INTERSTATE COMMERCE COMMISSION
et al.**

(See S. C. Reporter's ed. 582, 583.)

**Appeal — from commerce court — pre-
serving status quo.**

[No. 846.]

Submitted October 30, 1911. Decided No-
vember 6, 1911.

A PPEAL from the Commerce Court to re-
view a judgment sustaining an order
of the Interstate Commerce Commission.
On motion of the appellants the enforce-
ment of such order restrained pending the
appeal.

Mr. John Lee Webster for appellants.

Attorney General **Wickersham**, and
Messrs. **Blackburn Esterline** and **C. W.
Needham** for appellees.

Per Curiam: Upon the authority of U.
S. Rev. Stat. § 716, U. S. Comp. Stat. 1901,
p. 580; Ex parte Milwaukee & M. R. Co. 5
Wall. 188, 18 L. ed. 676; **Leonard v. Ozark**

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Land Co. 115 U. S. 465, 468, 29 L. ed. 445,
446, 6 Sup. Ct. Rep. 127; Re Claasen, 140
U. S. 200, 207, 35 L. ed. 409, 412, 11 Sup.
Ct. Rep. 735; Re McKenzie, 180 U. S. 536,
549, 45 L. ed. 657, 662, 21 Sup. Ct. Rep.
468; United States v. Shipp, 203 U. S. 563,
573, 51 L. ed. 319, 323, 27 Sup. Ct. Rep.
165, 8 A. & E. Ann. Cas. 265; and upon full
consideration of the facts bearing upon the
propriety of the appellant's motion for an
order to maintain the *status quo* pending
this appeal, it is ordered that the enforce-
ment of the order of the Interstate Com-
merce Commission entered November 27,
1909, and drawn in question in this case, be,
and it is, suspended and enjoined during
the pendency of this appeal, upon condi-
tion that within ten days herefrom the ap-
pellants execute unto the Interstate Com-
merce Commission and file in this cause a
good and sufficient bond in the sum of \$10,
000, with sureties to be approved by the
clerk of this court, and conditioned that
the appellants will promptly pay any and
all damages which may be suffered by their
several passengers and intended passengers
by reason of the granting or continuance of
this order if it is adjudged ultimately that
the order of the Interstate Commerce Com-
mission, drawn in question in this case, is
a valid one.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1911.

Vol. 223.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1911.

1]*EDGAR G. MONDOU, Plff. in Err.,
v.

NEW YORK, NEW HAVEN, & HART-
FORD RAILROAD CO. (No. 120.)

NORTHERN PACIFIC RAILWAY CO.,
Plff. in Err.,
v.

BESSIE BABCOCK, Administratrix. (No.
170.)

NEW YORK, NEW HAVEN, & HART-
FORD RAILROAD CO., Plff. in Err.,
v.

MARY AGNES WALSH, Administratrix.
(No. 289.) And

MARY AGNES WALSH, Administratrix,
Plff. in Err.,
v.

NEW YORK, NEW HAVEN, & HART-
FORD RAILROAD CO. (No. 290.)

(See S. C. Reporter's ed. 1-59.)

**Commerce — power of Congress — em-
ployers' liability.**

1. Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Federal Constitution, and

to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

**Commerce — power of Congress — em-
ployers' liability.**

2. Congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce by enacting the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), which abrogates the fellow-servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right in any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

**Commerce — power of Congress — em-
ployers' liability — fellow servants.**

3. The power of Congress, under the commerce clause, to regulate the liability of an interstate railway carrier for the death or injury of an employee engaged in inter-

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the validity of statute abrogating fel-
low-servant rule—see note to Bradford.

low-servant rule—see note to Bradford. Constr. Co. v. Heflin, 12 L.R.A. (N.S.) 1040.

As to constitutionality of statute rendering master liable for injuries to servant, irrespective of negligence—see note to Ives v. South Buffalo R. Co. 34 L.R.A. (N.S.) 162.

On concurrent jurisdiction of Federal and state courts—see notes to Copp v. Louisville & N. R. Co. 12 L.R.A. 725; and Smith v. M'Iver, 6 L. ed. U. S. 152.

On the administration of Federal laws in state courts—see note to Loughin v. McCaulley, 48 L.R.A. 33.

state commerce, which may result from the negligence of a fellow servant, is not exceeded by the enactment of the employers' liability act of April 22, 1908, although that act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom to contract — employers' liability.

4. Congress, possessing the power exercised in the employers' liability act of April 22, 1908, to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, made no unwarranted interference with the liberty of contract, contrary to U. S. Const. 5th Amend., by declaring in the 5th section of that act that any contract, rule, regulation, or device the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void.

[For other cases, see Constitutional Law, 605-607, 891-894, in Digest Sup. Ct. 1908.]

Constitutional law — classification — due process of law — equal protection of the laws — employers' liability.

5. The imposition of the liability created by the employers' liability act of April 22, 1908, upon interstate carriers, by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce not within the act are exposed, does not invalidate the statute under the due-process-of-law clause of the 5th Amendment to the Federal Constitution, on the ground that it makes an arbitrary and unreasonable classification,—even assuming that that clause is equivalent to the provision of the 14th Amendment securing the equal protection of the laws.

[For other cases, see Constitutional law, 286-291, in Digest Sup. Ct. 1908.]

Commerce — employers' liability — conflicting state and Federal regulations.

6. The laws of the several states, in so far as they cover the same field, were superseded by the enactment by Congress of the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Commerce — employers' liability — conflicting legislation — distribution.

7. The distribution of the damages recoverable, under the act of April 22, 1908, from an interstate railway carrier, for the death of an employee while engaged in interstate commerce, is governed by the provisions of that statute, which necessarily supersede any applicable state legislation.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — enforcing rights under Federal statute.

8. The enforcement of rights under the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, cannot be regarded as impliedly restricted to the Federal courts, in view of the concurrent jurisdiction provision of the judiciary act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, and of the amendment made by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), to the original employers' liability act, which, instead of granting jurisdiction to the state courts, presupposes that they already possess it.

[For other cases, see Courts, 1361-1432, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — enforcing rights under Federal statute.

9. Jurisdiction of an action to enforce the rights arising under the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, may not be declined by the courts of a state whose ordinary jurisdiction as prescribed by local laws is adequate to the occasion, on the theory that such statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.

[For other cases, see Courts, 1361-1432, in Digest Sup. Ct. 1908.]

[Nos. 120, 170, 289, and 290.]

Argued February 20 and 21, 1911. Decided January 15, 1912.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New London County in that state sustaining a demurrer to a complaint based upon the Federal employers' liability act. Reversed and remanded for further proceedings. Also—

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of plaintiff in an action based on the Federal employers' liability act. Affirmed. Also—

CROSS WRITS OF ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff in an action based on the Federal employers' liability act. Affirmed.

See same case below, No. 120, 82 Conn. 373, 73 Atl. 762; Nos. 289, 290, 173 Fed. 494.

Statement by Mr. Justice Van Devanter:
No. 120.

This was an action by a citizen of Connecticut against a railroad corporation of that state, to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Connecticut August 5, 1908, the action was commenced in one of the superior courts of that state in October following, and the [4]right *of action was based solely on the act of Congress of April 22, 1908. [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171.] According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the states, and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed upon the grounds, first, that the act of Congress was repugnant in designated aspects to the Constitution of the United States, and, second, that, even if the act were valid, a right of action thereunder could not be enforced in the courts of the state. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the supreme court of errors of the state (82 Conn. 373, 73 Atl. 762), upon the authority of *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 A. & E. Ann. Cas. 324, and the plaintiff then sued out the present writ of error. No. 170.

This was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the circuit court of the United States for the district of Minnesota, October 4, 1909, and the right of action was based solely on the act of Congress before mentioned. It appeared from the complaint that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the states, and while the deceased, as a locomotive fireman, was employed [5]by the defendant in *such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana, and died with-

out issue or a surviving father or mother, but leaving a widow and also a sister; and that if the statutes of Montana were applicable, the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint, and as provided in the act of Congress. The defendant challenged the validity of the act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly, and not for the benefit of the widow alone, but the demurrer and the insistence were overruled, and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment. Nos. 289 and 290.

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the benefit of the surviving widow and children, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Connecticut, February 11, 1909, the action was commenced in the circuit court of the United States for the district of Massachusetts in July following, and the right of action asserted in the second count of the declaration was based on the act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the defendant, *as a common carrier by [6] railroad, was engaged in commerce between some of the states, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death, and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and a jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other

counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury, and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count, and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The act whose validity is drawn in question (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), and the amendment of April 5, 1910 (36 Stat. at L. 291, chap. 143), are as follows:

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent

upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees," approved June eleventh, nineteen hundred and six. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148].

Approved April 22, 1908.

An Act to Amend an Act Entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," Approved April Twenty-second, Nineteen Hundred and Eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case 10]*arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said act be further amended by adding the following section as section nine of said act:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

56 L. ed.

Mr. Donald G. Perkins argued the cause and filed a brief for plaintiff in error in No. 120:

So far as the substantive right goes, the employers' liability act of 1908 does not differ from the act of 1906, and was within the power of Congress.

Thornton, Federal Employers' Liability Acts, § 7, p. 10; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 178, 52 L. ed. 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

Even the rules of the common law limited the power of the carrier to free itself entirely by contract from liability for its negligence in the carriage of passengers and freight, and the legislative power of Congress, assuming the matter is within its sphere, includes the right to change these rules of the common law and create a new and different rule.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

All the arguments as to the confusion and evil results likely to be caused by this law have no bearing upon the question as to the constitutional power of Congress to pass it, but relate merely to the wisdom of the legislative act.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 492, 52 L. ed. 306, 28 Sup. Ct. Rep. 141; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 405, 53 L. ed. 847, 29 Sup. Ct. Rep. 527.

Nor is there any violation of constitutional privilege because the act applies to railroad interstate carriers alone; for it bears alike upon all in that class, and it was a matter for Congress alone to decide whether it should apply to all carriers, carriers by water or carriers by railroad, as Congress saw the need for the regulation of commerce.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The opinion of the Connecticut supreme court fails to take note of the distinction between the act conferring power on the court to take jurisdiction of and adjudicate the disputed rights of the litigant, and the right of action itself belonging to the litigant.

Ex parte McNiel, 13 Wall. 243, 20 L. ed. 626; Cook v. Whipple, 55 N. Y. 164, 14 Ann. Rep. 202.

State courts have concurrent jurisdiction of civil actions arising under the Constitution or laws of the United States, unless

such jurisdiction is excluded by express words or by a strong implication.

Claffin v. Houseman, 93 U. S. 137, 23 L. ed. 838.

The power to regulate interstate commerce is one of the powers which the state surrendered to the United States, and assuming that the act in question is constitutional and within the power of Congress to regulate interstate commerce, then the power of Congress is supreme and paramount to that of the state, and supersedes the law and policy of the state of Connecticut on the same subject, so that the state has no law and no policy on this subject except the act of Congress.

Sinnot v. Davenport, 22 How. 242, 16 L. ed. 247; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 103, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 162, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

The great and substantial difference noted by the Connecticut supreme court, which, in its opinion, precludes jurisdiction, is that the act allows recovery for damages caused by the negligence of a fellow servant, while the Connecticut law does not; but this very difference has been held not sufficient to prevent the courts of one state from enforcing the laws of another, merely from comity.

Walsh v. New York & N. E. R. Co. 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584; *Northern P. R. Co. v. Babcock*, 154 U. S. 197, 38 L. ed. 960, 14 Sup. Ct. Rep. 978.

Another objection noted by the Connecticut supreme court was the rule of distribution of death damages fixed by the act, which differs slightly from the Connecticut law, but such a difference has been held by this court not sufficient to prevent the courts of one state from enforcing a cause of action under the statutes of another.

Dennick v. Central R. Co. 103 U. S. 18, 21, 26 L. ed. 441, 443.

There is no objection to the statute because under it a receiver appointed by a state court may be sued without going through the form of first getting the consent of the court.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

Even if the plaintiff's right of action were to be treated as arising under the laws of a foreign state, the Connecticut court could not deny him a remedy from mere whim or because the judges did not like the law, but it could only be done on established princi-

ples of law governing all cases, that to grant him his remedy would be against the public policy or interests of the state, not simply against the interest of the defendant, and the following cases show that the conclusion of the court that it could not entertain jurisdiction was unsound and not in accord with established principles.

Dennick v. Central R. Co. 103 U. S. 18, 26 L. ed. 441; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Ward v. Jenkins*, 10 Met. 588; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *Walsh v. New York & N. E. R. Co.* 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584; *King v. Sarria*, 69 N. Y. 31, 25 Am. Rep. 128; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *Stoekman v. Terre Haute & I. R. Co.* 15 Mo. App. 503; *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 495, 44 L.R.A. 449, 23 S. E. 935.

But the plaintiff's case is much stronger than if he were suing under a foreign law, because the whole foundation of the comity rule as to transitory actions is the principle that the law of a state has no extra-territorial force, and therefore can be enforced, not of right, but only as an act of comity; while this plaintiff is a citizen of Connecticut, and sues in the courts of his own state on a cause of action arising in the state under the act of Congress, which is the supreme law of Connecticut, and governs the public policy of the state on that point.

Blythe v. Hinckley, 173 U. S. 508, 43 L. ed. 786, 19 Sup. Ct. Rep. 497; *Claffin v. Houseman*, 93 U. S. 136, 23 L. ed. 838.

It is true, as held in *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 285, 52 L. ed. 1064, 28 Sup. Ct. Rep. 616, that each state may determine the limits of the jurisdiction of its courts, and how far it will entertain transitory actions when the cause of action arose outside the state, but that case establishes the exception that such power is subject to the limitations of the Federal Constitution, and is not applicable to a cause of action arising in the state under a law of the United States which is secured to the citizen by the Constitution.

No such situation is presented here as in *Re Stephens*, 4 Gray, 559, where by state statute the courts had been deprived of jurisdiction to grant naturalization papers to United States citizens.

The following authorities establish the

proposition that the plaintiff was entitled to maintain his action in the state court:

Ex parte McNiel, 13 Wall. 243, 20 L. ed. 626; Teal v. Felton, 12 How. 292, 13 L. ed. 993; Claflin v. Houseman, 93 U. S. 136, 23 L. ed. 838; First Nat. Bank v. Morgan, 132 U. S. 141, 144, 33 L. ed. 282, 283, 10 Sup. Ct. Rep. 37; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Raisler v. Oliver, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238; Ordway v. Central Nat. Bank, 47 Md. 245, 28 Am. Rep. 455; Schuyler Nat. Bank v. Bullock, 24 Neb. 827, 40 N. W. 413; Singer v. National Bedstead Mfg. Co. 65 N. J. Eq. 293, 55 Atl. 868; Cook v. Whipple, 55 N. Y. 164, 14 Am. Rep. 202; People v. Welch, 141 N. Y. 273, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; Bletz v. Columbia Nat. Bank, 87 Pa. 87, 30 Am. Rep. 343; Hartley v. United States, 3 Hayw. 45; Kansas City, M. & B. R. Co. v. Flipppo, 138 Ala. 487, 35 So. 457; Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Nelson v. Southern R. Co. 172 Fed. 478.

Mr. Edward D. Robbins argued the cause, and, with Mr. Joseph F. Berry, filed a brief for defendant in error:

Congress cannot confer jurisdiction upon the state courts.

Martin v. Hunter, 1 Wheat. 334, 4 L. ed. 104; Houston v. Moore, 5 Wheat. 27, 5 L. ed. 25; Dudley v. Mayhew, 3 N. Y. 15; Davison v. Champlin, 7 Conn. 244; State v. Curtis, 35 Conn. 374, 95 Am. Dec. 263; United States v. Lathrop, 17 Johns. 8; Ex parte Knowles, 5 Cal. 301; 1 Kent, Com. 12th ed. **399, 400; State v. Inferior C. P. Judges, 58 N. J. L. 97, 30 L.R.A. 761, 32 Atl. 743.

The reservation to the states respectively means the reservation of the right of sovereignty which they respectively possessed before the adoption of the Constitution, and which they had not parted from by that instrument; and any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void.

United States ex rel. Turner v. Williams, 194 U. S. 295, 48 L. ed. 986, 24 Sup. Ct. Rep. 719; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; The Collector v. Day (Guffington v. Day) 11 Wall. 124, 20 L. ed. 125.

The several state legislatures retain all the powers of legislation delegated to them by the state Constitutions which are not expressly taken away by the Constitution of the United States. The establishing of courts of justice, the appointment of judges, and the making of regulations for the

administration of justice within each state according to laws on all subjects not intrusted to the Federal government is the peculiar and exclusive province and duty of the state legislature.

Calder v. Bull, 3 Dall. 388, 1 L. ed. 649.

Can it be within the power of Congress to prescribe that the superior court of Connecticut must assume jurisdiction of a cause of action based upon an act the terms of which are entirely incompatible with its system of jurisprudence?

Kent, Com. 12th ed. *403; Mitchell v. Great Works Mill. & Mfg. Co. 2 Story, 648, Fed. Cas. No. 9,662; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 126, 20 L. ed. 122, 126; Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341; Sherman v. Bingham, 3 Cliff. 552, Fed. Cas. No. 12,762; Beavin's Petition, 33 N. H. 89; Re Stephens, 4 Gray, 559.

Nowhere in the United States Constitution can it be found that the states have given up to the Federal government the power which they originally possessed of assuming or denying jurisdiction of any particular cause of action, and this power never having been granted to the Federal government, neither expressly nor impliedly, and never having been prohibited to the states, they may assume or decline to assume the jurisdiction as granted.

Re Woodbury, 98 Fed. 833.

The rule is well settled that Congress cannot provide rules of evidence which the state courts are bound to follow.

People ex rel. Barbour v. Gates, 43 N. Y. 40; Caldwell v. New Jersey S. B. Co. 47 N. Y. 282; Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466; Bowlin v. Com. 2 Bush, 5, 92 Am. Dec. 468; Carpenter v. Snelling, 97 Mass. 542.

One of the most vital objections which the state court may offer as an excuse for refusing to assume jurisdiction is that contained in § 7 of the act, which gives the right to bring an action against a receiver of a corporation, irrespective of whether the receiver is appointed by authority of a state court or not. The court which appoints the receiver clearly has the right to decide for itself whether the receiver, acting for the court, shall be sued in any action. Although this section is not contrary to practice in the Federal courts, by reason of the fact that every receiver appointed by a court of the United States may be sued without its previous leave, it is, however, contrary to the practice of the state court, and sets up a new rule which the state courts may well object to. No action against a receiver may be had except by permission of the court which appointed the receiver.

Barton v. Barbour, 104 U. S. 126, 26 L.

ed. 672; *Tobin v. Central Vermont R. Co.* 185 Mass. 337, 70 N. E. 431; *Passage v. Dansville & Mt. M. R. Co.* 41 App. Div. 182, 58 N. Y. Supp. 770.

All actions brought under the interstate commerce law for penalties and complaints made in regard to rates and so forth are brought exclusively in the courts of the United States, as it is desirable to obtain uniformity in decisions.

Sheldon v. Wabash R. Co. 105 Fed. 785.

The reasons of the supreme court of errors of the state of Connecticut, as set forth in the case of *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, are sufficient to warrant this court in holding that the state courts of Connecticut are not obliged to assume jurisdiction in cases arising under an act which is not in harmony with Connecticut's system of administrative justice, and which sets up rules of evidence and procedure which could only be sustained by disregarding many of the requirements of the law of the state of Connecticut, both with respect to pleadings and evidence.

Mr. Edward D. Robbins also filed a separate brief for defendant in error:

The relations of master and servant, and specifically the liability of the master in case of injury to a servant, are in themselves matters for regulation by the states, and are not, in general, within the sphere of the national government.

From the mere circumstance that an act of Congress regulates the relation of master and servant, it does not necessarily follow that it may not also substantially affect the course of commerce between the states; and there is no peculiar sacredness about this particular relation, which should hedge out the national government from dealing with it, if and when Congress is truly acting under the power to regulate commerce between the states, within the limits established by the Constitution of the United States.

The mere circumstance that persons are engaged in interstate commerce does not make all their affairs and mutual relations subjects for regulation by Congress, or render any statute affecting the affairs and relations of such persons a regulation of commerce between the states, and therefore void if enacted by a state legislature, and valid if enacted by Congress. Such a statute must at least actually and substantially affect the course of such commerce. The application of this rule is alone sufficient for a complete disposal of this whole case. It is difficult to believe that anybody, awake to facts and willing to face them, can believe that this act does in reality affect the course of commerce between the states.

An act of Congress may affect the course of interstate commerce in some of its ap-

plications, but if it has also other substantial important applications in which it will not so affect interstate commerce, it is not in these last-mentioned applications a valid exercise of the power of Congress to regulate commerce, and, unless sustained by some other constitutional provision, is, to this extent, at least, an invalid law. And where the applications of an act of Congress which are beyond the power of Congress are not applications of separable parts of the act, but are applications of the statute as a whole, or of the particular provision in question, then this whole statute, or this whole provision, is invalid. And it is respectfully submitted that this act embraces provisions without which it would never have been enacted at all by Congress, which invade the sphere secured by the Constitution of the United States to the governments of the several states.

An act of Congress may directly and substantially affect the course of commerce between the states, and yet be invalid, if it violates the fundamental principles of justice and social order upon which rests the distinction between an arbitrary government and a government of law, so as to deprive any person of life, liberty, or property without due process of law.

In determining whether any statute does, within the meaning of the Constitution of the United States, deny to any person the protection of the "law of the land," the judiciary will always look beyond the form of the statute, and, refusing to be trammelled by fictions or technicalities, will consider it as constitutional statesmen, whose eyes may and should be fully open to all actualities of the present, and all substantial potentialities of the future.

Mr. Charles W. Bunn argued the cause and filed a brief for plaintiff in error in No. 170:

The act of Congress rests wholly upon the power of Congress to regulate commerce among the states, and this power has not been described in better terms than by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, when he said it was the power "to prescribe the rules by which commerce is to be governed."

This definition has been followed constantly; see *Adair v. United States*, 208 U. S. 161, 177, 52 L. ed. 436, 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The object of the commerce clause, we think, was well stated by Mr. Hackett in 22 *Harvard L. Rev.* 38, thus: "It is the guarantying of a facility of intercourse in transportation across state lines. In a word, the power intrusted to Congress was designed to insure and expedite the conveyance of passengers and freight with complete freedom and ease from one state to another."

It will be said that the effect and purpose of the act are to promote the safety of employees; that employees are an instrumentality of commerce; that Congress has the right to regulate such instrumentalities, and therefore the right to regulate employees. This is true only to the extent that the attempted regulation of the employee bears such relation to commerce as to be in fact a regulation thereof. Congress may well have the right to prescribe qualifications, examinations, or tests for color blindness, to regulate the carrier's method of doing business and its relations to its employees by prescribing safety appliances or by limiting the employees' hours of labor. All these matters operate directly upon commerce, tending, as they do, to make transportation more reliable, safe, and expeditious. It would seem that regulation of liability for injury to an employee merely because the master is engaged in interstate commerce, or because the employee is so engaged, is inadmissible, the particular regulation not being a rule of commerce or having any relation to commerce; or, at most, such a shadowy and indirect relation as not to be a regulation of commerce within the power of Congress.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Re Rahrer (Wilkerson v. Rahrer)* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

Such regulations as are before us would seem to be police regulations for the protection of life, within the *Gloucester Ferry Company Case*; to be of that character of regulation within the police power of the state under the *Rahrer Case*; to relate to the security of lives, limbs, and health of persons and within the jurisdiction of the state, as said in the *Robbins Case*; to be within the first division of powers stated in *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, and within the exceptions stated in the *Hooper Case*.

Mr. Samuel A. Anderson argued the cause and filed a brief for defendant in error:

Congress has the power, under the commerce clause, to regulate the relation of master and servant as between an interstate carrier and an interstate servant.

Employers' Liability Cases (*Howard v.* 56 L. ed.

Illinois C. R. Co.) 207 U. S. 463, 494, 496, 52 L. ed. 297, 307, 308, 28 Sup. Ct. Rep. 141; *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; *Peirce v. VanDusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The power of Congress to regulate commerce upon natural highways is exactly the same as it is to regulate commerce on artificial highways, being based solely upon the commerce clause of the Constitution. Hence, decisions of this court construing statutes regulating commerce by water are directly in point in the case at bar. In this connection, see:

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; *Gilman v. Philadelphia*, 3 Wall. 713, 724, 725, 18 L. ed. 96, 99; *United States v. Coombs*, 12 Pet. 72, 78, 9 L. ed. 1004, 1006; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

The power of Congress in this respect is as great as was that of the states in their respective boundaries before the adoption of the Constitution.

Gilman v. Philadelphia, 3 Wall. 725, 18 L. ed. 99.

Various decisions of this court, in which state statutes regulating the relation of railroad common carriers and their employees were under consideration as to their constitutionality, clearly tend to sustain the contention that Congress has the power to regulate the relation of master and servant as between an interstate carrier and an interstate employee.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

There can be no question that the power of Congress to regulate commerce between the states is as great as to regulate commerce with foreign nations, the power in both instances originating solely from the commerce clause.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Pittsburg & S. Coal Co. v. Bates*, 156

U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

There would seem to be no doubt that the act, properly construed, covers cases where injuries to an interstate employee are caused through the negligence of any employee, whether or not the latter was employed in such commerce. But it does not undertake to change the common-law doctrine of the assumption of risk for the negligence of fellow servants, in so far as interstate employees are concerned. It would impair the usefulness of the act very materially if Congress did not have the power to impose such liability upon a common carrier engaged in interstate commerce, for the work being done by interstate employees and intrastate employees is so combined and intermingled that at all times interstate trains and interstate employees, as well as the public, are constantly being exposed to danger through the acts of intrastate servants. If Congress did not have the power to impose liability for the negligence of such intrastate servants, then it would not be true that the power to regulate "may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942.

The decisions of this court sustaining the constitutionality of the safety-appliance acts are directly in point. Those acts make it unlawful for any common carrier by railroad, engaged in interstate commerce, to use any car in any train engaged in interstate commerce, not equipped as provided for in those acts, without reference to the use to which such car at any time is being put. In other words, if any car in said train is being used in interstate commerce, all cars in that train must be equipped according to the provisions of the safety-appliance acts, whether such cars are being used or were ever used in carrying interstate merchandise.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

It necessarily follows that, if Congress has the power to regulate as to the character of safety appliances to be used upon all cars in an interstate train, irrespective of whether the cars are interstate or intrastate cars, so as to promote the safety of the employees engaged in interstate commerce, the safety of the train and of the public, Congress also has the power to impose liability upon an interstate carrier by railroad in favor of an interstate servant injured through the negligence of other employees working at and about and in connection

with such interstate railroad, irrespective of the employment of the servant chargeable with careless acts resulting in such injury.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The act in question is not invalid because confined to common carriers by railroad, engaged in interstate commerce, nor because it embraces all interstate employees or interstate roads, when injured while engaged in such service, without regard to the character of such service.

Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

Congress has just as much power to classify railroads engaged in interstate commerce for the purpose of legislation as it had to pass an act with reference to contracts for seamen's wages, and such legislation has been held to be valid.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

Congress has the right to declare that the common-law doctrine of contributory negligence and assumption of risk, being good defenses, notwithstanding the negligence of the master, shall no longer prevail.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *The Mystic*, 44 Fed. 399; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616.

Any contention made that the statute impairs liberty of contract is fully and ably met and refuted by the language of the supreme court of Wisconsin, and the cases therein, cited in *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

Mr. John L. Hall argued the cause and filed a brief for the New York, New Haven, & Hartford Railroad Company in Nos. 289, 290:

Any regulation, to come within the meaning of the interstate commerce clause, must be direct and logical, and not indirect, remote, and merely incidental.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 44 L. ed. 136, 142, 20 Sup. Ct. Rep. 96; *Hall v. DeCuir*, 95 U. S. 485, 487, 24 L. ed. 547, 548; *Field v. Barber Asphalt Paving Co.* 194 U. S. 623, 48 L. ed. 1154, 24 Sup. Ct. Rep. 784; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 624, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Corfield v. Coryell*, 4

Wash. C. C. 378, Fed. Cas. No. 3,230; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 190, 21 Sup. Ct. Rep. 128; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Adair v. United States, 208 U. S. 161, 178, 180, 52 L. ed. 436, 444, 445, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 113; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

If the act has no real or substantial relation to that commerce, or if it is an invasion of the rights reserved to the state, it is the duty of the court to adjudge the act unconstitutional.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

Acts which are held constitutional when applied to maritime regulation are not necessarily constitutional when applied to commerce by land.

Craig v. Continental Ins. Co. 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97; Butler v. Boston & S. S. Co. 130 U. S. 548, 32 L. ed. 1021, 9 Sup. Ct. Rep. 612; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; The

Daniel Ball, 10 Wall. 557, 19 L. ed. 999; The Roanoke, 189 U. S. 183, 47 L. ed. 770, 23 Sup. Ct. Rep. 491; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

The act invades the sovereignty of the states.

Trade-Mark Cases, 100 U. S. 96, 25 L. ed. 552; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Houston v. Moore, 5 Wheat. 1, 48, 5 L. ed. 19, 30; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

The right of the state to regulate its commerce within its own borders is paramount to the power of Congress to regulate such commerce.

License Cases, 5 How. 504, 12 L. ed. 256.

The act touches directly and seeks to regulate the relation of master and servant as to intrastate business.

Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 368, 73 Atl. 754, 17 Ann. Cas. 324.

The purpose of both the 5th and 14th Amendments to the Federal Constitution is to secure the existence of fundamental justice and to prevent capricious and arbitrary legislation whereby unfair burdens are placed upon one class of persons. If such legislation be passed by any of the states, it conflicts with the 14th Amendment. If it is an act of Congress, it conflicts with the 5th Amendment. In this respect the construction placed upon one Amendment is applicable to the other.

San Mateo County v. Southern P. R. Co. 7 Sawy. 517, 13 Fed. 151; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Munn v. Illinois, 94 U. S. 123, 24 L. ed. 83; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The 5th Amendment insures equal protec-

tion of the laws. It prevents distinctions and classifications, unless the classifications are made upon some basis which is natural, and not arbitrary.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

As a basis for classification by special legislation of Congress, has this court any right to assume that the majority of the members of the class who are favored by this legislation are exposing their lives to extraordinary risks when the facts are to the contrary? This court will determine for itself the propriety of the classification.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

One rule of liability cannot be established for railway companies merely as such, and another rule for other employers, under like circumstances and conditions.

Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156.

Assuming as we do that the equal protection demanded by the 14th Amendment in respect to legislation by the states is similarly demanded by the 5th Amendment in respect to legislation of Congress (*French v. Barber Asphalt Paving Co.* 181 U. S. 324, 328, 45 L. ed. 879, 883, 21 Sup. Ct. Rep. 625), and that no classification can be made that does not rest upon some proper basis, then the hazardous character of the railroad business seems to offer the only reasonable and natural test.

Akeson v. Chicago, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676.

The provisions of § 5 violate the 5th Amendment in that they interfere with freedom of contract.

Allegeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173.

Congress in this respect, and under the guise of regulating interstate commerce, sought to legislate upon the right of contract in relation to matters only indirectly and remotely connected with interstate commerce.

Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 369, 73 Atl. 754, 17 Ann. Cas. 324.

It would seem to be a strained construction of the statute to hold that Walsh and Keating resumed their employment in interstate commerce by returning to the work of repairs upon a car which had been withdrawn from its journey, if, indeed, its journey was not at an end.

Foley v. Chicago, R. I. & P. R. Co. 64 Iowa, 644, 21 N. W. 124; *Stroble v. Chicago, M. & St. P. R. Co.* 70 Iowa, 555, 59 Am.

Rep. 456, 31 N. W. 63; *Malone v. Burlington, C. R. & N. R. Co.* 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A. (N.S.) 696, 104 N. W. 1079; *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Taylor v. Southern R. Co.* 178 Fed. 380; *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233.

The carrier is not liable for the negligence of the intrastate employee.

Zikos v. Oregon R. & Nav. Co. 79 Fed. 893.

Congress cannot create such a right of action in favor of the personal representatives of the inhabitant of a state, thereby seeking to regulate the measure of damages and determining the beneficiaries.

Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *Sherlock v. Al-ling*, 93 U. S. 99, 103, 23 L. ed. 819, 820.

A strict construction of this statute, which alters the common law, is required, and no sufficient provision has been made for the assessment of damages.

Sewall v. Jones, 9 Pick. 412; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 557, 25 L. ed. 892.

Expectancy tables are entitled to consideration only when the precedent has brought the deceased clearly within the class of selected lives tabulated.

Kerrigan v. Pennsylvania R. Co. 194 Pa. 98, 44 Atl. 1069; *McKenna v. Citizens' Natural Gas Co.* 198 Pa. 31, 47 Atl. 990.

Those tables themselves were the best evidence, and not the testimony of the witness as to their contents.

Whelan v. New York, L. E. & W. R. Co. 38 Fed. 15; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 518, 21 N. W. 711; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Banks v. Braman*, 195 Mass. 97, 80 N. E. 799.

Life or mortuary tables do not furnish any absolute rule of computation.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1; *Hinsdale v. New York, N. H. & H. R. Co.* 81 App. Div. 617, 81 N. Y. Supp. 356; *Mix v. Hamburg-American S. S. Co.* 85 App. Div. 475, 83 N. Y. Supp. 322; *Fajardo v. New York C. & H. R. R. Co.* 84 App. Div. 354, 82 N. Y. Supp. 912; *Thornton, Federal Employers' Liability Acts*, p. 121.

Mr. Endicott P. Saltonstall argued the cause, and, with Mr. George D. Burrage, filed a brief for Walsh, administratrix:

Congress has the power to regulate the relations of master and servant as between an interstate carrier and an interstate employee.

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942; Colasurdo v. Central R. Co. 180 Fed. 832; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Fulgham v. Midland Valley R. Co. 167 Fed. 660; Winfree v. Northern P. R. Co. — L.R.A.(N.S.) —, 97 C. C. A. 392, 173 Fed. 65; Dewberry v. Southern R. Co. 175 Fed. 307; Bottoms v. St. Louis & S. F. R. Co. 179 Fed. 318; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 494, 52 L. ed. 307, 28 Sup. Ct. Rep. 141; State v. Chicago, M. & St. P. R. Co. 136 Wis. 410, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

The fellow-servant rule is an exception to the general rule, *respondeat superior*. If Congress repeals the fellow-servant rule as to employees of an interstate carrier while engaged in interstate commerce, then the employer becomes directly responsible in such cases to the injured employee, by force of the general rule; and it is entirely immaterial how the employee who caused the injury was employed, since his act or omission is legally that of the employer.

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 950.

Assuming, however, that the act must be held to regulate intrastate commerce, to some extent, because it makes the employer liable for the negligence of intrastate employees, nevertheless, even in that event, the act is not invalid, because, wherever it is a necessary incident to the regulation of interstate commerce, Congress may control to that extent intrastate commerce.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; The Daniel Ball, 10 Wall. 557, 566, 19 L. ed. 999, 1002; Re Debs, 158 U. S. 564, 599, 39 L. ed. 1092, 1107, 15 Sup. Ct. Rep. 900; United States v. Burlington & H. C. Ferry Co. 21 Fed. 340; The Hazel Kirke, 23 Blatchf. 292, 25 Fed. 607; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 953; Colasurdo v. Central R. Co. 180 Fed. 832; Thornton, Federal Employers' Liability Acts, pp. 48-50.

There is nothing to indicate that any distinction is made between injuries due to the negligence of interstate employees and injuries due to the negligence of intrastate employees.

Adair v. United States, 208 U. S. 161, 178, 52 L. ed. 436, 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; El Paso & N. E. 56 L. ed.

R. Co. v. Gutierrez, 215 U. S. 87, 93, 54 L. ed. 106, 109, 30 Sup. Ct. Rep. 21.

Railroads may be classed as subjects for special legislation on account of the dangerous character of their business.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Pittsburg, C. C. & St. L. R. Co. v. Ross, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688.

If the Indiana act does not violate the 14th Amendment, *a fortiori*, the act under discussion does not violate the 5th Amendment, which does not contain the "equal protection" clause.

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 946.

If there is nothing in the 14th Amendment to prevent a state from passing an employers' liability act which puts in one class all railroad employees, irrespective of the hazardous nature of their employment, as in the Indiana act (Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676), *a fortiori*, there is nothing in the 5th Amendment to prevent Congress from making a similar classification in a Federal employers' liability act.

If Congress has the power to regulate the relation between interstate railroads and their employees while engaged in interstate commerce, and may prescribe a rule of liability as between them (Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764), it certainly has the power to determine the extent of that liability, and therefore to alter or abolish the common-law rule that contributory negligence is a defense.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 74, 51 L. ed. 708, 716, 27 Sup. Ct. Rep. 412; Bertholf v. O'Reilly, 74 N. Y. 524, 30 Am. Rep. 323; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87.

If Congress has power, under the Constitution of the United States, to pass the act, it is clear that nothing in the Constitution, laws or decisions of the courts of Connecticut can in any way affect its validity, so that these assignments raise no new question.

Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

The safety-appliance act is a penal statute, and there are no words specifically giving an injured employee a right of action for damages, much less providing how those damages shall be assessed; but, since a violation of a statutory obligation is negligence, an employee who is injured by reason of such violation has his action for damages, and those damages will be assessed according to the principles applied in similar actions of tort for personal injuries.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

Congress may create such a right of action in favor of personal representatives of an inhabitant of a state.

Sherlock v. Alling, 93 U. S. 99, 104, 23 L. ed. 819, 820; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

Congress has the power to abolish the doctrine of "assumption of risk" as provided in § 4 of the act.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

Congress has the power to declare void a contract which enables a common carrier to exempt itself from liability under the act, as provided in § 5.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 540, 52 L. ed. 326, 28 Sup. Ct. Rep. 141; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

The single fact that the defective car which Walsh undertook to repair contained perishable freight, brought from outside the state where the accident happened, is sufficient to show that the company was engaged in interstate commerce at the time Walsh was killed.

The Daniel Ball, 10 Wall. 557, 566, 19 L. ed. 999, 1002; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893.

The defective car which Walsh was repair-

ing at the time he was killed was, under the decisions above and hereafter cited, being used in interstate commerce. It was filled with perishable freight brought from outside the state, and temporarily "cut out" of the train for necessary, but easily and quickly made, repairs.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; St. Louis & S. F. R. Co. v. Delk, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233; United States v. Chicago, M. & St. P. R. Co. 149 Fed. 486; United States v. St. Louis, I. M. & S. R. Co. 154 Fed. 516; United States v. Illinois C. R. Co. 156 Fed. 182; United States v. Wheeling & L. E. R. Co. 167 Fed. 198; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; Belt R. Co. v. United States, 22 L.R.A.(N.S.) 582, 93 C. C. A. 666, 168 Fed. 542; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; United States v. Southern R. Co. 170 Fed. 1014; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 646; Felt v. Denver & R. G. R. Co. 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379.

It follows that Walsh was at that time employed in such commerce.

Colasurdo v. Central R. Co. 180 Fed. 832; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

The late Solicitor General Bowers and Attorney General Wickersham filed a brief for the United States as *amici curiæ*:

So far as it relates to the liability of an interstate employer to an interstate employee for injury received through the negligence of another interstate employee, the act is certainly a regulation of interstate commerce, and therefore is within the constitutional power of Congress.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 543, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

Numerous illustrations of the power of Congress to regulate interstate commerce by legislation concerning the agents who carry it on or the instruments with which it is done exist both in the Federal statutes and in the decisions of this court. For example:

(a) Congress may even create an agent for doing interstate commerce. The Pacific Railroad Companies were so incorporated or enfranchised.

Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; California

v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

In like manner, Congress may authorize the erection of bridges as instrumentalities of interstate commerce.

The Clinton Bridge (Gray v. Chicago, I. & N. R. Co.) 10 Wall. 454, 19 L. ed. 969; Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891.

All this is because the agent or the instrumentality makes possible the act. If Congress may create, *a fortiori* it may legislate to preserve, the agent or instrumentality; because such preservation is essential to the act.

(b) Congress may prescribe the character or qualifications of the agents of interstate commerce. Thus, it may require the use of pilots licensed under its authority, and may provide that none but such pilot shall be necessary.

Spraigue v. Thompson, 118 U. S. 90, 95, 30 L. ed. 115, 117, 6 Sup. Ct. Rep. 988.

Such power as the states possess to license and to require the use of pilots exists only because Congress leaves them that power until action by itself.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Huus v. New York & P. R. S. S. Co. 182 U. S. 392, 45 L. ed. 1146, 21 Sup. Ct. Rep. 827; Olsen v. Smith, 195 U. S. 332, 344, 49 L. ed. 224, 230, 25 Sup. Ct. Rep. 52.

This congressional power over the kind and quality of the agents of interstate commerce arises from their influence upon the act of interstate commerce.

(c) Likewise, Congress may prescribe the kind and condition of the material instruments with which commerce shall be done. This is illustrated by the safety-appliance acts of March 2, 1893, April 1, 1896, and of March 2, 1903. It is illustrated also by the numerous acts concerning such things as steam boilers, life preservers, life boats, and fire apparatus on vessels. The validity of the safety-appliance acts seems never to have been questioned either by the bar or by this court.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The system of licensing steam vessels engaged in interstate commerce was upheld in *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999.

Do the kind and quality of material instruments affect the act of interstate commerce more importantly than it is influenced by the higher security and the more concentrated attention of its human agents?

56 L. ed.

(d) The supply and distribution of cars as instruments of interstate commerce may be regulated under the authority of Congress.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 472-474, 54 L. ed. 280, 288, 289, 30 Sup. Ct. Rep. 155.

(e) Congress has also already legislated with direct view to the good condition of interstate railroad employees during their work.

Congress has been upheld in restricting the subject of commerce—by forbidding carriage of commodities owned by the carrier itself—where the conduct of interstate commerce in that subject would cause inequality and injustice.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The Federal power is to protect and advance the act of interstate commerce, and so to protect and further the work of any particular agent of interstate commerce, against all the world. This was settled emphatically by *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

Even a state of the Union cannot sanction an interruption. A grant by a state of exclusive right of navigating waters of the state cannot prevent their navigation by vessels licensed for the purpose by Congress.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

Bridges whose construction has been authorized by a state must be altered or removed if they impede interstate commerce.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

Question may be made whether Congress would not be within its power if it were legislating solely for the benefit of the interstate employee who is injured in interstate work, and without reference to the effect of its legislation upon the security and efficiency of the interstate act itself.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

The established power of Congress to prohibit interstate commerce in certain subjects carries a like suggestion. That power rests upon the ground that Congress may so legislate as to preserve the utility or the beneficence of commerce to those for whom it is done or to the public at large, and may prevent the conduct of pernicious commerce.

Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

Authority of the most varied kind could be cited to show the protective power of Con-

gress over interstate commerce against external interference or detriment. Indeed, that very sort of protection has been most commonly required from Congress and the Federal courts.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

An act for punishment of outsiders for stealing goods of a wrecked vessel was upheld, on the commerce clause, in *United States v. Coombs*, 12 Pet. 72, 77, 78, 9 L. ed. 1004, 1006, 1007.

The congressional selection of a civil liability of the interstate employer as the best sanction for his new duty of preventing injury of an interstate employee through negligence of his coemployees was clearly allowable.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 300.

As Congress had authority to adopt that sanction, it necessarily prescribed to whom the new civil right should belong.

Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; *McCune v. Essig*, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78.

Nobody has a vested right in the continuance of the rules of the common law. Rights already created under those rules and property already derived from them have sanctity; but the common law may be changed as to future transactions, just as statutes may be.

Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87.

The admiralty practice, which divides the loss between persons concurrently negligent, is well known.

The Sapphire, 18 Wall. 51, 56, 21 L. ed. 814, 816; *The Max Morris*, 137 U. S. 1, 8, 9, 15, 34 L. ed. 586-589.

And contribution lies between joint tortfeasors in admiralty.

Erie R. Co. v. Erie & W. Transp. Co. 204 U. S. 220, 225, 227, 51 L. ed. 450, 453, 454, 27 Sup. Ct. Rep. 246.

The rule of comparative negligence, variant in its details, but always contradictory of the common-law rule, was established by the courts in Illinois, Kansas, and Tennessee.

Galena & C. Union R. Co. v. Jacobs, 20 Ill. 496; *Kansas P. R. Co. v. Peavey*, 29 Kan. 180, 44 Am. Rep. 630; *Union P. R. Co. v. Rollins*, 5 Kan. 180; *Chicago v. Stearns*, 105 Ill. 557; *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 366. See also *McNicholas v. Dawson*, 68 L. J. Q. B. N. S. 470 [1899]

1 Q. B. 773, 47 Week. Rep. 500, 80 L. T. N. S. 317, 15 Times L. R. 242.

It seems never to have been held anywhere that the Federal or any state Constitution requires that contributory negligence be either total or a partial defense. Such holding would be strange. Usually no constitutional question has been raised concerning alternative statutes; but they have been sustained when attacked.

(a) As to statutes adopting the rule of comparative negligence—*Missouri P. R. Co. v. Castle*, 97 C. C. A. 124, 172 Fed. 843; *Alabama G. S. R. Co. v. Coggins*, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455; *Christian v. Macon R. & Light Co.* 120 Ga. 314, 47 S. E. 923.

(b) As to a statute exactly like the congressional act—*Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 63, 79 Am. St. Rep. 149, 25 So. 338.

And as to the congressional act itself—*Philadelphia B. & W. R. Co. v. Tucker*, 35 App. D. C. 123.

(c) As to a statute abolishing contributory negligence altogether—*Pulliam v. Illinois C. R. Co.* 75 Miss. 627, 23 So. 359.

The doctrines of contributory negligence and assumption of risk are so closely related that the authorities hereafter cited concerning the latter doctrine are here in point.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

Authorities upholding such statutory change of the doctrine of assumed risk are abundant.

(a) Where the change is general.

Coley v. North Carolina R. Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43, 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195.

(b) The cases sustaining statutes which abolish the fellow-servant rule are in point, because that rule itself rests upon the idea that each employee assumes the risk of negligence of his coemployee.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

(c) Cases inferring a change of the common-law rule where defendant's negligence consists in violation of a statute specifically prohibiting certain conduct, or specifically requiring certain protective appliances.

Narramore v. Cleveland C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed.

302; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531.

(d) Cases under the safety-appliance acts.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 11-14, 51 L. ed. 681, 685-687, 27 Sup. Ct. Rep. 407; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The general grant of jurisdiction by state law is sufficient to cover any right, whether created by the law of that state or of other states or of the United States or of foreign countries. Congress has left the state courts free to use that general jurisdiction, by not prohibiting its use; and the terms of the state's grant of jurisdiction cover the case.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833.

In exercising their concurrent jurisdiction, the state courts do not use a new jurisdiction conferred upon them by Congress, but their ordinary jurisdiction derived from the Constitution or statutes of their own state.

Ibid.

The following cases sustain state statutes abolishing the fellow-servant rule upon railroads alone, against express attack under the 14th Amendment:

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; St. Louis Merchants' Bridge Terminal R. Co. v. Callahan, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Pittsburg, C. C. & St. L. R. Co. v. Lightheiser, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676.

Pertinent support of other legislation making special rules for railroads is found in *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527.

Extension of the new rules to interstate employees generally was permissible. Their restriction to employees injured in consequence of special railroad hazard was not required by the Constitution.

Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *St. Louis Merchants' Bridge Terminal R. Co.* 56 L. ed.

v. Callahan, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

Special Assistant to the Attorney General, J. C. McReynolds, also filed a brief for the United States as *amicus curiæ*:

The principles of law necessary for solving the questions in issue have been definitely determined by this court.

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 96, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912a, 463; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246.

The relationship—the reciprocal rights and liabilities—between a railroad carrier and its employees, arises out of agreement.

Beven, Employers' Liability, pp. 3, 5; *Ruegg, Employers' Liability Act*, 7th ed. § 1; *Cooley, Torts*, 531; *Farwell v. Boston & W. R. Corp.* 4 Met. 56, 38 Am. Dec. 339; *Priestley v. Fowler*, 3 Mecs. & W. 1; *Murph. & H.* 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987, 19 Eng. Rul. Cas. 102; *Murray v. South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 268; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 15 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590; *Mechem's article 4 Ill. L. Rev.* 243; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. ed. 787, 789, 5 Sup. Ct. Rep. 184.

Without doubt Congress has plenary power to regulate whatever is interstate commerce, subject only to the restrictions of the Constitution.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

It has long been established doctrine in

this court that, in the absence of action by Congress, the states may legislate concerning the relationship—the rights and liabilities—between master and servant operating in interstate commerce. But such declarations have been constantly coupled with the statement that the general subject is within the control of Congress whenever it may choose to exercise its power.

Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Sherlock v. Alling*, 93 U. S. 99, 103, 107, 23 L. ed. 819, 820, 821; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815.

The contract between a passenger and an interstate carrier is a part of interstate commerce subject to regulation by Congress. Accordingly, a state legislature cannot prescribe its terms in such way as to interfere with the free flow of commerce between the states.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Plessy v. Ferguson*, 163 U. S. 537, 540, 41 L. ed. 256, 257, 16 Sup. Ct. Rep. 1138; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; *Hutchinson, Carr.* 3d ed. §§ 997, 1077.

The contract of sale negotiated by a traveling agent representing a manufacturer in another state and the purchaser is a part of interstate commerce, and cannot be taxed or otherwise restricted by state legislation so as to burden commerce between the states.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Dozier v. Alabama*, 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

A contract for the transportation of goods between different states by vessel or railroad is a part of interstate commerce whose terms may be prescribed or regulated by act of Congress.

The Delaware, 161 U. S. 459, 471, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516; *The Southwark*, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 663, 45 L. ed. 361, 364,

21 Sup. Ct. Rep. 275; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

The contract for service between a sailor and a vessel engaged in foreign commerce is part thereof, and its terms may be directly prescribed by Congress.

Patterson v. The Eudora, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

Congress may prescribe the character of instruments to be used in interstate commerce, and declare the result of a failure so to do upon the agreement of employment between master and servant.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 294, 295, 52 L. ed. 1061, 1067, 1068, 28 Sup. Ct. Rep. 616.

Mr. Justice **Van Devanter**, after stating the cases as above, delivered the opinion of the court:

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supersede the laws of the states in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the states when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (art. I., § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce . . . among the several states," and "to make all laws which shall be necessary and proper" for the purpose, have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several states"

marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single [47]state and does *not affect other states,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley v. Port Wardens*, 12 How. 299, 315-317, 13 L. ed. 996, 1003, 1004; *The Lot-tawanna* (*Rodd v. Heartt*) 21 Wall. 558, 577, 22 L. ed. 654, 662; *Sherlock v. Alling*, 93 U. S. 99, 103-105, 23 L. ed. 819-821; *Smith v. Alabama*, 124 U. S. 465, 479, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238. 9 Sup. Ct. Rep. 28; *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, 698-700; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 37 L. ed. 772, 776, 13 Sup. Ct. Rep. 914; *Patterson v. The Eudora*, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 48]407; *Employers' Liability Cases* (*How-* 56 L. ed.

ard v. Illinois C. R. Co.) 207 U. S. 463, 495, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141; *Adair v. United States*, 208 U. S. 161, 176-178, 52 L. ed. 436, 443, 444, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 222 U. S. 20, ante, 72, 32 Sup. Ct. Rep. 2.

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations *of common car- [49 riers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the act offends against the 5th Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class, and all their employees engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer 50]* and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the per-

sonal representatives of the deceased, for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Martin v. Pittsburgh & L. E. R. Co.* 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 577, 22 L. ed. 654, 662; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 417, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59.

Second. The natural tendency of the changes described *is to impel the car-ri-ers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottery Case (Champion v. Ames)* 188 U. S. 321, 353, 355, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 203, 55 L. ed. 167, 181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 581, 582, 22 L. ed. 654, 664; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier

for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. v. United States*, 222 U. S. 20, 27, ante, 72, 32 Sup. Ct. Rep. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained 52]*by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the 5th Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164, and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it.

Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not sub-

jected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the "due process of law" clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the 14th Amendment,[53 which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579:

(P. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component *parts.[54 But this question is not left to mere reason: the people have, in express terms,

decided it, by saying, 'this Constitution, and the laws of the United States which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'

(P. 426) "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them."

And particularly apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482, 31 L. ed. 508, 510, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Reid v. Colorado*, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 581, 22 L. ed. 654, 664; *Gloucester Ferry Co. v. Pennsylvania*, 114

U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; *Southern R. Co. v. Reid*, No. 487, 222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140; *Northern P. R. Co. v. Washington*, No. 136, 222 U. S. 370, ante, 237, 32 Sup. Ct. Rep. 160.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the superior courts of the state of Connecticut, and, in that case, the supreme court of errors of the state answered the question in the negative. That, however, was not because the ordinary jurisdiction of the superior courts, as defined by the Constitution and laws of the state, was deemed inadequate or not adapted to the adjudication of such a case, but because the supreme court of errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the state respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act, and in others the different standards recognized by the laws of the state.

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of

the United States." 25 Stat. at L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508; *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; *United States v. Barnes*, 222 U. S. 513, ante, 291, 32 Sup. Ct. Rep. 117. This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "the jurisdiction of the courts of the United States under this act shall be *concurrent with that of the courts of the several states*, and no case arising under this act, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

Because of some general observations in the opinion of the supreme court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, *as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion," because we are advised by the decisions of the supreme court of errors that the superior courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant.

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a

policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Claffin v. Houseman*, 93 U. S. 130, 136, 137, 23 L. ed. 833, 838, 839:

"The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without *speci- [58] fying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even

although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon 59] whether the injured person *was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289 several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289, and 290 the judgments are affirmed, and in No. 120 the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

—
QUONG WING, Plff. in Err.,
v.

THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana.

(See S. C. Reporter's ed. 59-65.)

Constitutional law — equal protection of the laws — discrimination in license tax.

Exempting steam laundries and women engaged in the laundry business, where not more than two women are employed, from the license tax imposed by Mont. Rev. Codes, § 2776, upon the laundry business, does not deny the equal protection of the laws to a man operating a hand laundry.

[For other cases, see Constitutional Law, 360-368, in Digest Sup. Ct. 1908.]

[No. 119.]

Argued December 18, 1911. Decided January 22, 1912.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which reversed a judgment of the District Court for the County of Lewis and Clark, in that state, for the recovery of a license tax exacted from a person operating a hand laundry. Affirmed.

NOTE.—As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

See same case below, 39 Mont. 64, 101 Pac. 250.

The facts are stated in the opinion.

Mr. Charles E. Pew argued the cause, and, with Messrs. Ira. T. Wight and M. S. Gunn, filed a brief for plaintiff in error:

Classification for any purpose must be based upon same real and reasonable difference in the property or business placed in one class from the property or business which is exempted from burdens imposed upon such class; otherwise such classification is repugnant to the equal protection clause of the Federal Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Re Yot Sang*, 75 Fed. 983; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676.

Mr. W. H. Poorman, Assistant Attorney General of Montana, argued the cause, and, with **Mr. Albert J. Galen**, Attorney General of Montana, filed a brief for defendant in error:

The "equal protection of the laws" clause requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

No doubt can be entertained of the right of a state legislature to tax trades, professions, or occupations in the absence of inhibition in the state Constitution in that regard.

Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *State ex rel. Toi v. French*, 17 Mont. 56, 30 L.R.A. 415, 41 Pac. 1078; *State v. Camp Sing*, 18 Mont. 129, 32 L.R.A. 635, 56 Am. St. Rep. 551, 44 Pac. 516.

The state may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow de-

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

ductions for indebtedness. All such regulations and those of like character, so long as they proceed within limits and general usage, are within the discretion of the state legislature or the people of the state in confirming their Constitution.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 562, 46 L. ed. 690, 22 Sup. Ct. Rep. 431.

There can be no claim maintained here that the "United States citizenship" of anyone is invaded by the state law, for this law makes no distinctions or discriminations except as the same relates to women.

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

Neither can it be successfully maintained that the purpose of this law is to discriminate against the subjects of the Emperor of China, for no such motive is apparent on the face of this law, nor is there anything in its practical application that would lead to such a conclusion. The law by its terms operates equally upon all male persons, and by its exemptions operates equally upon all female persons.

Soon Hing v. Crowley, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730.

We can here investigate neither the wisdom nor the expediency of this legislation, nor can we go beyond the statute itself to inquire into the motives which impelled its enactment.

McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; *Quong Wing v. Kirkendall*, 39 Mont. 69, 101 Pac. 250.

Discrimination as between persons having equal facilities for profit is not objectionable.

St. Louis v. Wehrung, 46 Ill. 392.

There is no precise application of the rule of reasonableness or classification, and the rule of equality permits many practical inequalities, and necessarily so. In a classification for governmental purposes, there cannot be any exact exclusion or inclusion of persons or things.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Clark v. Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382.
56 L. ed.

The state could exempt women from the operation of this law.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

Whether the license required by this state law is a license tax, strictly speaking, or a revenue tax, is immaterial, for the legislature has authority under the state Constitution to resort to either or both methods in raising revenue, and it also has the authority to resort to the license system as a method of regulation, or as a proper exercise of the police power, and the license tax, whether imposed for regulation or for revenue, is not controlled by the equality or uniformity requirements of the Constitution.

State ex rel. Toi v. French, 17 Mont. 54, 30 L.R.A. 415, 41 Pac. 1078.

*Mr. Justice Holmes delivered the [62 opinion of the court:

This is an action to recover \$10 paid under duress and protest for a license to do hand laundry work. The plaintiff got judgment in the court of first instance, but this judgment was reversed by the supreme court of the state. 39 Mont. 64, 101 Pac. 250. The law under which the fee was exacted imposed the payment upon all persons engaged in laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged, where not more than two women were employed. Rev. Codes, § 2776. The only question is whether this is an unconstitutional discrimination, depriving the plaintiff of the equal protection of the laws. U. S. Const. 14th Amend.

The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. One like the former was held bad in *Re Yot Sang*, 75 Fed. 983, and while the latter was spoken of by the supreme court of the state as an exemption of one or two women, it is to be observed that in 1900, the census showed more women than men engaged in hand laundry work in that state. Nevertheless we agree with the supreme court of the state so far as these grounds are concerned. A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. *McLean v. Arkansas*, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235, 50 L. ed. 451,

456, 26 Sup. Ct. Rep. 232; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was 63] illustrated in *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 92, 95, 45 L. ed. 102, 103, 105, 21 Sup. Ct. Rep. 43; *Williams v. Fears*, 179 U. S. 270, 276, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469, 45 L. ed. 619, 627, 21 Sup. Ct. Rep. 423. It may favor or discourage the liquor traffic or trusts. The criminal law is a whole body of policy on which states may and do differ. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair. And if, again, it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the 14th Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state.

Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the Constitution does not allow. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country, while, on the other hand, it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged, and rather was disclaimed when it was mentioned from the bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if, when called to our attention, the facts should be taken notice of judicially, 64]*whether, because they are only the

premises for a general proposition of law (*Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Telfair v. Stead*, 2 Cranch, 407, 418, 2 L. ed. 320, 324), or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned, the judgment must be affirmed.

Judgment affirmed.

Mr. Justice Hughes concurs in the result.

Mr. Justice Lamar, dissenting:

I dissent from the conclusions reached in the first branch of the opinion, because, in my judgment, the statute, which is not a police but a revenue measure, makes an arbitrary discrimination. It taxes some and exempts others engaged in identically the same business. It does not graduate the license, so that those doing a large volume of business pay more than those doing less. On the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand. Among these small operators there is a further discrimination, based on sex. It would be just as competent to tax the property of men and exempt that of women. The individual characteristics of the owner do not furnish a basis on which to make a classification for *purposes of taxation.[65 It is the property or the business which is to be taxed, regardless of the qualities of the owner. A discrimination founded on the personal attributes of those engaged in the same occupation, and not on the value or the amount of the business, is arbitrary. "A classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Connolly v. Union Sewer Pipe Co.* 184 U. S. 560, 46 L. ed. 690, 22 Sup. Ct. Rep. 431.

JOSEFA RUIZ DE NOBLE, James R. Noble, William D. Noble, et al., Appts.,
v.

ELIZA GALLARDO Y SEARY, Estefania Varonni, Celestina Gallardo y Varonni, and Eva Gallardo y Varonni.

(See S. C. Reporter's ed. 65-67.)

Laches — in foreclosure suit — applying doctrine in Porto Rico.

The injustice which would result from applying the doctrine of laches to the conduct of the parties in Porto Rico during the many years that were not governed by any rule peculiar to chancery courts forbids the application of this doctrine so as to defeat a suit to foreclose a mortgage or lien executed in 1865, and still supposed to exist at law, and not shown to be barred by any statute of limitations,—especially where no change of position on the faith of, or seemingly influenced by, the quiescence of the complainants or their predecessors, is disclosed.

[Laches as equitable defense, see Limitation of Actions, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 147.]

Submitted December 22, 1911. Decided
January 22, 1912.

A PPEAL from the District Court of the United States for Porto Rico to review a decree dismissing, on the ground of laches, a bill to foreclose a mortgage or lien. Reversed without prejudice.

See same case below, 5 Porto Rico Fed. Rep. 10.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill submitted the cause for appellants:

A suit to foreclose a mortgage cannot be held to be barred by laches when the limit of time fixed by the applicable statute of limitations has not arrived at the time of beginning suit.

Story, Eq. Jur. 13th ed. § 1520; Metropolitan Nat. Bank v. St. Louis Dispatch Co. 149 U. S. 436, 448, 37 L. ed. 799, 803, 13 Sup. Ct. Rep. 944; Rankin v. Scott, 12 Wheat. 177, 6 L. ed. 592; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; Diefenthaler v. New York, 111 N. Y. 331, 19 N. E. 48; Boon v. Pierpont, 28 N. J. Eq. 7; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; Jordan v. Sayre, 24 Fla. 1, 3 So. 329; Syracuse Salor Salt Co. v. Rome, W. & O. R. Co. 67 Hun, 153, 22 N. Y. Supp. 321; Fullwood v. Fullwood, L. R. 9 Ch. Div. 176, 47 L. J. Ch. N. S.

459, 38 L. T. N. S. 380, 26 Week. Rep. 435; Re Baker, L. R. 20 Ch. Div. 230, 51 L. J. Ch. N. S. 315, 45 L. T. N. S. 658, 30 Week. Rep. 858.

No brief was filed for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to foreclose a mortgage or lien executed in *December, 1865, by [66] which one Ramon Ruiz Gandia bound himself to pay a certain sum to William Noble with the proceeds of the first crops that might be ground from the next January at a certain plantation. The defendants pleaded laches apparent on the face of the bill and different statutes of limitation. The notarial document by which the lien was created is presented only in a translation which suggests doubts whether a further lien upon succeeding crops applied to this debt or only to another that is referred to and that was due to another man. There was also a petition for leave to intervene on the part of the representative of the other creditor, referring to documents not set out, but this was not acted upon except as affected by the disposition of the principal case. The court below expressed doubts whether any of the instruments bound the land, but held that in any event the plaintiffs were barred by laches, and dismissed the bill.

As was observed by the court below, a court of equity in a novelty in Porto Rico. But, this being so, it would be unjust to apply its doctrines to the conduct of the parties during the many years that were not governed by any rule peculiar to chancery courts. The plaintiffs are not relying upon a merely equitable right; they are asserting a lien which they say the Spanish law gave them until it was barred by the statute of limitations. Whether the Spanish law had any doctrines of laches that in any aspect would be applicable to this case was not argued and we have not inquired. But it is to be observed that no change of position on the faith of, or seemingly influenced by, the quiescence of the plaintiff's and their predecessors, is disclosed. It would be open to argument whether laches was made out, even under our law, sufficient to defeat the remedy usually given by equity to enforce a purely legal right; in other words, whether mere lapse of time short of the statute of limitations, with nothing more, should defeat the foreclosure of a lien supposed still to *exist at law. [67]

NOTE.—As to laches as a defense—see notes to Middletown v. Newport Hospital, 1 L.R.A. 191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 56 L. ed.

J.L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; Hammond v. Hopkins, 36 L. ed. U. S. 135; and Felix v. Patrick, 36 L. ed. U. S. 720.

But we express no opinion on that point because the matter must be decided by Spanish law, which prevailed during the time when the laches is supposed to have been shown.

The case is a hard one, no doubt, if the plaintiffs ultimately should prevail on the strength of the old law of prescription for mortgages and subsequent recognitions. It should be scrutinized with care, not only with reference to the property covered by the lien, but the nature of the recognitions during the time when the bond could not be denied, and the law. As we have intimated, the record leaves some doubt as to material facts, no argument was presented to us on behalf of the appellees, and upon the whole we think it will be more conducive to justice if the case be remitted to the district court for further consideration. To that end the decree will be reversed.

Decree reversed without prejudice.

UNITED STATES, Petitioner,
v.

WONG YOU, Wong Cheen, et al.

(See S. C. Reporter's ed. 67-70.)

Aliens — deportation of Chinese laborers.

Chinese laborers are not tacitly exempted from the general provisions of the immigration act of February 20, 1907 (34 Stat. at L. 898, 908, chap. 1134, U. S. Comp. Stat. Supp. 1909, pp. 447, 466), for the deportation of any alien unlawfully entering the United States, because of the Chinese exclusion acts of earlier date, which make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing him, although by § 43 of the later act its provisions shall not be construed to repeal, alter, or amend the laws relating to the Chinese.

[For other cases, see Aliens, VI. b, 4, in Digest Sup. Ct. 1908.]

[No. 597.]

Argued January 12, 1912. Decided January 22, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment which reversed a judgment of the District Court for the Northern District of New

York, refusing relief by habeas corpus to Chinese laborers whose deportation from the United States had been ordered. Reversed.

See same case below, 104 C. C. A. 535, 181 Fed. 313.

The facts are stated in the opinion.

Assistant Attorney General Harr argued the cause and filed a brief for petitioner:

The application of the immigration laws to Chinese aliens is well settled.

Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Ex parte Lec Sher Wing, 164 Fed. 506; Looc Shee v. North, 95 C. C. A. 646, 170 Fed. 566; Ex parte Li Diek, 174 Fed. 674, 176 Fed. 998; Haiw Moy v. North, 105 C. C. A. 381, 183 Fed. 89.

No appearance for respondents.

*Mr Justice Holmes delivered the [69] opinion of the court:

This is a writ of habeas corpus. It was dismissed by the district court (176 Fed. 933), but was sustained by the circuit court of appeals, which ordered the parties concerned to be discharged from custody. 104 C. C. A. 535, 181 Fed. 313. The parties are Chinamen who entered the United States surreptitiously, in a manner prohibited by the immigration act of February 20, 1907, chap. 1134, § 36, 34 Stat. at L. 898, 908, U. S. Comp. Stat. Supp. 1909, pp. 447, 466, and the rules made in pursuance of the same, if applicable to Chinese. They were arrested *in transitu* and ordered by the Secretary of Commerce and Labor to be deported. §§ 20, 21. But as it transpired in the evidence that they were laborers, the circuit court of appeals held that they could be dealt with only under the Chinese exclusion acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the immigration act, although broad enough to include them, and although of later date.

We are of opinion that the circuit court of appeals made a mistaken use of its principles of interpretation. By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of

NOTE.—As to what Chinese persons are excluded from the United States—see note to Wong You v. United States, 104 C. C. A. 538.

the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the government a better remedy against them alone of all the world, now that one has been 70] created in general terms. *To allow the immigration act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in § 43. The present act does not contain the clause found in the previous immigration act of March 3, 1893 [27 Stat. at L. 569, chap. 206, U. S. Comp. Stat. 1901, p. 1300], that it shall not apply to Chinese persons, and, on the other hand, as it requires deportation to the trans-Pacific ports from which such aliens embarked for the United States (§ 35), it is rather hard to say that it has not the Chinese specially in mind.

Judgment reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

F. W. COOK BREWING COMPANY.

(See S. C. Reporter's ed. 70-84.)

Appeal — from circuit court of appeals — Federal question.

1. The jurisdiction of a Federal circuit court of a suit by an Indiana corporation to enjoin a common carrier incorporated under the laws of Kentucky from refusing to accept interstate shipments of intoxicating liquors consigned to local-option points in Kentucky was not dependent upon diverse citizenship alone, so as to make the judgment of the circuit court of appeals final, where there was involved not only the validity of the Kentucky statute as a regulation of interstate commerce, but the question as to whether the sole remedy was not by an application to the Interstate Commerce Commission.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

Appeal — objections not raised below — adequate remedy at law.

2. The objection that there was an adequate remedy at law where a common car-

rier refused to accept interstate shipments of intoxicating liquors destined to local-option or "dry" points in another state, and announced its purpose to persist in such refusals, comes too late, if ever available, when first made on appeal.

[For other cases, see Appeal and Error, 4550-4555, in Digest Sup. Ct. 1908.]

Commerce — state regulation — intoxicating liquors — carrier's refusal to accept.

3. A carrier incorporated under the laws of the state of Kentucky cannot justify its refusal to accept interstate shipments of intoxicating liquors consigned to localities in that state where local-option prohibitory laws prevail, under Ky. act of March 21, 1906, making the transportation of such shipments unlawful, since such statute, as applied to interstate shipments, is an unlawful regulation of commerce.

[For other cases, see Commerce, 178-184, in Digest Sup. Ct. 1908.]

Carriers — remedy for refusal to accept interstate shipment — necessity of action by Interstate Commerce Commission.

4. A shipper seeking relief because of the refusal of a carrier to accept interstate shipments of intoxicating liquors consigned to local-option or "dry" points, which the carrier seeks to justify under a state statute forbidding the transportation of such shipments, which is attacked as an unlawful regulation of commerce, may invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission, since the question involved is one of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

[Carrier's duty to receive shipment, see Carriers, II. b, 2, in Digest Sup. Ct. 1908.]

[No. 64.]

Submitted November 13, 1911. Decided January 22, 1912.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Indiana, enjoining a carrier from refusing to accept interstate shipments of intoxicating liquors consigned to local-option or "dry" points. Affirmed.

See same case below, — L.R.A.(N.S.) —, 96 C. C. A. 322, 172 Fed. 117.

Statement by Mr. Justice **Lurton**:

This suit started in a court of the state of Indiana, and was removed by the defendant, now the appellant, to the circuit court of the United States.

The brewing company is an Indiana corporation, engaged in brewing beer at Evansville, Indiana, and sells its product in state and interstate trade. The railroad

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

As to constitutional right to prohibit sales of intoxicating liquors—see note to *State v. Durein*, 15 L.R.A.(N.S.) 908.

On jurisdiction of courts pending proceedings before Interstate Commerce Commission—see note to *Sandusky-Portland Cement Co. v. Baltimore & O. R. Co.* 111 C. C. A. 443.

56 L. ed.

company is a Kentucky corporation, owning and operating a line of railway extending into many states, including Indiana and Kentucky.

72] *The complaint averred that although prepayment of freight had been tendered and every shipping regulation complied with, the railroad company had refused to accept for carriage from Evansville, Indiana, to stations on the line of its railway in the state of Kentucky, beer in kegs and cases, consigned to points which were "local-option" or "dry" localities under the law of Kentucky, and had notified complainant and the public that it would discontinue receiving consignments of beer or other liquors for points in the state of Kentucky where the local-option law of that state was in operation. The prayer of the bill was that the railroad company be enjoined from so refusing to accept the product of the brewing company for transportation from Evansville to such local-option points in Kentucky.

A preliminary injunction was issued as prayed. Thereupon the defendant removed the case to the circuit court of the United States, upon the ground that there was diversity of citizenship, and also because the case involved questions arising under the Constitution and laws of the United States; namely, the validity of the law of Kentucky, prohibiting the transportation and delivery of liquors to points in that state where the sale was prohibited, and also as a case arising under the act of Congress regulating interstate commerce of February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], as amended June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149]. An answer was then filed and the cause heard upon bill and answer, with the result that the preliminary injunction allowed by the state court was made permanent, and the railroad company enjoined from refusing to receive and carry beer from Evansville to any point upon its line of road in the state of Kentucky, wet or dry. An appeal by the railroad company to the circuit court of appeals resulted in an affirmance of the order of the circuit court. For the opinion see — L.R.A.(N.S.) —, 96 C. C. A. 322, 172 Fed. 117.

Mr. Henry L. Stone submitted the cause for appellant. Messrs. Philip W. Frey and George De Bruler were on the brief:

The Vanderburgh circuit court of Indiana had no jurisdiction of the subject-matter of this action, because original and exclusive jurisdiction thereof has been vested by

the act to regulate commerce in the Interstate Commerce Commission.

Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Howard Supply Co. v. Chesapeake & O. R. Co. 162 Fed. 188; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

The order of the state court granting to appellee the preliminary injunction was void, as well as the order of the circuit court perpetuating the same, because they affected property and rights of the parties beyond the territorial jurisdiction of either court.

11 Cyc. 684; Western U. Teleg. Co. v. Western & A. R. Co. 8 Baxt. 54.

After removal, it was the duty of the court below to dissolve the temporary restraining order and dismiss the action.

Fidelity Trust Co. v. Gill Car Co. 25 Fed. 737; Foster, Fed. Pr. § 391, pp. 955, 956, note, 22; Auracher v. Omaha & St. L. R. Co. 102 Fed. 1; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Sheldon v. Wabash R. Co. 105 Fed. 785.

The rule of the appellant that it will not accept, transport, or deliver intoxicating liquors consigned to points in Kentucky where the sale of such liquor is prohibited by law is reasonable and valid.

Dickson v. Great Northern R. Co. 56 L. J. Q. B. N. S. 111, L. R. 18 Q. B. Div. 176, 55 L. T. N. S. 868, 35 Week. Rep. 202, 51 J. P. 388, 5 Eng. Rul. Cas. 358; 5 Am. & Eng. Enc. Law, 2d ed. 162; 4 Elliott, Railroads, §§ 1465, 1466; Moore, Carr. § 5, p. 98; 1 Hutchinson, Carr. §§ 144, 145, 147; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37, affirmed in 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Kansas P. R. Co. v. Nichols, 9 Kan. 243, 12 Am. Rep. 494; Johnson v. Midland R. Co. 4 Exch. 367, 18 L. J. Exch. N. S. 366, 6 Eng. Ry. & C. Cas. 61; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; American Exp. Co. v. Com. 30 Ky. L. Rep. 207, 97 S. W. 807; Crigler v. Com. 27 Ky. L. Rep. 921, 87 S. W. 276; Adams Exp. Co. v. Com. 124 Ky. 160, 5 L.R.A.(N.S.) 630, 92 S. W. 932; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Cook v. Marshall

County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Mugler v. Kansas*, 123 U. S. 662, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, 9 Atl. 829; *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; *Milwaukee Malt Extract Co. v. Chicago R. I. & P. R. Co.* 73 Iowa, 98, 34 N. W. 761; *Platt v. LeCocq*, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 723.

Mr. George A. Cunningham submitted the cause for appellee:

The appeal should be dismissed.

Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Bonin v. Gulf Co.* 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608; *Banker's Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325; *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 Ann. Cas. 451; *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; *Weir v. Rountree*, 216 U. S. 603, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510; *Bagley v. General Fire Extinguisher Co.* 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341.

The remedies provided by the act to regulate commerce are exclusive only when it is sought to enforce some provision of the act itself, and not when it is sought to enforce a right theretofore existing, either at common law or by statute, unless the enforcement of such right is, by the act, committed to some other tribunal.

Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Danciger v. Wells, F. & Co.* 154 Fed. 379.

Even proceedings in the courts of one state may be enjoined by courts of another state, where the latter have jurisdiction of the parties.

1 High, Inj. 4th ed. §§ 103, et seq.; 6 Pom. Eq. Jur. § 670; *Eingartner v. Illinois Steel Co.* 59 Am. St. Rep. 859, note; *Hawkins v. Ireland*, 58 Am. St. Rep. 534, note; *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 So. 633.

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The court, having jurisdiction of the parties, was not without authority to act merely because the merchandise in question is to be delivered in another state.

Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co. 34 Fed. 481; *Hutchinson, Carr.* 3d ed. § 149; *Bluthenthal v. Southern R. Co.* 84 Fed. 920.

Mandatory injunction is the proper remedy to compel a carrier to accept shipments of intoxicating liquors which it refuses because of void state legislation.

Elliott, Railroads, 2d ed. § 1564; *Danciger v. Wells, F. & Co.* 154 Fed. 379; *Crescent Liquor Co. v. Platt*, 148 Fed. 897.

The transportation of intoxicating liquor from one state to another is interstate commerce, and entirely beyond the control of the states.

Cincinnati, N. O. & T. P. R. Co. v. Com. 126 Ky. 563, 104 S. W. 394; *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Lord v. Goodall, M. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224; *Com. v. McKinney*, 140 Ky. 657, 131 S. W. 497; *Com. v. Scott*, 141 Ky. 702, 133 S. W. 766; *Danciger v. Stone*, 188 Fed. 510, 187 Fed. 823; *Barrett v. New York*, 183 Fed. 793.

No state may make any law limiting the right of a citizen of one state to purchase any article of commerce in any other state, and to have the same shipped to him, wherever he may be, without regard to the laws of any state.

State v. Wignall, 150 Iowa, 650, 34 L.R.A.(N.S.) 507, 128 N. W. 935.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court:

1. The jurisdiction of this court to entertain an appeal in this case cannot be seriously controverted. The jurisdiction of the circuit court was not dependent alone upon diversity of citizenship. There was involved not only the validity of the law of Kentucky as a regulation of interstate commerce, but a question as to whether the sole remedy in any such case was not by an application to the Interstate Commerce Commission.

2. The objection that there was an adequate remedy at law, assuming that the subject is one for any tribunal other than the Interstate Commerce Commission, comes too late, if ever available, the objection being now made for the first time, so far as is discoverable from the record. The announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate ship-

ments of all intoxicating liquors to localities in the state of Kentucky where the Kentucky local-option prohibition laws prevailed threatened the ruin of complainant's business, and relief by injunction against such a continued course of conduct was certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings. *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

3. The case was heard upon bill and answer. The defense is based solely upon the terms of the Kentucky act of March 21, 1906, now § 2569a, Carroll's Kentucky Statutes of 1909, entitled an act "to Regulate the Carrying, Moving, Delivery, Transferring or Distribution of Intoxicating Liquors in Local-option Districts." By that act it is made unlawful for any common carrier to transport beer or any intoxicating liquor to any consignee in any locality within the state where the sale of such liquors has been prohibited by vote of the people under the local-option law of the state. A violation of the law subjects the offender to a fine of not less than fifty nor more than one hundred dollars for each offense.

Upon the assumption that this legislation effectively prohibited both state and interstate transportation of such commodities within the state, the railroad company notified all of its agents, in and out of the state, to refuse to receive such liquors when consigned to any local-option point. This notification was by a printed circular letter, which set out the full text of the act, and gave a full list of all such local-option points. In express terms this 82]*notification applied to both inter and intrastate shipments; and, it is averred, this circular was filed with the Interstate Commerce Commission. It is not, however, averred that the Commission either took any action thereon, or that it was asked to take any action.

The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local-option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it has been indisputably determined:

a. That beer and other intoxicating li-

quors are a recognized and legitimate subject of interstate commerce;

b. That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another;

c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

The Wilson act (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson act construed are: *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky court of appeals, upon the authority of the line of cases *above cited, reached the 83 same conclusion. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 126 Ky. 563, 104 S. W. 394.

The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other states, any commodity which is an ordinary subject of interstate commerce and such transportation, could not be prohibited by any law of the state of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce, not authorized by the police power of the state. It is obvious, therefore, that in so far as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight.

The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the state court nor the circuit court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.

Why should the brewing company have made complaint to the Commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

The decision in the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate-making necessarily required a resort to that body as a basis for a common-law recovery of an excessive charge.

The result is that the decree of the court below must be affirmed.

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*FRANK H. WASKEY et al., Petition-[85
ers,
v.

JOSEPH HAMMER et al.

(See S. C. Reporter's ed. 85-95.)

Mines — readjustment of lines of location — loss of place of discovery.

1. A placer mining claim which unintentionally included a trifle more than the maximum permitted area is invalidated under U. S. Rev. Stat. §§ 2320, 2329, U. S. Comp. Stat. 1901, pp. 1424, 1432, making the discovery of mineral within the limits of the claim a prerequisite to the location, when, by the readjustment of its lines so as to exclude the excess, the point or place of the only prior mineral discovery was left outside the area included by the readjusted lines.

[For other cases, see *Mines*, 54-64, in *Digest Sup. Ct.* 1908.]

Mines — location by mineral surveyor.

2. The location of a placer mining claim by a United States mineral surveyor is within the prohibition of U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, against the direct or indirect purchase by officers, clerks, and employees in the General Land Office of any of the public land. [For other cases, see *Mines*, 18-18b, in *Digest Sup. Ct.* 1908.]

Mines — location by employee of Land Office — void or voidable.

3. The location of a placer mining claim, contrary to U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, prohibiting officers, clerks, and employees in the General Land Office, under penalty of dismissal, from directly or indirectly purchasing or becoming interested in the purchase of the public land, is void, and not merely voidable at the instance of the government.

[For other cases, see *Mines*, 18-18b, in *Digest Sup. Ct.* 1908.]

[No. 84.]

Argued December 7, 1911. Decided January 22, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Alaska, Second Division, in favor of plaintiffs in an action of ejectment growing out of conflicting locations of placer mining claims. Affirmed.

See same case below, 95 C. C. A. 305, 170 Fed. 31.

The facts are stated in the opinion.

NOTE.—On location of mining claim—see notes to *Dwinnell v. Dyer*, 7 L.R.A.(N.S.) 763; *Last Chance Min. Co. v. Tyler Min. Co.* 39 L. ed. 859; and *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 42 L. ed. U. S. 96.

Mr. Albert Fink argued the cause and filed a brief for petitioners Whittren and Eadie:

Upon a valid location of a mining claim title vests in the locator to an estate from which he shall not be divested, even by act of Congress.

Belk v. Mcagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; *Elder v. Wood*, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; *Manuel v. Wulff*, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85.

Whatever reason might be assigned for extending the supposed doctrine of *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482, further than the facts of that case in lode locations, can find no support when applied to placers, where it is presumed that the auriferous gravels extend through the entire claim.

The doctrine of *Gwillim v. Donnellan*, supra, has never been pushed further than the facts of that case.

Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. 5 McCrary, 298, 17 Fed. 57; *Silver City Gold & S. Min. Co. v. Lowry*, 19 Utah, 334, 57 Pac. 11, 20 Mor. Min. Rep. 55; *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 408.

A deputy mineral surveyor is not an employee of the General Land Office.

Century Dict.; *Hand v. Cook*, 29 Nev. 518, 92 Pac. 3.

That the General Land Office has itself concluded that a deputy mineral surveyor is an employee within the prohibition of the statute is not controlling. The earlier view of the Department was to the contrary, and no sufficient reason is assigned for the change of sentiment.

Instructions of Commissioner of Gen. Land Office, 2 Land Dec. 313; *Dennison v. Willets*, 11 C. L. O. 261; *Re Lock Lode*, 6 Land Dec. 105.

It has always been the practice of the Land Department to permit entries to be perfected where the rights had been initiated prior to any relation with the government, even though at the time of the entry the entrymen were in the government service and employed in the General Land Office.

Winans v. Beidler, 15 Land Dec. 266.

The question cannot be raised by plaintiffs.

1 *Lindley, Mines*, § 233; *Martin, Mining Law*, § 98; *Costigan, Mines*, p. 167; *Snyder, Mines*, § 263; *Lone Jack Min. Co.*

v. Megginson, 27 C. C. A. 63, 48 U. S. App. 452, 82 Fed. 89; *Billings v. Aspen Min. & Smelting Co.* 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338, 3 C. C. A. 69, 10 U. S. App. 322, 52 Fed. 251; *Tornanses v. Melsing*, 47 C. C. A. 596, 109 Fed. 711; *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 209; *Manuel v. Wulff*, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 46 L. ed. 331, 22 Sup. Ct. Rep. 84, 21 Mor. Min. Rep. 730.

Messrs. W. H. Metson, Ira D. Orton, and E. H. Ryan filed a brief for petitioners Wasky and Crabtree:

If it be admitted that Whittren, as a deputy mineral surveyor, is subject to the loss of any location made by him while such surveyor, no such loss could be asserted except in a proceeding under proper process and pleading where the government is a party.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 46 L. ed. 331, 22 Sup. Ct. Rep. 84, 21 Mor. Min. Rep. 730; *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 215; *Tornanses v. Melsing*, 47 C. C. A. 596, 109 Fed. 711; *Lone Jack Min. Co. v. Megginson*, 27 C. C. A. 63, 48 U. S. App. 452, 82 Fed. 89; *Billings v. Aspen Min. & Smelting Co.* 3 C. C. A. 69, 10 U. S. App. 322, 52 Fed. 250; *Holdt v. Hazard*, 10 Cal. App. 440, 102 Pac. 540; *Shamel, Mining, Mineral & Geological Law*, 108; *Morrison, Mining Rights*, 13th ed. 308; 1 *Lindley, Mines*, § 233; *Martin, Mining Law*, § 98; *Costigan, Mines*, § 263; *Ricketts, Mines*, § 163; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 627, 25 L. ed. 188, 190; *Oates v. First Nat. Bank*, 100 U. S. 239, 249, 25 L. ed. 580, 584; *National Bank v. Whitney*, 103 U. S. 102, 103, 26 L. ed. 444, 445; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Seymour v. Slide & S. Gold Mines*, 153 U. S. 523, 38 L. ed. 807, 14 Sup. Ct. Rep. 847; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 60, 25 L. ed. 547, 549; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; *Blair v. Chicago*, 201 U. S. 450, 451, 50 L. ed. 822, 823, 26 Sup. Ct. Rep. 427; *McMichael v. Murphy*, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460; *Hodges v. Colcord*, 193 U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433; *Weber v. Spokane Nat. Bank*, 12 C. C. A. 93, 29 U. S. App. 97, 64 Fed. 208; *Sanders v. Thornton*, 38 C. C. A. 508, 223 U. S.

97 Fed. 863; *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 987; *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893; *Waterbury v. McKinnon*, 77 C. C. A. 294, 146 Fed. 737; *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545; *Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043; *Ledebuhr v. Wisconsin Trust Co.* 112 Wis. 657, 88 N. W. 607, 609; *Myers v. Campbell*, 64 N. J. L. 186, 44 Atl. 863; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839.

The fact that the claim exceeded in area the statutory amount simply rendered that excessive area void.

McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716; *Zimmerman v. Funchion*, 89 C. C. A. 53, 161 Fed. 859; *Waskey v. Hammer*, 95 C. C. A. 305, 170 Fed. 31; *Richmond Min. Co. v. Rose*, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055.

And even as to this void excess Whittren had the sole and first right to say where and how he should cut it off. He was not compelled to cast it off until someone had complained, and then could use his judgment as to what portion should be eliminated.

McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716; *Zimmerman v. Funchion*, 89 C. C. A. 53, 161 Fed. 859.

If these innocent purchasers were assumed to know the law, no other conclusions could have been arrived at by them than:

(1) Assuming that loss of employment was specifically named as a penalty in the statute, the courts could prescribe no further penalty.

Sutherland, Stat. Constr. §§ 324, 327; *Endlich*, Interpretation of Statutes, § 397; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545; *DeWolf v. Johnson*, 10 Wheat. 392, 6 L. ed. 349; *Bird v. Dennison*, 7 Cal. 308.

(2) If loss of employment (the consequence provided by the statute) was not to be regarded as the exclusive penalty, and the courts could by construction assume that Congress designed a further penalty, there could be none greater than by making the location voidable, and that could only be at the instance of the sovereign power.

Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Mor. Min. Rep. 610.

The presumption is that discovery extends throughout location.

Armstrong v. Lower, 6 Colo. 393, 15 Mor. Min. Rep. 631; *Patterson v. Hitchcock*, 3 Colo. 533, 5 Mor. Min. Rep. 542; *Erhardt v. Boaro*, 113 U. S. 536, 28 L. ed. 1116, 5 Sup. Ct. Rep. 560, 15 Mor. Min. Rep. 472; *Lange v. Robinson*, 148 Fed. 799; *Shoshone* 56 L. ed.

Min. Co. Rutter, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 807, 19 Mor. Min. Rep. 356.

Where the locator of a mining claim extends or changes his boundaries by an amended location, he is not required to make any discovery of ore in the ground so added, as it becomes a part of the original claim, and is validated by the original discovery.

Tonopah & S. L. Min. Co. v. Tonopah Min. Co. 125 Fed. 389.

After the claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him.

Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. 5 McCary, 298, 17 Fed. 57; *Silver City Gold & S. Min. Co. v. Lowry*, 19 Utah, 334, 57 Pac. 11, 20 Mor. Min. Rep. 55.

An innocent purchaser may be in a somewhat different position than would be the original locator.

Harris v. Equator Min. & Smelting Co. 3 McCary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178.

A deputy mineral surveyor is not an "officer" within the provisions of U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, in that he cannot be held to be an officer of the United States.

United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; *United States v. Germaine*, 99 U. S. 508, 25 L. ed. 482; *United States v. Mouat*, 124 U. S. 303, 307, 31 L. ed. 463, 464, 8 Sup. Ct. Rep. 505; *United States v. Smith*, 124 U. S. 525, 532, 31 L. ed. 534, 536, 8 Sup. Ct. Rep. 595.

A deputy mineral surveyor is not a "clerk in the General Land Office."

Bouvier's Law Dict.; *People ex rel. Sims v. Fire Comrs.* 73 N. Y. 442; *People ex rel. Satterlee v. Board of Police* 75 N. Y. 38.

A deputy mineral surveyor is not an "employee" in the General Land Office.

Century Dict.; *Standard Dist.*; *McCluskey v. Cromwell*, 11 N. Y. 593; *United States v. Meigs*, 95 U. S. 748, 24 L. ed. 578; *Ex parte Burdell*, 32 Fed. 681; *Powell v. United States*, 60 Fed. 689; *People ex rel. Crane v. Ahearn*, 125 App. Div. 795, 110 N. Y. Supp. 306; *United States v. McDonald*, 21 C. C. A. 347, 44 U. S. App. 461, 72 Fed. 898; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 505, 34 L. ed. 1023, 1025, 11 Sup. Ct. Rep. 405; *Auffmordt v. Hedden*, 137 U. S. 310, 34 L. ed. 674, 11 Sup. Ct. Rep. 103; *Vane v. Newcombe*, 132 U. S. 220, 233, 33 L. ed. 310, 315, 10 Sup. Ct. Rep. 60; *Pack v. New York*, 8 N. Y. 222; *Campfield v. Lang*, 25 Fed. 128; *Kelly v. New*

York, 11 N. Y. 432; *People ex rel. Morris v. Randall*, 73 N. Y. 416; *Blake v. Ferris*, 5 N. Y. 58, 55 Am. Dec. 304; *Wood, Mast. & S. § 4*; *Bishop, Non-Contract Law*, § 602; *Kearney v. Oakes*, 18 Can. S. C. 148; *Com. ex rel. Bache v. Binns*, 17 Serg. & R. 220.

Where a statute plainly points out the persons subject to its provisions, no others can by construction be brought within the purview thereof.

26 Am. & Eng. Enc. Law 2d ed. 597; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

Mr. Albert H. Elliot argued the cause, and, with Mr. George W. Rea, filed a brief for respondents:

A deputy United States mineral surveyor comes within the restrictive prohibition of U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257.

Re McMicken, 10 Land Dec. 97; *Muller v. Coleman*, 18 Land Dec. 394; *Re Neill*, 24 Land Dec. 393; *Floyd v. Montgomery*, 26 Land Dec. 122; *Re Maxwell*, 29 Land Dec. 76; *Re Baltzell*, 29 Land Dec. 333; *Lavagnino v. Uhlig*, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Mor. Min. Rep. 610.

The marking of boundaries on the ground and discovery of gold are two acts necessary to a valid mining location.

Gwillim v. Donnellan, 115 U. S. 45, 50, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482.

Locating a mining claim is purchasing or becoming interested in the purchase of any of the public lands, within the meaning of the statute.

Farrington v. Wilson, 29 Wis. 392; 32 Cyc. 1265.

When Whittren drew in his lines and excluded his discovery point, he abandoned his location of January, 1902, and the ground was open to location by Schwartz if the attempted relocation of 1903 by Whittren was invalid.

Farrell v. Lockhart, 210 U. S. 142, 52 L. ed. 994, 16 L.R.A. (N.S.) 162, 28 Sup. Ct. Rep. 681; *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863, 21 Mor. Min. Rep. 678.

Did Whittren acquire such a title that he could hold the claim against the whole world except the government of the United States?

Prosser v. Finn, 208 U. S. 67, 52 L. ed. 392, 28 Sup. Ct. Rep. 225.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action of ejectment, the subject-matter of which was the overlapping portions of two placer mining claims in

Alaska, one known as the Golden Bull and the other as the Bon Voyage. The plaintiffs claimed the area in conflict as part of the Golden Bull, and the defendants claimed it as part of the Bon Voyage. The facts, as they must be accepted for present purposes, are these:

In 1902 the Bon Voyage was located by J. Potter Whittren, he having previously made a discovery of placer gold within the ground which he included in the claim. Although not intended to be excessive, the claim embraced a trifle more than 20 acres, the maximum area permitted in a location by one person. In 1903 Whittren, upon ascertaining that fact, drew in two of the boundary lines sufficiently to exclude the excess, and in doing so left the point or place of his only prior mineral discovery outside the readjusted lines. Later in 1903, he made a discovery of placer gold within the lines as readjusted. At the time of drawing in the lines and making the subsequent discovery he was a United States mineral surveyor, but was not such at the time of the original location. In 1904 the Golden Bull was located by B. [90] Schwartz, and included a part of the ground embraced in the Bon Voyage. Neither claim was carried to patent or entry, and when the action was begun the defendants were in possession. The plaintiffs other than Schwartz claimed under him, and the defendants other than Whittren claimed under conveyances from him, made after 1904.

Upon the trial the court, at the instance of the plaintiffs, directed a verdict in their favor, substantially upon the following grounds, taken collectively: 1. A discovery of mineral within the limits of a mining claim is essential to its validity; 2. The original location of the Bon Voyage was invalidated by the readjustment of its lines whereby the point or place of the only prior discovery of mineral was left without those lines; 3. The readjusted location was invalid because, at the time of the discovery of mineral therein, Whittren, being a United States mineral surveyor, was disqualified to make a location under the mining laws. The jury returned a verdict as directed, judgment was entered thereon, the judgment was affirmed by the circuit court of appeals for the ninth circuit, (95 C. C. A. 305, 170 Fed. 31), and the case is here upon certiorari (216 U. S. 622, 54 L. ed. 641, 30 Sup. Ct. Rep. 577).

Conceding that the unintentional inclusion of a trifle more than 20 acres in the Bon Voyage as originally located was an irregularity which did not vitiate the location, but merely made it necessary that the excess be excluded when it became known (*Richmond Min. Co. v. Rose*, 114 U. S. 576,

580, 29 L. ed. 273, 274, 5 Sup. Ct. Rep. 1055; McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716; Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859), we come to consider whether the location was invalidated when, by the readjustment of its lines, it was left without a mineral discovery therein. The mining laws, Rev. Stat. §§ 2320, 2329, U. S. Comp. Stat. 1901, pp. 1424, 1432, make the discovery of mineral "within the limits of the claim" a prerequisite to the location of a claim, whether lode or placer, the purpose being to reward the discoverer and to prevent the location of land not found to be mineral. A discovery without the limits of the claim, no matter what its proximity, does not suffice. In giving effect to this restriction, this court said, in *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482, that the loss of that part of a location which embraces the place of the only discovery therein is "a loss of the location." Possibly what was said went beyond the necessities of that case, critically considered, but it illustrates what naturally would be taken to be the effect of the statute; and as that view of it has been accepted and acted upon for twenty-five years by the Land Department and by the courts in the mining regions, it should not be disturbed now. It follows that when, in 1903, Whittren excluded from the Bon Voyage the only place at which mineral had been discovered therein, he lost the location. That his purpose was not to give up the location, but only to eliminate the excess in area, is immaterial, because, although free to exclude any other part of the claim and to retain that embracing the discovery, he excluded the latter, and thereby caused the location to be without a discovery within its limits. Possibly, as was suggested in argument, the discovery was excluded because it was not deemed sufficiently promising to make its retention advisable, but, however that may have been, its exclusion defeated the location and left the lands therein "open to exploration and subject to claim for new discoveries." *Ibid*.

As no adverse right had intervened at the time of Whittren's subsequent discovery of mineral within the limits of the readjusted location, it must be conceded that that location became effective as of that time, just as if he had then marked those limits anew (2 Lindley, Mines, §§ 328, 330), unless he was then disqualified to make a location by reason of his having become a United States mineral surveyor; and so it is necessary to consider whether such a surveyor is within the prohibition of Rev. Stat. § 452, U. S. Comp. Stat. 1901, 92]p. 257, *and, if so, whether the prohibition made the readjusted location void, or only voidable at the instance of the government. That section reads:

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Mineral surveyors are appointed by the surveyor general under Rev. Stat. § 2334, and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the government. Of the representatives of the government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general makes the certificate required by Rev. Stat. § 2325, which is a prerequisite to the issuance of a patent. See Mining Regulations of July 26, 1901, paragraphs 90, 115-169, 31 *Land Dec. 474, 489, 493; *Gowdy* [93 v. *Kismet Gold Min. Co.* 24 Land Dec. 191, 193. The *résumé* of their authority and duties, and of their relation to the surveyor general and the General Land Office, satisfies us that they are within the prohibition of § 452. That prohibition is addressed not merely to the officers of the General Land Office, or to its officers and clerks, but to its "officers, clerks, and employees." These words, taken collectively, are very comprehensive, and easily embrace all persons holding positions under that office and participating in the work assigned to it, as is the case with mineral surveyors. The purpose of the prohibition is to guard against

the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws. So understanding the letter and purpose of the prohibition, we think it embraces the location of a mining claim by a mineral surveyor. True, it is addressed to officers, clerks, and employees "in the General Land Office," and is directed against "the purchase of any of the public land" by them; but in view of the terminology common to public-land legislation, we think the reference to the General Land Office is inclusive of the subordinate offices or branches maintained under its supervision, such as the offices of the surveyors-general and the local land offices, and that the term "purchase" is inclusive of the various modes of securing title to or rights in public lands under the general laws regulating their disposal.

That the construction which we here place upon § 452 is the one prevailing in the Land Department is shown in its circular of September 15, 1890, 11 Land Dec. 348, wherein it is said: "All officers, clerks, and employees in the offices of the surveyors general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner *of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States." The published decisions of the Secretary of the Interior, although disclosing instances in which that construction has been departed from or doubted (*Dennison and Willets*, 11 Copp's L. O. 261; *Lock Lode*, 6 Land Dec. 105; *Re Leflingwell*, 30 Land Dec. 139), show that in the main it has been closely followed (*Re McMicken*, 10 Land Dec. 97, and 11 Land Dec. 96; *Muller v. Coleman*, 18 Land Dec. 394; *Re Neill*, 24 Land Dec. 393; *Floyd v. Montgomery*, 26 Land Dec. 122, 136; *Re Maxwell*, 29 Land Dec. 76; *Re Baltzell*, 29 Land Dec. 333; *Re Bradford*, 36 Land Dec. 61).

In principle, the recent case of *Prosser v. Finn*, 208 U. S. 67, 52 L. ed. 392, 28 Sup. Ct. Rep. 225, goes far to sustain the view here expressed. There a special agent of the General Land Office, whose field of duty was in the state of Washington, made an entry of public land under the timber-culture law, and thereafter in all respects complied with that law. But it was held by this court that he was, in every substantial sense, an employee in the General Land Office, and therefore was within the prohibition of § 452.

The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer; but this rule is subject to the qualification that when, upon a survey of the statute, its subject-matter and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. *Miller v. Ammon*, 145 U. S. 421, 426, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884; *Burck v. Taylor*, 152 U. S. 634, 649, 38 L. ed. 578, 583, 14 Sup. Ct. Rep. 696; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 548, 46 L. ed. 679, 685, 22 Sup. Ct. Rep. 431. Here we think the general rule applies. The acts described in § 452 are expressly prohibited under penalty of dismissal. There is in its language nothing indicating that its scope is to be confined *to the[95] exaction of that penalty. (*Prosser v. Finn*, supra), or that acts done in violation of it are to be valid against all but the government. Nor is there anything in its subject-matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts. We therefore are of opinion that the readjusted location was void.

Affirmed.

UNITED STATES OF AMERICA EX REL.
LILLIE LOWE, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Plffs. in Err.,

v.

WALTER L. FISHER†, Secretary of the Interior.

(See S. C. Reporter's ed. 95-107.)

Judgment — supplemental decision — court of claims.

1. The reply of the court of claims in response to a request from the Commissioner of Indian Affairs, giving its opinion upon a question not passed upon in its original opinion, but of which it was given special jurisdiction by the act of October 1, 1890 (26 Stat. at L. 636, chap. 1249), is a part of the decision in the case, where, at the time of such reply, the case was still under

†Resignation of Richard A. Ballinger, as Secretary of the Interior, suggested October 30, 1911, and Walter L. Fisher, his successor in office, substituted as the party defendant in error herein.

its control, and pending upon certain motions made by the parties.

[For other cases, see Judgment, XII. e, in Digest Sup. Ct. 1908.]

Indians — Cherokee enrolment — confirmation.

2. The enrolment of Cherokee freedmen on the tribal rolls is not to be taken as absolutely confirmed by the confirmatory provision of the act of June 10, 1896 (29 Stat. at L. 321, chap. 398), in view of the requirements of the subsequent acts of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 1, July 1, 1902 (32 Stat. at L. 716, chap. 1375), § 27, and April 26, 1906 (34 Stat. at L. 137, chap. 1876), § 3, that a roll of Cherokee freedmen be made in strict compliance with a decree of the court of claims, so as to exclude freedmen and their descendants who had not returned to the Cherokee Nation within the time designated by a treaty stipulation.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Cherokee allotment — revision by Secretary of Interior.

3. The revisory and corrective power of the Secretary of the Interior over Indian allotments under the acts of March 3, 1905 (33 Stat. at L. 1060, chap. 1479), and April 26, 1906, includes the right, upon notice and hearing, to strike from the approved roll of the citizens of the Five Civilized Tribes the names of Cherokee freedmen allottees because their ancestors had not returned to the Cherokee Nation within the time designated by a treaty stipulation, although, by the act of July 1, 1902, § 29, "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrolment, the roll shall be deemed complete." [For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 445.]

Argued November 14, 1911. Decided January 29, 1912.

IN ERROR to the Court of Appeals for the District of Columbia to review a judgment which, on a second writ of error, affirmed the judgment of the Supreme Court of the District, dismissing a petition for mandamus to compel the Secretary of the Interior to cancel his action in striking the names of certain Cherokee freedmen from the approved roll of citizenship. Affirmed.

See same case below on first appeal, 34 App. D. C. 70; on second appeal, 35 App. D. C. 524.

The facts are stated in the opinion.

Mr. Charles H. Merillat argued the cause, and, with Messrs. Charles J. Kappler, James K. Jones, and Frank E. Duncan, filed a brief for plaintiffs in error:

Executive officials have no power to cancel or forfeit a vested interest.

56 L. ed.

Garfield v. United States ex rel. Goldsby, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Garfield v. United States ex rel. Allison, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 67; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

If recourse is to be had to analogy, the Indian statutes should be compared with special statutes, such as that involved in Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

By the Cherokee agreement and other acts the Secretary of the Interior was invested with jurisdiction over enrolments, and authority to approve rolls containing names of persons he found on the facts and law to be entitled to enrolment. That approval, being pursuant to authority vested in him, is not open to review.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 323, 47 L. ed. 1076, 23 Sup. Ct. Rep. 698; Daniels v. Tearney, 102 U. S. 418, 26 L. ed. 187; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 581, 60 Fed. 316.

The extent of his investigation and knowledge of the points decided, or the methods by which the Secretary reached his determination, is not open to review.

De Cambra v. Rogers, 189 U. S. 121, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

Having approved the partial lists constituting part and parcel of the final roll, the Secretary had exhausted his discretion and power was gone except it had been specially invested in him. His approval of enrolment ended authority in him. The statutes conferred no further power or authority upon him, in the absence of statutory authority to proceed further and to cancel, his jurisdiction had ceased and determined. Once declared to be citizens of the tribe, by operation of law the plaintiffs in error became entitled absolutely and of right to a vested interest in tribal lands and funds, and with the issuance of an allotment certificate that individual but vested interest in the tribal lands became a vested interest in a separate and distinct tract of land as the enrolled's separate partited share of the tribal landed estate.

Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 721.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred on him by statute.

United States v. McDaniel, 7 Pet. 1-14, 8

L. ed. 587-592; *United States v. Thurber*, 28 Fed. 56.

Any contention that because of his general power of supervision over enrolment, allotments, and the Five Civilized Tribes, the Secretary must be held to have power to cancel enrolments which he ascertains he has approved by reason of fraud or mistake of law, can best be answered by citation of the case of *Mosgrove v. Harper*, 33 Or. 252, 54 Pac. 187, wherein it was held that the Secretary was without authority for any cause to cancel a once approved lease.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

The allotment certificates, like certification of lists of lands under the special acts, convey a title as complete as patents.

Frasher v. O'Connor, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063.

Assistant Attorney General **Harr** argued the cause and filed a brief for defendant in error:

The secretary had authority to correct the rolls, upon notice and hearing to the party concerned, within the time fixed by law for their completion.

Cornelius v. Kessel, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122; *Hawley v. Diller*, 178 U. S. 476, 490, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986.

Only Cherokee freedmen and their descendants who had complied with the provisions of the treaty of 1866, as to residence in the nation, were entitled to enrolment.

Whitmire v. Cherokee Nation, 31 Ct. Cl. 148.

The court of claims had jurisdiction to determine this matter.

Journeycake v. Cherokee Nation, 28 Ct. Cl. 282.

Congress itself construed article 9 of the treaty of August 11, 1866, as conferring the rights of native Cherokees only upon Cherokee freedmen residents of the nation, or who had returned thereto as provided therein.

Whitmire v. Cherokee Nation, 30 Ct. Cl. 182.

Mr. Justice **McKenna** delivered the opinion of the court:

The case involves the question whether the Secretary of the Interior, after due hearing, and after having made up a roll of citizens of the Five Civilized Tribes of Indians, and after having issued certificates of allotment to the enrolled Indians, may strike their names from the roll after

*giving due notice of his intended action[97 and an opportunity to be heard.

The case arose upon the exercise of such power by the Secretary and an action of mandamus to require him to cancel his action. To the answer of the Secretary, the supreme court of the District of Columbia sustained a demurrer and entered a judgment in accordance with the prayer of the petition. The court of appeals reversed the judgment. On return of the case to the supreme court, the relators elected to stand on their demurrer and the court dismissed their petition. This action was affirmed by the court of appeals and the case was then brought here.

It was decided in *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62, that the Secretary had no such power without notice to the parties concerned and an opportunity to be heard. These conditions were performed in the present case, and, so far, the case is distinguished from the *Goldsby* Case. The power of the Secretary upon the rehearing under the applicable statutes is now to be considered.

The relators base their right of enrolment on article 9 of the Cherokee treaty of August 11, 1866 [14 Stat. at L. 801], the material part of which is as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the Rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." It was found by the Secretary of the Interior that relators were descendants of liberated slaves, but he also found that their ancestors had not returned to the Cherokee Nation within six months of the date of the treaty, August 11, 1866. This must be assumed to be the fact, for it is alleged in the answer and admitted by the demurrer. Two propositions of law are, however, urged *by relators: (1) That[98 the requirement of a return within the time designated applies only to free colored persons; and (2) that the Secretary, having, on November 16, 1904, approved a list of Cherokee freedmen, containing the names of relators, on the ground that their ancestors had complied with the provisions for return to the Nation, had no power to cancel their names.

(1) Article 9 of the treaty is undoubtedly ambiguous, and to support their construction of it relators trace its genesis to the compulsion exercised on the Cherokee Nation by the United States for its es-

pousal of the cause of the Confederacy during the Civil War. The Indians, it is said, were regarded as having forfeited their treaty rights, but the United States were willing to renew relations with them, stipulating, among other things, that "the institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for."

The Indians resisted the conditions, and replied that it would not be for the benefit of the emancipated negro, nor for the Indians, to incorporate the former into the several tribes on an equal footing with the original members. They conceded, however, that the emancipated negro must be suitably provided for, and subsequently the Choctaws suggested that white persons should be excluded from their territory, and that "no person of African descent, except our former slaves, or free persons of color who are now, or have been, residents of the territory, will be permitted to reside in the territory, unless formerly incorporated with some tribe, according to the usage of the band."

The Seminoles answered to the same effect, and asked that article 3 be changed 99]to admit only colored persons* lately held in bondage by them and free persons of color residing in the Nation previous to the Rebellion, to a residence among them, and adoption in the Seminole tribe upon some plan to be agreed upon by them and approved by the government. "We are willing," they said, "to provide for the colored people of our own Nation, but do not desire our lands to become colonization grounds for the negroes of other states and territories." The Creeks expressed this in the same way, and the relators further adduce, as supporting their construction of article 9, that the commission which negotiated the treaty, reporting on it officially, said: "Slavery is abolished and the full rights of the freedmen are acknowledged."

The history of article 9, therefore, it is insisted, shows that the article consummated the purpose. In other words, when the Indians realized that they must provide for negroes, they limited their concession "to former slaves and then to any other negroes who had been in the Indian country at the outbreak of the War, and might return within a short time after peace to make their home in the Indian territory, thereby preventing a general influx of negroes who might seek free land." And the right to land, it is pointed out, was the

consequence to be apprehended, as "lawful residence in the Indian territory meant the right to occupy land."

It is further contended that the Cherokees acted upon the treaty practically in accordance with this construction of it, and that it was not until many years after that they "sought to refine it away and abrogate it in effect." They accepted it reluctantly, it is said, and subsequently contended that it conferred civil, not property, rights, and passed what was known as the "blood bill," by which they sought to exclude all but native Cherokees by blood from participation in a large payment of funds which was about to be made. This gave rise to controversy, and Congress passed an act conferring jurisdiction on the *court of claims to settle[100 the matter. The act is entitled, "An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes." It was approved October 1, 1890. [26 Stat. at L. 636, chap. 1249.] The Cherokee freedmen whose rights were to be determined under the act were those who "settled and located in the Cherokee Nation under the provisions and stipulations of article 11" of the treaty.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens equally with the Cherokees, and equally interested in the common property, and equally entitled to share in its proceeds *per capita*. But the court did not attempt an analysis of § 5 of the constitution nor of article 9 of the treaty (they are alike), but defined the rights of the freedmen and the free negroes in the language of the constitution and the article. 31 Ct. Cl. 148. The opinion in the case, therefore, as delivered, had the same ambiguity as the constitution and treaty, and was not understood by the Commissioner of Indian Affairs, who was charged by the Secretary of the Interior with the duty of determining who were the resident freedmen entitled to share in the disposition of the fund as decreed, and who desired the further opinion of the court. In reply, the court said:

"The court is of the opinion that the clauses in that article in these words, '*And are now residents therein, or who may return within six months, and their descendants,*' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is

to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree."

101] *Subsequently the court was called upon to add to its opinion, which it did, as follows: "The court is also of the opinion that the *act 2d March, 1895* (28 Stat. at L. p. 910, § 11, chap. 188), prescribes the manner in which payments *per capita* shall be made, and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior. The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs February 18, 1896.

"The within motion for instructions is overruled." 31 Ct. Cl. 140, 148.

The relators contend that the reply of the court to the Commissioner was not part of its decision. This, however, is a mistake. The court had kept control of the case, and at the time of its reply to the Commissioner the case was pending upon certain motions made by the parties. And, as we have seen, the court had been given special jurisdiction of the question and all others which were involved in the controversy. But it is contended that the only issue submitted to the court was whether "the Cherokee freedmen, as a class, were entitled to share in the proceeds of the Cherokee outlet or strip lands west of the 90th meridian." It is, hence, further contended that the jurisdictional act did not extend to the determination of what particular persons composed such class, or who were freedmen, and that therefore "the point now involved has not had judicial determination."

The object of the contention, no doubt, is to clear the way for the ultimate contention upon which their case must rest,—the want of power of the Secretary of the Interior over rolls which he had once approved, and after having issued certificates of allotment to the enrolled Indians. In other words, relators would push aside the adjudication of their disqualification to be enrolled, they not having returned to the Cherokee Nation within the time designated by the treaty. They, however, make 102]*an alternative contention, and urge that they were adjudged to be within the provisions of the treaty by their enrolment upon the Kern-Clifton roll, which they insist was adjudged to be legal evidence of the rights of the freedmen; in other words, that the enrolment identified the individual freedmen who were entitled to participate in the tribal property.

It is admitted in the answer that relators are on the Kern-Clifton roll, and it does not seem to be contested that the roll

was made under instructions from the court of claims. A plausible argument, therefore, is presented that it partakes of the conclusive effect to be attributed to a judicial decree. And it is further urged by relators that the Kern-Clifton roll was confirmed by the act of June 10, 1896 (29 Stat. at L. 321, 329, chap. 398), which declared "that the rolls of citizenship of the several tribes, as now existing, are hereby confirmed."

What effect we should have to give to the decree, assuming it to go as far as contended, we are not called upon to say. It was certainly competent for Congress further to deal with the subject. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.

We pass, therefore, to a consideration of the act of June 10, 1896, upon which relators rely. It was one of a number of acts which exhibit a connected scheme for the enrolment of the members of the Five Civilized Tribes and the division of their tribal property, although their provisions are somewhat varying.

By the act of March 3, 1893 (27 Stat. at L. 645, chap. 209), the Dawes Commission was created, with powers to negotiate with the tribes. In 1896, by the act of June 10th of that year (29 Stat. at L. 321, chap. 398), the Commission was directed to make up a roll of the citizens of the tribes, which included the Cherokees, who should apply within three months from the passage of the act, and to decide all such applications within ninety days after the same should be *made. Due force[103 and effect was directed to be given to tribal rolls, usages, customs, and laws, if not inconsistent with Federal laws. The act contained the provision which we have already quoted, that is, "that the rolls of citizenship of the several tribes as now existing are hereby confirmed." There were powers of review given to those aggrieved by the decision either of the Commission or the tribal authorities. The relators, however, say that "the Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the rights of persons to be on the tribal rolls, and the controversy which ensued continued, and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time."

But before that final date arrived Congress passed several acts, the provisions of which are relied on by relators as establishing their right. The acts would seem to demonstrate the contrary, and that the conditions which arose demanded changes

in legislation. It is true that it is provided that the rolls of the tribes which were directed to be made, when approved by the Secretary of the Interior, should be final, and should constitute the several tribes which they represented; and it is therefore contended that those provisions became legislative confirmations which the Secretary was without power to disregard, and that every partial list forwarded to him which he approved he could not afterwards change, whatever the proof of mistake, imposition, or fraud. A few citations will prove the unsoundness of the contention.

The act of June 10, 1896, *supra*, which is so much relied on, was largely superseded by § 1 of the act of June 28, 1898, commonly known as the Curtis act. 30 Stat. at L. 495, 502, chap. 517. The section gave the Commission the power to investigate the right of persons whose names were on the rolls, and to "omit all such as may have been placed there by fraud or without authority of law, enrolling only 104]such *as may have lawful rights thereto," etc. And it was provided that the Commission "should make a roll of Cherokee freedmen in strict compliance with the decree of the court of claims, rendered the 3d day of February, eighteen hundred and ninety-six." It was further provided that the Commission should "take the roll of Cherokee citizens of eighteen hundred and eighty, not including freedmen, as the only roll intended to be confirmed by this and preceding acts of Congress. . . ."

It is manifest from this act that the contention of relators that the tribal rolls were to be treated or accepted as absolutely confirmed is unsound. One roll only was confirmed. The other rolls were to be corrected, not confirmed; and a roll of the Cherokee freedmen was to be made in conformity with the decree of the court of claims,—a roll not confirmed, but to be made, so as to exclude the relators because they were excluded by the decree; that is, because they were not residents of the Cherokee Nation at the time of the promulgation of the treaty.

It does not appear that relators were on any roll prior to the passage of the act of June 10, 1896, upon which they so much rely, and therefore within its confirmatory provision, giving it all the force contended for. They were on the Kern-Clifton roll, it is said, but when that roll was made does not appear. The allegation of the petition is that prior to November 16, 1904, the Secretary of the Interior affirmed a decision by the Commissioner of the Five Civilized Tribes, which held that relators were entitled to enrolment as citizens, and

that prior to that date they were regularly ordered to be placed upon the final roll of freedmen citizens, and that such roll was duly and regularly approved by the Secretary of the Interior on the 16th of November, 1906.

But the act of July 1, 1902 (32 Stat. at L. 716, § 27, chap. 1375), emphasized the requirement that the enrolment of freedmen *must be made in strict conform-[105 ity with the decree of the court of claims. Congress was even more particular in the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876). Section 3 of the act explicitly provided that "the roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual, personal, bona fide residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11, 1867."

Relators nevertheless insist that notwithstanding they were not entitled to be placed upon the rolls, yet, having been placed there, they cannot be taken off by the Secretary of the Interior; citing in support of the contention certain provisions of the acts of Congress and the congressional policy expressed in them. The policy of the government, it is said, was to expedite enrolment, with the view to the distribution of the tribal property and the preparation of the Indian territory for statehood. To these ends the acts of May 31, 1900 (31 Stat. at L. 221, chap. 598), and March 3, 1901 (31 Stat. at L. 1073, chap. 832), endeavored to speed enrolment matters by directing the Secretary of the Interior to fix a time for closing the rolls, after which no name should be added thereto. Then came the act of 1902 (32 Stat. at L. 716, chap. 1375), which, it is insisted, practically repealed prior acts so far as they concerned enrolments. Such prior acts, it is said, "made approval of enrolments depend upon the completion of the rolls of an entire tribe, and the Secretary's approval under it would await the finishing of enrolments of an entire tribe." And until such time "there would be no allotment to any tribal member." The Secretary's control, hence, continued "until the last" and the congressional policy was likewise postponed. But it is argued, contrasting the *new measures with the old, under[106 the act of 1902 "enrolment and allotment went hand in hand." This connection is rested on § 29 of the act, which directs lists to be prepared of those found by the Commission to be entitled to enrolment; and it is provided that "the lists thus prepared, when approved by the Secretary of the Interior,

shall constitute a part and parcel of the final roll of citizens of the Cherokee Tribe upon which allotment of land and distribution of other tribal property shall be made;" and, further, that "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrolment the roll shall be deemed complete."

A roll made complete, it is argued, by legislation, excludes the idea of correction by an executive officer; and, besides, it is urged that the certificates of allotment carry with them the sanction of the law's declaration that they shall be "conclusive evidence" of the rights of the allottee. Physical possession of the lands described in them is to be given, it is pointed out, and, describing the conditions which were created and which would be disturbed by an exercise of power to recall them it is said that "from the date of selection of their allotments under the law, allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes." And, further, that "allottees also, from the same date, created town sites where practicable, and sold town lots, with their title resting in their allotment selections or certificates," and that such transactions have been declared valid by the supreme court of Oklahoma, citing *McWilliams Invest. Co. v. Livingston*, 22 Okla. 884, 98 Pac. 914; *Godfrey v. Iowa Land. & T. Co.* 21 Okla. 293, 95 Pac. 792.

We recognize the strength of the considerations urged, but it certainly did not militate against the congressional policy of the allotment of lands to retain in the Secretary of the Interior the power of revision and correction until *the final moment when jurisdiction was expressly taken from him as provided in § 2 of the act of April 26, 1906, (34 Stat. at L. 137, chap. 1876), that is, the 4th day of March 1907. That Congress could give such power to the Secretary of the Interior is settled. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363. In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat attempts at fraud. We have seen what power the Dawes Commission was given to investigate the rights of persons whose names were on the rolls, and, as to freedmen, strict compliance with the decree of the court of claims was enjoined. By the act of March 3, 1905 (33 Stat. at L. 1060, chap. 1479), the work of completing the unfinished business of the Commission was devolved upon

the Secretary of the Interior, and all of the powers theretofore granted to the Commission were conferred upon the Secretary. It was subsequent to this act that action was taken as to relators, and their names stricken from the rolls. This revisory and corrective power of the Secretary over the allotment of land is similar to that exercised by the Land Department respecting the entries upon public lands, which this court has stated to be to correct and annul entries of land which were made upon false testimony and without authority of law. *Cornelius v. Kessel*, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122; *Hawley v. Diller*, 178 U. S. 476, 490, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986.

Judgment affirmed.

*CHEROKEE NATION and the United States, Appts.,
v.

MOSES WHITMIRE, Trustee for the Freedmen of the Cherokee Nation.

(See S. C. Reporter's ed. 108-117.)

Appeal — final judgment — supplemental decree.

1. A supplemental decree of the court of claims in a controversy over the rights of Cherokee freedmen to participate in the distribution of the tribal property cannot be regarded, for the purpose of testing the right to appeal, as merely in the nature of an execution of the original decree, where, assuming that such original decree declared the principle by which such rights should be determined, there was intervening congressional legislation by which the original decree was by one of the parties thought to be confirmed, and by the other superseded, the court holding that it was confirmatory in character.

[For other cases, see Appeal and Error, I. d. 10, in Digest Sup. Ct. 1908.]

Appeal — further proceedings below — motion for new trial.

2. The court of claims did not lose jurisdiction of a case upon the filing of an application for an appeal from its decree to the Federal Supreme Court, so as to preclude it from allowing a subsequent motion to withdraw the application, and from entertaining a motion for new trial.

[For other cases, see Appeal and Error, IV. g. 3, in Digest Sup. Ct. 1908.]

Indians — allotment — Cherokee freedmen.

3. The roll of the Cherokee freedmen, made by administrative officers under in-

NOTE.—On the jurisdiction of lower court to rehear cause or grant new trial after remand by appellate court—see note to *American Soda Fountain Co. v. Sample*, 70 C. C. A. 416.

structions from the court of claims, which, under the act of October 1, 1890, had determined the rights of such freedmen in the tribal property, was superseded by the roll made by the Dawes Commission conformably to the provisions of the subsequent acts of June 28, 1898, and July 1, 1902, directing such commission to make a roll of Cherokee freedmen in strict compliance with the decree of the court of claims. [For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 735.]

Argued January 9 and 10, 1912. Decided January 29, 1912.

APPEAL from the Court of Claims to review a decree directing the Secretary of the Interior to enroll certain Cherokee freedmen upon the final roll of the citizens of the Cherokee Nation. Reversed and remanded, with directions to dismiss the petition.

See same case below 46 Ct. Cl. 227.

The facts are stated in the opinion.

Mr. William W. Hastings, National Attorney for the Cherokee Nation, argued the cause and filed a brief for appellant, the Cherokee Nation:

The jurisdiction of the court of claims, conferred by the jurisdictional act, had been exhausted.

Journeycake v. Cherokee Nation, 30 Ct. Cl. 174, 31 Ct. Cl. 143.

Only rights of Cherokee freedmen as a class, not as individuals, were determined by decree of February 3, 1896.

Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; *Cherokee Nation v. Blackfeather* (*United States v. Blackfeather*) 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63; *Cherokee Intermarriage Cases*, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29; *Blackfeather v. United States*, 190 U. S. 368, 47 L. ed. 1099, 23 Sup. Ct. Rep. 772; *Journeycake v. Cherokee Nation*, 31 Ct. Cl. 144.

The court of claims had no jurisdiction to grant injunctive relief in this case.

United States v. Jones, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669.

Congress, in re-enacting § 21 of the act of June 28, 1898, by § 27 of the act of July 1, 1902, must have adopted the construction placed upon that section by the Senate, by the Department, Commission to the Five Civilized Tribes, and the Cherokee Nation.

Sessions v. Romadka, 145 U. S. 41, 36 L. ed. 614, 12 Sup. Ct. Rep. 799.

Courts will regard the contemporaneous construction by the executive officers and Department.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *United States v. Moore*, 95 U. S. 763, 24 L. ed. 589; *Sac & F. Indians v. Sac & F. Indians*, 220 U. S. 481, 55 L. ed. 552, 31 Sup. Ct. Rep. 473.

The language of laws and treaties is to be construed favorably to the Indians.

Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, 508.

Congress had the power to change the method of making the Cherokee freedmen roll.

Wallace v. Adams, 143 Fed. 716, affirmed in 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; *Roff v. Burney*, 168 U. S. 222, 42 L. ed. 443, 18 Sup. Ct. Rep. 60.

There are no vested interests in enrolment as citizens.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, affirmed in 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Ligon v. Johnston*, 90 C. C. A. 486, 164 Fed. 670; *Hayes v. Barringer*, 93 C. C. A. 507, 168 Fed. 221; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Conley v. Ballinger*, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224; *Fleming v. McCurtain*, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16.

Was not exclusive jurisdiction for the making of the final rolls of the Five Civilized Tribes, including the Cherokee freedmen roll, conferred upon the Secretary of the Interior?

United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

No provision was made for an appeal from the decision of the Secretary of the Interior in citizenship cases.

United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 323, 47 L. ed. 1076, 23 Sup. Ct. Rep. 698; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Johnson v. Towsley*, 13 Wall. 83, 20 L. ed. 486; *De Cambra v. Rogers*, 189 U. S. 121, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

The duties of the Commission in enrolment matters were judicial.

Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 653; *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Buffington v. Commission*, Annual Rep. Int. Dept. 1904, pt. 2, p. 160; *Sac & F. Indians v. Sac & F. Indians*, 220 U. S. 481, 55 L. ed. 552, 31 Sup. Ct. Rep. 473; *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62;

Garfield v. United States ex rel. Turner, 31 App. D. C. 332; Garfield v. United States ex rel. Lowe, 34 App. D. C. 70; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16.

Enrolment by the Secretary of the Interior is not reviewable.

United States ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 323, 47 L. ed. 1076, 23 Sup. Ct. Rep. 698; Daniels v. Tearney, 102 U. S. 418, 26 L. ed. 187; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 581, 60 Fed. 316; Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 653; Bufington v. Commission, Annual Rep. Int. Dept. 1904, pt. 2, p. 160.

Neither the court nor the Department, under existing law since the enactment of § 2 of the act of April 26, 1906, providing that the Secretary of the Interior should have no jurisdiction to approve the enrolment of anyone after March 4, 1907, has any authority to order the enrolment of anyone upon the roll of the Cherokee Nation. Congress alone, by legislation, could authorize it, and this has not been done.

Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

The appeal should not be dismissed.

Re Eastern Cherokees, 220 U. S. 83, 55 L. ed. 379, 31 Sup. Ct. Rep. 373; Kingman & Co. v. Western Mfg. Co. 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

Assistant Attorney General John Q. Thompson and Mr. George M. Anderson filed a brief for appellant the United States:

The court of claims has no jurisdiction to issue the writ of injunction to the Secretary of the Interior.

United States v. Milliken Imprinting Co. 202 U. S. 168, 50 L. ed. 980, 26 Sup. Ct. Rep. 572; Hearne v. New England Mut. M. Ins. Co. 20 Wall. 490, 491, 22 L. ed. 396, 397; Walden v. Skinner, 101 U. S. 583, 584, 25 L. ed. 965, 966; South Boston Iron Works v. United States, 34 Ct. Cl. 174; United States v. Jones, 131 U. S. 1-20, 33 L. ed. 90-92, 9 Sup. Ct. Rep. 669; Kentucky v. Dennison, 24 How. 97, 16 L. ed. 725; Walkley v. Muscatine, 6 Wall. 483, 18 L. ed. 930.

Congress gave the Secretary of the Interior exclusive jurisdiction to make the Cherokee rolls.

Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 653; Laurel Oil & Gas Co. v. Morrison, 212 U. S. 291, 53 L. ed. 517, 29 Sup. Ct. Rep. 394; Sass v. Thomas, 214 U. S. 489, 53 L. ed. 1057, 29 Sup. Ct. Rep. 695; Romadka v. Sessions, 145 U. S. 41, 36 L. ed. 614, 12 Sup. Ct. Rep. 799; Claflin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Sac & F. Indians v. Sac & F. Indians, 220 U. S. 481, 55 L. ed. 552, 31 Sup. Ct. Rep. 473; Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; United States ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Pam-to-pee v. United States, 187 U. S. 371, 47 L. ed. 221, 23 Sup. Ct. Rep. 142; Pain-to-pee v. United States, 148 U. S. 691, 705, 37 L. ed. 613, 618, 13 Sup. Ct. Rep. 742; Garfield v. United States ex rel. Goldsby, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Garfield v. United States ex rel. Lowe, 34 App. D. C. 70.

The appellee was guilty of laches in not having taken appropriate action in time.

Re Eastern Cherokees, 220 U. S. 83, 55 L. ed. 379, 31 Sup. Ct. Rep. 373; Re Sanford Fork & Tool Co. 160 U. S. 247, 259, 40 L. ed. 414, 417, 16 Sup. Ct. Rep. 291.

Mr. George S. Ramsey filed a brief as *amicus curiæ*:

The United States and the Cherokee Nation have the right of appeal from the decree of the court of claims, entered February 20, 1911, that decree being of such finality as renders it applicable to this court.

Re Farmers' Loan & T. Co. 129 U. S. 206, 32 L. ed. 656, 9 Sup. Ct. Rep. 265; Re Michigan C. R. Co. 59 C. C. A. 643, 124 Fed. 727; Bibber-White Co. v. White River Valley Electric R. Co. 53 C. C. A. 282, 115 Feb. 787.

The court of claims had no jurisdiction to entertain the supplemental petition filed May 6, 1908, and enter the decree of February 20, 1911, based thereupon.

Price v. United States & O. Indians, 174 U. S. 375, 43 L. ed. 1012, 19 Sup. Ct. Rep. 765; Blackfeather v. United States, 190 U. S. 369, 47 L. ed. 1099, 23 Sup. Ct. Rep. 772.

Citizenship remains a political question until the lands are actually allotted, and the power of the legislative department of the government is plenary and supreme until some property right has vested by virtue of an actual allotment. Citizenship is not a vested property right, and has not been recognized as such by Congress.

Delaware Indians v. Cherokee Nation, 193 U. S. 129, 48 L. ed. 648, 24 Sup. Ct. Rep. 342; Hays v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Fleming v. McCurtin, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302; Eastern Band of Cherokee Indians v. United States, 117 U. S. 288, 312, 29 L. ed. 880, 887, 6 Sup. Ct. Rep. 718; Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; Cherokee Nation v. Hitchcock, 187 U. S. 294, 299, 47 L. ed. 183, 184, 23 Sup. Ct. Rep. 115; Stephens v. Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 18 Sup. Ct. Rep. 722; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716, 204 U. S. 419, 51 L. ed. 550, 27 Sup. Ct. Rep. 363; Emblen v. Lincoln Land Co. 42 C. C. A. 499, 102 Fed. 559.

The Dawes Commission had authority and jurisdiction to hear and determine who were entitled to be enrolled as Cherokee freedmen, and its decision, whether right or wrong, on the facts submitted, is not void, is not a nullity, and is not subject to review by the courts.

United States ex rel. West v. Hitchcock, 205 U. S. 82, 51 L. ed. 720, 27 Sup. Ct. Rep. 423; Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 654; United States v. California & O. Land Co. 148 U. S. 32, 37 L. ed. 356, 13 Sup. Ct. Rep. 458; Foley v. Harrison, 15 How. 433, 14 L. ed. 761; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Wright v. Rosebury, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; United States use of Hine v. Morse, 218 U. S. 493, 507, 54 L. ed. 1123, 1128, 31 Sup. Ct. Rep. 37; Flannigan v. Chapman & D. Land Co. 75 C. C. A. 310, 144 Fed. 371; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 316; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

Messrs. Charles M. Rice, C. C. Calhoun, Frank J. Boudinot, John J. Hemphill, and Daniel B. Henderson also filed briefs as *amici curiæ*.
56 L. ed.

Messrs. Samuel A. Putman and Charles Poe argued the cause, and, with Mr. Robert H. Kern, filed briefs for appellee:

The court of claims is a court with jurisdiction to pass and enforce decrees, and not a mere commission to give opinions or recommendations to the heads of executive departments.

Gordon v. United States, 117 U. S. 697; United States v. Anderson, 9 Wall. 56, 19 L. ed. 615.

The court did not intend to surrender its jurisdiction over the parties and the subject-matter so long as anything remained to be done properly to carry out and enforce its decree.

Pam-to-pee v. United States, 187 U. S. 371, 47 L. ed. 221, 23 Sup. Ct. Rep. 142.

Repeals by implication are not favored. They are never admitted where former directions can stand with the new act, but only where there is positive repugnancy between the two, and where both acts cannot be reconciled.

United States v. Greathouse, 166 U. S. 601, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701.

The Dawes Commission was not a judicial body.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 726.

The Secretary of the Interior and the Dawes Commission were directed by the 21st section of the act of 1898 to obey the decree of the court. Their refusal to do so was the exercise of arbitrary and unwarranted power, and it was not only within the power of the court of claims to restore the status of the parties aggrieved, but it was its imperative duty to do so.

Garfield v. United States ex rel. Goldsby, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; United States ex rel. Turner v. Fisher, 222 U. S. 204, ante 165, 32 Sup. Ct. Rep. 37.

The appeal should be dismissed.

Carr v. Hoxie, 13 Pet. 460, 10 L. ed. 247; Callan v. May, 2 Black, 541, 17 L. ed. 281; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; United States v. Babbitt, 104 U. S. 767, 26 L. ed. 921; Whiting v. Bank of United States, 13 Pet. 6, 15, 10 L. ed. 33, 37; Bank of Lewisburg v. Sheffey, 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. Rep. 755; Mackey v. Daniel, 59 Md. 485.

Mr. Justice McKenna delivered the opinion of the court:

This appeal is prosecuted to review a supplemental decree of the court of claims enjoining and directing the Secretary of the Interior to enroll upon the final roll of the citizens of the Cherokee Nation for allotment of lands the names of certain

persons and their descendants claiming rights as Cherokee freedmen, whose names were found upon the roll called the Kern-Clifton roll, which the decree adjudged was directed to be made by a former decree of the court. The names of those persons who are appellees in this case, after investigation by the Secretary of the Interior, were found by him not entitled to be enrolled, and not entitled to participate in the distribution of the tribal property.

The decision in *United States ex rel. Lowe v. Fisher* [223 U. S. 95, ante 364, 32 Sup. Ct. Rep. 196] has simplified the decision in this case. Indeed, the ultimate question in both is the same, the power of Congress over the allotment of Indian lands and the manner of ascertaining what persons shall be entitled to them. There were, however, contentions made in that case which are not made here. There are propositions of law conceded in this case which were contested in that. Therefore a brief summary of the elements necessary to a decision is appropriate.

Preceding the merits, however, motion to dismiss the appeal must be disposed of. The motion is made on the following grounds: (1) The decree of February 3, 1896, was a final decree from which no appeal was prosecuted to this court; (2) that the decree of February 20, 1911, hereafter referred to, was merely in the nature 110] of an execution *of that of February 3, 1896, and defined no new rights, but enforced merely rights established and consented to; and (3) because, although the decree of February 20, 1911, was regularly entered on that day, and the appeal now pending was not allowed or prosecuted until the 17th of June, 1911, more than ninety days after the entry of the decree.

The first and second grounds are untenable. The decree under review has broader application than that of February 3, 1896. It determined rights to allotments which had not then been provided for, and, assuming that it declared the principle by which such rights could be determined, there was, as we shall presently see, intervening legislation by Congress. This legislation gave rise to serious controversy. It confirmed, it was contended by petitioners (appellees here), and is yet contended by them, as we shall presently see, the decree of the court both as to the principle of the decree and also as to the means of identification of the individuals who would be entitled to rights under the principle. By the defendants (appellants here) it was contended that the legislation superseded the decree and made new provision for the identification of persons. The court decided in favor of the petitioners, and we

think the decision is more than the execution of the decree of February 3, 1896. It is a decision upon the effect of subsequent legislation by Congress, enacted in the exercise of its power over Indian affairs,—a power which is not questioned.

The third ground urged for the dismissal of the appeal is also without merit. The contention is that the decree of the court became final the instant it was entered, February 20, 1911, and that an appeal was not taken from it until June 17, 1911, which was not within the time allowed by § 1086, of the Revised Statutes (U. S. Comp. Stat. 1901, p. 745). There were, however, intervening proceedings. The record shows that “on March 30, 1911, the defendants [appellants] filed an application for appeal. On May 15, 1911, the defendants *filed a motion to withdraw[111 the application for appeal filed March 30, 1911, which was allowed by the court May 15, 1911.” On May 15, 1911, the defendants filed a motion for new trial, which motion was overruled June 5, 1911, “with privilege to the defendants to renew their application for appeal heretofore filed.” The record further shows that the defendants, “from the decree rendered on the 20th day of February, 1911, in favor of claimants, . . . make application for, and give notice of, an appeal to the Supreme Court of the United States.” The application was allowed as prayed.

This court has decided that if a motion for a new trial or petition for rehearing is made in season and entertained by the court, the time for taking an appeal or writ of error does not begin to run until the motion or petition is disposed of. *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786. It is, however, urged that the court lost jurisdiction of the case by the application for appeal filed March 30, 1911. *United States v. Adams*, 6 Wall. 101, 18 L. ed. 792, is cited to support this contention. In that case the paper filed was as follows: “The United States, by E. P. Norton, its solicitor, makes application to the honorable court of claims for an appeal of the case of Theodore Adams v. The United States to the Supreme Court of the United States.” This application was filed within the ninety days allowed by the statute. The order allowing it, however, was not made until after the expiration of the ninety days. It was contended that both application and allowance should have been made within that time, but this court held otherwise, saying “that the filing of this paper was taking the appeal, and that the delay in the subsequent proceeding to render it effectual does not touch its validity.”

It was not, however, decided that the court of claims lost control of the case. It was only decided that the party had secured a right under the statute. The 112] rules of the "court of claims, made under regulations prescribed by this court, provided for further action to perfect the right acquired by the party, which was made necessary by certain statutes under which only questions of law could be brought here for review. And the action was more than formal. It consisted in the finding of the ultimate facts in the nature of a special verdict, and the questions of law therefrom to be certified to this court.

The practice in the court of claims is adverse to appellees' contention. The court followed the practice in entering the decree of February 3, 1896, the decree upon which appellees based all of their rights. It was substituted for a decree passed May 8, 1895. On the 20th of July, following entry of the latter decree, the defendants filed a motion for rehearing and an application for appeal from the decree. A few days afterward the claimants also filed an application for an appeal. Later the defendants filed a motion for new trial. On January 30, 1896, the applications for appeal were withdrawn by leave of the court, and, on February 3, the decree of May 6, 1895, was vacated and the decree of the former date was entered.

It will be observed, therefore, that if the contention of appellees is correct that the court of claims lost jurisdiction of the decree under review by the application of appellants for an appeal March 30, 1911, the court lost jurisdiction of the case by the applications for appeal from the decree of May 8, 1895, and therefore had no jurisdiction to enter the decree of February 3, 1896, which is the foundation of the rights of appellees. Counsel would hardly like us to push their contention that far, and that far it might have to be pushed if it were tenable. The motion to dismiss is denied.

The court of claims obtained its jurisdiction of the questions involved by an act of Congress approved October 1, 1890, entitled, 113] "An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes." The rights referred to the court of claims for adjudication were those "in law or in equity . . . of the Cherokee freedmen" who were "settled and located in the Cherokee Nation under the provisions and stipulations of article 9" of the treaty of 1866 [14 Stat. at L. 801], "in respect to the subject-matter" in the act provided for. The subject-matter was described to be "to recov-

er from the Cherokee Nation all moneys due, either in law or equity, and unpaid to the . . . freedmen, which the Cherokee Nation" had "before paid out or" might there after "pay *per capita* in the Cherokee Nation, and which was or might be" refused or neglected "to be paid to the said . . . freedmen by the Cherokee Nation out of any funds" which had been, or might be, "paid into the treasury of," or in any way had come or might come "into the possession of, the Cherokee Nation, Indian territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude," and which had been or might be, "appropriated and directed to be paid out *per capita* by the acts passed by the Cherokee Council, and for all moneys, lands, and rights which" should "appear to be due to the said . . . freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement." 26 Stat. at L. 636, chap. 1249.

Article 9 of the treaty of August 11, 1866, the meaning of which was to be determined, provided as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law as well as all free colored persons who were in the country at the commencement of the Rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees."

*Under the jurisdictional act, and in[114 accordance with its provisions, suit was brought by the freedmen by their trustee, Moses Whitmire, against the Cherokee Nation and the United States, to determine the rights of the freedmen under the treaty, which resulted in a decree of the court, passed May 8, 1895. The course of the litigation will be found in 30 and 33 Ct. Cl. pp. 138, 180. respectively.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens of the nation equally with the Cherokees, and equally interested in the common property, and equally entitled to share in its proceeds, but also decided that the freedmen to whom the treaty referred were those who had returned to the nation within six months after the promulgation of the treaty, and their descendants, and that the freedmen and the descendants of freedmen who did not return within six months were excluded from the benefits of the treaty. *United States ex rel. Lowe v. Fisher.*

The court decreed that the Cherokee Nation and the United States be prohibited from making any discrimination between such freedmen citizens and their descend-

ants and native Cherokees in the distribution of a fund of \$8,595,736 paid by the United States to the Cherokee Nation for that portion of its territory known as the "Cherokee Outlet."

The court conceived it necessary to ascertain the individual Indians who were entitled under its decree to share in the fund, and adjudged that the roll called the "Wallace Roll," which showed 3,524 persons, should be approved by the court.

Appeals were prayed by claimant and defendant, but were withdrawn afterward by stipulation, and a decree was entered February 3, 1896, as of May 8, 1895. The decree adjudged the rights of freedmen to be as we have hereinabove set out.

The decree also authorized the Secretary of the Interior *to appoint commissioners to make up a roll of the freedmen entitled to share in the fund to be distributed, which that officer did. They completed the roll which was thereafter known, and to which we have referred, as the Kern-Clifton roll. It was approved by the Secretary on the 18th of January, 1897, and in the succeeding month the moneys available for distribution were paid to the persons whose names were on the roll.

The legislation in regard to the allotment of lands and the making of rolls of persons entitled to allotments is detailed in *United States ex rel. Lowe v. Fisher*, and need not be repeated except in a very brief way. By virtue of that legislation the Dawes Commission, which had been created before the decree of February 3, 1896, proceeded to make up rolls, which were finally approved by the Secretary on March 4, 1907, from which were excluded a large number of freedmen whose names were on the Kern-Clifton roll, with the consequence that such persons so excluded will receive no allotments of lands or share in the moneys which stand to the credit of the Cherokee Nation in the Treasury of the United States.

On May 6, 1908, Jacob B. Wilson, by permission of the court of claims, and having been substituted trustee of the freedmen, filed a supplemental petition in the court in behalf of such excluded persons, which recited the decrees of the court and acts of Congress subsequent to them, asserted a right under the decrees and acts of Congress to be upon the rolls, to be allotted lands, and to share in the distribution of funds, and prayed that the action of the Dawes Commission and of the Secretary of the Interior be declared unlawful, and that the Cherokee Nation and the United States be enjoined from discriminating between such freedmen and other citizens of the Cherokee Nation in the allotment of

lands and the distribution of property and assets of the nation, and that it and the United States be further enjoined from further *distributing such freedmen in [116] the possession and occupation of their homes and improvements, and to reinstate such of them as have been ousted from such possession.

The court took jurisdiction of the petition, as we have seen, and decreed as it prayed. 44 Ct. Cl. 453. The court, in an elaborate and ably reasoned opinion, decided that its decree had larger scope than a description of the class of freedmen and the declaration of a principle, and that it undertook to identify 'the individuals who were entitled to share in everything that was to be allotted or distributed.' To this, the court said, the "defendants made no objections and acquiesced in the terms of the decree for the distribution of that part of the property then ready to be distributed." The court further said that "there was nothing in the terms of the decree or in the conduct of the parties affected by it to raise the inference that its language did not apply to all future distributions of the property, which the plaintiffs in that suit were entitled to have and enjoy whenever such property was ready for distribution."

The court therefore considered that the Kern-Clifton roll was made in compliance with the decree, and that the provisions of the Curtis act (30 Stat. at L. 495, chap. 517), requiring a roll to be made in "strict compliance with the decree of the court of claims rendered the 3d of February, eighteen hundred and ninety-six," necessarily confirmed the Kern-Clifton roll, and that the Dawes Commission, in disregarding it, disobeyed the command of the statute. "If," said the court, "the payment by the Secretary of the Interior was a 'compliance' with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow those same persons to participate in the common property, as further provided in the decree, is not a 'strict' compliance, nor, for that matter, a compliance of any kind."

The case is simplified by the concession of appellees that *the Congress [117] had power to alter the decree and to adopt other means or ways for the disposition of the property than there provided. Indeed, the decree of the court recognizes this power, and the case is brought to an interpretation of the acts of Congress subsequent to the decree. As we have already said, we have reviewed those acts in *United States ex rel. Lowe v. Fisher*, and, after a further consideration of them, invoked in the case at bar, and supported by the

very able opinion of the court of claims, we adhere to the views there expressed. Congress accepted the decree as a correct interpretation of article 9 of the treaty as to the rights of freedmen. It did not accept the Kern-Clifton roll as an authentic identification of the individual freedmen. It had been challenged. It had been made up with haste and under circumstances which caused question of its correctness. It had not received judicial approval. From the first to the last it was the act of administrative officers. Had it been reported to the court and its integrity established by the judgment of the court, Congress might, indeed, have hesitated to ignore it. As an act of merely administrative officers it had no such sanction. It must be borne in mind that important rights were involved and no good reason could be urged against, or serious consequences apprehended from, another investigation. Those who were entitled to be enrolled could again establish their right. Those who were not so entitled, and who had got on the rolls either by mistake or fraud, had no legal ground of complaint. However, we are not required to consider the reasons which induced Congress to direct that a roll be made by the Dawes Commission. Congress had the power, and, as we have decided, exercised it.

Decree reversed and case remanded, with directions to dismiss the supplemental petition.

118]•PACIFIC STATES TELEPHONE & TELEGRAPH COMPANY, Plff. in Err.,

v.

STATE OF OREGON.

(See S. C. Reporter's ed. 118-151.)

Courts — jurisdiction — political question — republican form of government — initiative and referendum.

Whether or not a state has ceased to be republican in form within the meaning of the guaranty in U. S. Const. art. 4, § 4, because of its adoption of the initiative and referendum, is not a judicial question, but a political one, which is solely for Congress to determine.

[For other cases, see Courts, I. c. 2, in Digest Sup. Ct. 1908.]

[No. 36.]

Argued November 3, 1911. Decided February 19, 1912.

NOTE.—On the initiative and referendum—see notes to *Ex parte Pfahler*, 11 L.R.A. (N.S.) 1092, and *Ex parte Farnsworth*, 33 L.R.A. (N.S.) 969.
56 L. ed.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court for Multnomah County, in that state, enforcing a tax on the gross revenue of a domestic corporation. Dismissed for want of jurisdiction.

See same case below, 53 Or. 162, 99 Pac. 427.

The facts are stated in the opinion.

Mr. E. S. Pillsbury argued the cause, and, with Mr. Oscar Sutro, filed a brief for plaintiff in error:

The authorities cited by defendant in error do not sustain the contention that the questions raised in the opening brief are political, and not within the jurisdiction of this court.

Luther v. Borden, 7 How. 1, 12 L. ed. 581; *Texas v. White*, 7 Wall. 730, 19 L. ed. 239; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

The courts have never held that a cause was not justiciable because it involved an interpretation of U. S. Const. art. 4, § 4, but have in proper cases construed the language of that clause.

Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *Re Pfahler*, 150 Cal. 71, 11 L.R.A. (N.S.) 1092, 88 Pac. 270, 11 Ann. Cas. 911; *People ex rel. Elder v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *People v. Johnson*, 38 Colo. 76, 88 Pac. 184; *People ex rel. Stidger v. Elder*, 34 Colo. 197, 86 Pac. 250, 204 U. S. 85, 51 L. ed. 381, 27 Sup. Ct. Rep. 223; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Forsyth v. Hammond*, 166 U. S. 519, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. ed. 261, 266, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Atty. Gen. ex rel. Kies v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

The right to a republican form of government is a substantial right. Like the franchise to vote, it is a political right. But this has always been held to be within the protection of the courts.

Capen v. Foster, 12 Pick. 489, 23 Am. Dec. 632; *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

So, in *Florida v. Georgia*, 17 How. 478,

15 L. ed. 181, it was pointed out that boundary disputes, though political in their nature, became, when brought into the judicial forum, judicial questions.

And see *Virginia v. West Virginia*, 11 Wall. 54, 20 L. ed. 71.

So, too, the right to the governorship of a state, when disputed, becomes a judicial question, and its determination involves a construction of the Constitution or laws of the United States.

Boyd v. Nebraska, 143 U. S. 135, 161, 36 L. ed. 103, 109, 12 Sup. Ct. Rep. 375.

The clause in the Federal Constitution conferring jurisdiction extended it to all cases in law and equity arising under the Constitution without making in its terms any exception whatever.

Starin v. New York, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Osborn v. Bank of United States*, 9 Wheat. 824, 6 L. ed. 224; *Nashville v. Cooper*, 6 Wall. 252, 18 L. ed. 852; *Tennessee v. Davis*, 100 U. S. 264, 25 L. ed. 650; *New Orleans, M. & F. R. Co. v. Mississippi*, 102 U. S. 140, 26 L. ed. 98; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 416, 28 L. ed. 795, 5 Sup. Ct. Rep. 208; *Cooke v. Avery*, 147 U. S. 384, 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; 1 Bryce, Am. Com. p. 365; *Wilcox v. Consolidated Gas Co.* 212 U. S. 19, 40, 53 L. ed. 382, 394, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Cohen v. Virginia*, 6 Wheat. 378, 5 L. ed. 284.

The action of Congress in receiving senators and representatives from Oregon, and its approval of a Constitution containing the initiative as providing a republican form of government, do not control this court in the construction of the language of the Oregon Constitution, or in passing upon the validity of any provision of or amendment to that Constitution.

Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *Coyle v. Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

The court cannot decline the exercise of jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own.

McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

The courts are the final interpreters of the Constitution, and as they pass upon the constitutional powers of the legislatures and executives of the nation and of the states, so must they, when called upon, exercise their functions and determine the validity of the acts of the people of a state, so far as they affect the constitutional

rights of the citizens or the powers of the national government.

Texas v. White, 7 Wall. 725, 19 L. ed. 237; *Smyth v. Ames*, 169 U. S. 527, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

The court has jurisdiction because the Oregon amendment providing for the initiative and the "measure" in question deny due process of law and the equal protection of the law.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Southwestern Tele. & Teleph. Co. v. Dallas*, — Tex. —, 134 S. W. 321; *Home Teleph. & Tele. Co. v. Los Angeles*, 211 U. S. 280, 53 L. ed. 185, 29 Sup. Ct. Rep. 50.

The unconstitutionality of the acts of a state are equally within the jurisdiction of the courts, whether they be the acts of the legislative or executive department or of the people themselves, adopting their constitutions or amending them.

Cohen v. Virginia, 6 Wheat. 415, 5 L. ed. 293; *Dodge v. Woolsey*, 18 How. 332, 15 L. ed. 401; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Cooley, Const. Lim.* 7th ed. p. 62.

Mr. A. M. Crawford, Attorney General of Oregon, argued the cause, and, with Messrs. I. H. Van Winkle, W. S. U'Ren, and C. E. S. Wood, filed a brief for defendant in error:

The power to determine whether a state has a republican form of government is vested in Congress. Hence, is a political rather than a judicial question.

Luther v. Borden, 7 How. 1-42, 12 L. ed. 581-599; *Texas v. White*, 7 Wall. 700, 730, 19 L. ed. 227, 239; *Taylor v. Beckham*, 178 U. S. 548, 578, 44 L. ed. 1187, 1200, 20 Sup. Ct. Rep. 890, 1009; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; 6 Mich. L. Rev. No. 4, p. 304; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Cooley, Const. Lim.* 7th ed. p. 59; *Cooley, Const. Lim.* 6th ed. p. 42.

Mr. Jackson H. Ralston also argued the cause, and, with Messrs. Frederick L. Siddons and William E. Richardson, filed a brief for defendant in error:

The only branch of the government competent to decide as to whether there exists in a state a republican form of government is the political, and not the judicial, branch,

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009.

Mr. George Fred. Williams also argued the cause and filed a brief for defendant in error.

Messrs. George H. Shibley, Robert L. Owen, and J. Harry Carnes filed a brief as *amici curiæ*.

The Congress of these United States, a department that is co-ordinate with this judicial department, has repeatedly passed upon the question at issue, and, therefore, under the settled practice in this court, it will not trench upon the powers conferred by the Constitution upon Congress.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Texas v. White*, 7 Wall. 700, 731, 19 L. ed. 227, 239; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009.

Messrs. John T. Dye and Addison C. Harris submitted a brief by permission of the court.

Mr. Elliott W. Major, Attorney General of Missouri, also filed a brief as *amicus curiæ*.

Mr. Chief Justice White delivered the opinion of the court:

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its Constitution. This amendment, while retaining an existing clause vesting the exclusive legislative power in a general assembly consisting of a senate and a house of representatives, added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or *reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." [Art. 4, § 1.] Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the Constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted, when approved by popular vote, should become the law of the state. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself, or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.†

er thus reserved was contained in further clauses authorizing both the amendment of the Constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted, when approved by popular vote, should become the law of the state. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself, or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.†

*In 1903 detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906, a law taxing certain classes of corporations was submitted, voted on, and promulgated by the governor in 1907 as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, 2 per centum upon their gross revenue derived from business done within the state. Penalties were provided for nonpayment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone & Telegraph Company, an Oregon corporation engaged in business in that state, made a return of its gross receipts, as required by the statute, and was accordingly assessed 2 per cent upon the amount of such return. The suit which is now before us was commenced by the state to enforce payment of this assessment and the statutory penalties

†Section 1 of article 4 of the Constitution of the state of Oregon shall be, and hereby is, amended to read as follows:

Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than 8 per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the

for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay, and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state Constitution, as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the state, begotten by the incorporation into the state Constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it, and that judgment was affirmed by the supreme court of Oregon. (53 Or. 163, 99 Pac. 427.) The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion, but by reference to the opinion in a prior case (*Kadderly v. Portland*, 44 Or. 118, 146, 74 Pac. 710, 75 Pac. 222), where a like controversy had been determined.

The assignments of error filed on the

allowance of the writ of error are numerous. The entire matters covered *by [137 each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of article 4 of the Constitution, that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress, or is judicial in its character. Because of their absolute unity we consider all the propositions together, and therefore at once copy them. We observe, however, that in the argument the second, fourth, and fifth paragraphs, for the purposes of discussion, were subordinately classified, and these subordinate classifications we omit from our text, reproducing them, however, by a marginal reference.

I.

"The initiative and the tax measure in question are repugnant to the provisions of § 1 of the 14th Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the law.

measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by 5 per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any meas-

ure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative or for the referendum shall be filed with the Secretary of State, and in submitting the same to the people, he and all other officers shall be guided by the general laws and the act submitting this amendment until legislation shall be especially provided therefor.

II.

"The initiative amendment and the tax in question, levied pursuant to a measure passed by authority of the initiative amendment, violates the right to a republican form of government which is guaranteed by § 4, article 4, of the Federal Constitution.†

III.

"Taxation by the initiative method violates fundamental rights, and is not in accordance with 'the law of the land.' (U. S. Const. art. 6.)

IV.

"The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy, and is subversive of the principles upon which the Republic is founded. Direct legislation is therefore repugnant to that form of government with which alone Congress could admit a state to the Union, and which the state is bound to maintain.‡

V.

139] * "The Federal Constitution presupposes in each state the maintenance of a republican form of government and the existence of state legislatures, to wit: Rep-

resentative assemblies having the power to make the laws; and that in each state the powers of government will be divided into three departments: a legislature, an executive, and a judiciary. One of these, the legislature, is destroyed by the initiative.†

VI.

"The provision in the Oregon Constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union."

On the surface, the impression might be produced that the first and third propositions,—the one in words relating *to [140 the equal protection clause of the 14th Amendment, and the other in terms asserting "taxation by the initiative method violates fundamental rights, and is not in accordance with the law of the land," are addressed to some inherent defect in the tax or infirmity of power to levy it, without regard to the guaranty of a republican form of government. But this is merely superficial, and is at once dispelled by observing that every reason urged to support the two propositions is solely based on § 4 of article 4, and the consequent inability of the state to im-

†1. The guaranty of article 4, section 4, of the Federal Constitution, is to the people of the states, and to each citizen, as well as to the states as political entities.

2. Section 4 of article 4 therefore prohibits the majority in any state from adopting an unrepubli can Constitution.

‡1. Difference between a republic and democracy.

2. In ascertaining the meaning of the phrase "republican form of government," the debates of the constitutional conventions and the federalist papers are of great importance, if not conclusive.

3. The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter.

4. The extent of territory of the states alone sufficed, in the judgment of the framers of the Constitution, to condemn the establishment of a democratic form of government.

5. The form of state government perpetuated by the Constitution was the republican form, with the three departments of government, in force in all the states at the time of the adoption of the Constitution.

6. The history of other nations does not furnish the definition of the phrase "republican form of government," as those words were used by the framers of the Constitution. They distinguish the American from all other republics by the introduction of the principle of representation.

7. Initiative legislation is invalid because government by the people directly

is inconsistent with our form of government.

8. The well-known practices of (a) adopting state Constitutions by popular vote, and of (b) local legislation in "town meetings," furnish no precedent for the lodgment of legislative power in the ballot box.

† 1. State legislatures are a vital feature of our government; the Federal Constitution presupposes their existence, and imposes on each state the obligation to maintain them.

2. The division of powers of the three departments in each of the states is a prerequisite to the national government.

3. It is evident under the Constitution the state legislatures are the agency to carry on the relations between the nation and the states.

4. The word "legislature" in the Constitution means a representative assembly consisting of two houses, empowered to make the law. Such was its meaning at the time of the adoption of the Constitution.

5. Contemporaneous legislation by Congress sheds some light on the meaning of the term "legislature," as used in the Constitution.

6. The initiative destroys the legislative assemblies or legislatures which it is the implied obligation of each state to maintain, for a legislature must be the law-making power.

7. The initiative overthrows one of the greatest safeguards against the abuse of the power of legislation, to wit: the system of a dual legislative assembly.

pose any tax of any kind which would not violate the 14th Amendment, or be repugnant to the law of the land, if in such state the initiative or referendum method is permitted. Thus dispelling any mere confusion resulting from forms of expression, and considering the substance of things, it is apparent that the second proposition, which rests upon the affirmative assertion that, by the adoption of the initiative and referendum, the state "violates the right to a republican form of government which is guaranteed by § 4 of article 4 of the Federal Constitution," and the two subdivisions made of that proposition, the first, that "the guaranty in question is to the people of the states and to each citizen, as well as to the states as political entities," and the second asserting, "§ 4 of article 4 therefore prohibits the majority in any state from adopting an unrepublican Constitution," are the basic propositions upon which all the others rest. That is to say, all the others and their subdivisions are but inducements tending to show the correctness of the second and fundamental one. This conclusion is certain, as they all but point out the various modes by which the adoption of the initiative and referendum incapacitated the state from performing the duties incumbent upon it as a member of the Union, or its obligations towards its citizens, thus causing the state to cease to be a government republican in form, 141] within the intendment of the *constitutional provision relied upon. In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is, at one and the same time, one and the same government, which is republican in form, and not of that character. Before immediately considering the text of § 4 of article 4, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruc-

tion of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for.

First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its power and rights as a member of the national government, and however all the departments of that government may recognize such state government, nevertheless, every citizen of such state, or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence *of the state. Sec-[142] ond. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a state, and if such contention be thought well founded, to disregard the existence in fact of the state, of its recognition by all of the departments of the Federal government, and practically award a decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government. And as a consequence of the existence of such judicial authority, a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one,—a right which, by its very terms, also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority. Do the provisions of § 4, article 4, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it, and thus overthrow the Constitution upon the ground that thereby the guaranty to the states of a government republican in form may be secured,—a conception which, after all, rests upon the assumption that the

states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of 143]those contentions *to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other, suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case,—*Luther v. Borden*, 7 How. 1, 12 L. ed. 581.

The case came from a circuit court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the *Dorr Rebellion* in Rhode Island, and the conflict which was brought about by the effort of the adherents of that alleged government, sometimes described as “the government established by a voluntary convention,” to overthrow the established charter government. The defendants justified on the ground that the acts done by them, charged as a trespass, were done under the authority of the charter government during the prevalence of martial law, and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government, and denied the legality of the charter government. In the course of the trial the plaintiffs, to support the contention of the illegality of the charter government and the legality of the voluntary government, “although that government never was able to exercise any authority in the state, nor to command obedience to its laws or to its officers,” offered certain evidence tending to show that nevertheless it was “the lawful and established government,” upon the ground that its powers to govern have been ratified by a large majority of the male people of the state of the age of twenty-one years and upwards, and also 144]by a large *majority of those who were entitled to vote for general officers cast in favor of a Constitution which was submitted as the result of a voluntarily assembled convention of what was alleged 56 L. ed.

to be the people of the state of Rhode Island. The circuit court rejected this evidence and instructed the jury that, as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out “the novelty and serious nature” of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of, and for the purpose of sustaining, such established government. On this subject it was said (p. 38):

“For, if this court is authorized to enter upon this inquiry, as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.”

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the *voluntary govern-[145]ment for the purpose of decreeing the established government to be illegal, on the ground (p. 39) “that the inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the state, without the aid of oral evidence or the examination of witnesses, etc.” It was further remarked:

“This doctrine is clearly and forcibly stated in the opinion of the supreme court of the state in the trial of *Thomas W. Dorr*, who was the governor elected under the opposing Constitution, and headed the

armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of article 4 of the Constitution of the United States. The contention of the plaintiff in error concerning that article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people; and they, in the nature of things, if the government is a free one, must have a right to change their Constitution. Where, in the ordinary course, no other means exists of doing so, that right, of necessity, embraces the power to resort to revolution. As, however, no such right, it was urged, could exist under the Constitution, because of the provision of § 4 of article 4, protecting each state, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guaranty of a republican government in form *was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question, determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular state hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government, and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new Constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of article 4, and the re-

sultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a state could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that, owing to the inherent political character of such a question, its decision was not by the Constitution vested in the judicial department of the government, but was, on the contrary, exclusively committed to the legislative department, by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

*"Moreover, the Constitution of the [147 United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the Executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 [1 Stat. at L. 424, chap. 36], had recognized the obligation

resting upon it to protect from domestic violence by conferring authority upon the 148] President of the United States, *on the application of the legislature of a state or of the governor, to call out the militia of any other state or states to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of article 4 was a judicial one, the duty to afford protections from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009, where, after disposing of a contention made concerning the 14th Amendment, and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guaranty of § 4 of article 4, it was said (p. 578):

"But it is said that the 14th Amendment must be *read with § 4 of article 4, of the Constitution, providing that 'the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the state of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in state af-

fairs,' and received in lieu thereof a distinct pledge to the people of the state of the guaranty of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guaranty, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 575, to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

"It was long ago settled that the enforcement of this guaranty belonged to the political department. *Luther v. Borden*, 7 How. 1, 12 L. ed. 581. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it."

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just *stated points out between [150] judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different; that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed,

or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has in-
151]juriously *affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

FRANK KIERNAN, Plff. in Err.,
v.

CITY OF PORTLAND, Joseph Simon, Mayor, et al.

(See S. C. Reporter's ed. 151-166.)

Courts — jurisdiction — political question — republican form of government — initiative and referendum.

1. Whether or not a state has ceased to be republican in form within the meaning of the guaranty in U. S. Const. art. 4, § 4, because of its adoption of the initiative and referendum, is not a judicial question,

but a political one, which is solely for Congress to determine.

[For other cases, see Courts, I. e, 2, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — local law.

2. Questions as to the validity under the state Constitution of Or. Laws 1907, chap. 226, authorizing the voters of a municipality to resort to the initiative to amend its charter, and as to the regularity of the proceedings leading up to the adoption of an amendment, and of the proceedings culminating in the adoption of a particular ordinance, are not Federal, and hence will not support a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1529-2049, in Digest Sup. Ct. 1908.]

[No. 503.]

Argued November 3, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court of Multnomah County, in that state, dismissing a taxpayer's suit to enjoin the sale of municipal bonds. Dismissed for want of jurisdiction.

See same case below, 57 Or. 454, 37 L.R.A. (N.S.) 332, 111 Pac. 379, 112 Pac. 402.

The facts are stated in the opinion.

Mr. **Ralph R. Duniway** argued the cause, and, with Mr. T. J. Geisler, filed a brief for plaintiff in error.

Messrs. **Frank S. Grant** and **William C. Benbow** argued the cause and filed a brief for defendants in error:

The Federal government is the only party who can question the construction of a bridge over navigable water on account of a lack of Federal authority. None can question the lack of legislative authority to construct a bridge across navigable waters, except the state.

Kundinger v. Saginaw, 132 Mich. 405, 93 N. W. 914; *Portland v. Montgomery*, 38 Or. 222, 62 Pac. 755, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 689, 27 L. ed. 442, 447, 2 Sup. Ct. Rep. 185; *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294; *Doolittle v. Broome County*, 18 N. Y. 155.

NOTE.—On the initiative and referendum—see notes to *Ex parte Pfahler*, 11 L.R.A. (N.S.) 1092, and *Ex parte Farnsworth*, 33 L.R.A. (N.S.) 969.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land*

Co. 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

Whether or not a state government is republican in form is a political question.

Luther v. Borden, 7 How. 1, 42, 12 L. ed. 581, 599; *Texas v. White*, 7 Wall. 700, 730, 19 L. ed. 227, 239; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 579; *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408; *Brickhouse v. Brooks*, 165 Fed. 534.

Mr. Chief Justice **White** delivered the opinion of the court:

Following the incorporation into the Constitution of the state of Oregon in 1902 of the initiative and referendum amendment referred to in the case of *Pacific States Teleph. & Teleg. Co. v. Oregon*, just decided [223 U. S. 118, ante 377, 32 Sup. Ct. Rep. 224], two other amendments to the Constitution were adopted by that method, designated, the first, as article 4, § 1a, and the second as article 11, § 2. The pertinent provisions of article 4, § 1a, and of article 11, § 2, are in the margin.†

160] *The legislature (Laws of 1907, chap. 226) authorized municipalities to provide by ordinance for carrying into effect the initiative and referendum powers reserved by the amendment to the Constitution just quoted. The city of Portland adopted ordinance No. 16,311, providing the methods by which the initiative and referendum powers of the city should be exerted. We quote

†Article 4, § 1a. . . . The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum, nor more than 15 per cent to propose any measure by the initiative, in any city or town.

Article 11, § 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any character or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon.

56 L. ed.

in the margin‡ from the opinion of the *supreme court of Oregon [57 Or. 457[161 37 L.R.A.(N.S.) 332, 111 Pac. 379] in this case the facts concerning the action taken by the municipality leading up to the adoption of an ordinance which forms the subject-matter of this controversy.

The ordinance in question was entitled, "To Amend Article 6 of Chapter 3 of the Charter of the City of Portland . . . by Inserting a Section in Said Article 6 of Chapter 3 after Section 118, and before Section 119 Thereof, Which Shall Be Designated in the Charter as Section One Hundred and Eighteen and a Half (118½) of Article 6 of Chapter 3." Omitting details, the amendment conferred upon the council of the city authority to issue and dispose of bonds of the city not exceeding two millions of dollars, to be sold, as occasion might require, to enable the executive board of the city of Portland to construct, in the name of the city of Portland, a bridge with proper approaches and terminals "across the Willamette river in said city, from Broadway street at or near its intersection with Larabee street, on the east side of said river. . . ." The amendment gave power to the executive board in building the authorized bridge, to "erect and construct . . . subject to such regulations as may be imposed by the United States, piers, abutments, and other necessary supports in the bed of the Willamette river for the foundation of such bridge." Again, as stated by the supreme court of Oregon, pursuant to the submission to voters, as above stated, "on June 7th the election was held, at which

‡On April 7, 1908, an initiative petition, containing the required number of signatures, was filed with the council, requesting the city to build a bridge across the Willamette river, from Broadway street in East Portland, to the west side of the river, whereupon the city of Portland took steps to obtain plans and specifications for building said bridge. On May 8, 1908, the auditor notified the mayor of the filing of said petition, and requested him to comply with his duties under the charter in regard thereto. On October 20, 1908, the petition, containing a sufficient number of signatures, was presented to the council at a legally called meeting, and at said date the council requested the opinion of the city attorney as to the validity thereof. On October 27, 1908, the attorney filed his opinion, affirming its validity, and thereafter, on November 11, 1908, the council passed an ordinance (No. 18,531) submitting to a vote of the people an amendment to the city charter, providing for the construction of said bridge, and for issuing bonds in the sum of not to exceed \$2,000,000 to pay for the same, designating said proposed amendment as § 118½ of art. 6 of chap. 3, and on November 25,

there were cast for the amendment 10,087 votes, and against it 6,061, and on June 21st the mayor proclaimed that the amendment had been adopted." Following the adoption of the ordinance, on October 27, 1909, **162**]the council passed an ordinance ("No. 20,208), authorizing the issue and sale of two hundred and fifty thousand dollars of the bonds provided for in the amendment to the charter for the purpose of obtaining funds to commence the construction of the bridge. On the promulgation of this ordinance the present suit was begun by the plaintiff in error in a state court, with the object of enjoining the sale of the bonds, and preventing the carrying out of the amendment of the city charter which had been adopted in pursuance of the vote as above stated. The right to stand in judgment for this purpose was based upon the interest of the complainant as a citizen and taxpayer. The complaint stated a multitude of grounds, assailing in every conceivable form the power to authorize the voters of the municipality to resort to the initiative for the purpose of amending the charter; and the repugnancy of the delegation of that power and of the charter amendment adopted in pursuance of it to many provisions of the state Constitution and the Constitution of the United States. The regularity of the proceedings taken to adopt the amendment was also elaborately assailed. The city answered. The case was submitted to the trial court on bill and answer, and resulted in the dismissal of the bill. The case was taken to the supreme court of the state, where that judgment was affirmed. The court delivered two opinions, one on the first hearing and the other on a rehearing. The first carefully disposed of

the many objections made to the power under the state Constitution to confer on the voters of the municipality the authority to amend the charter, and to the regularity of the proceedings leading up to the adoption of the amendment, and to the proceedings culminating in the adoption of the assailed ordinance. The various contentions concerning these subjects, based upon the Constitution of the United States, were also disposed of in the course of the opinion. We have not examined the petition for the rehearing, as it was omitted in printing the record, but it is *inferable, from the **163** elaborate opinion which was delivered on the rehearing, that the main grounds urged for a rehearing were based on the absence of power in a state to adopt the methods of initiative and referendum, and the effect of doing so on the continued existence of a government republican in form. We think this is the reasonable inference, as those subjects were elaborately reviewed by the court on the rehearing.

The errors assigned are numerous and involve assumed state and Federal questions so interwoven as to cause it to be difficult to separate them or state with precision the questions of a Federal nature which they embrace. We need not, however, undertake to do so, as all the questions which it is deemed arise for consideration are in the argument reduced to eight propositions, which are in the margin.† Coming to test these propositions, we think on their face it is apparent they are disposed of by either or *both of one or **164** two considerations,—(a) the necessary operation and effect of the opinion in *Pacific States Teleph. & Teleg. Co. v. Oregon*, just announced, or (b) the conclusive effect on

1908, the council passed a resolution, submitting the proposed amendment to a vote of the people at a special election on April 23, 1909. Thereafter, on February 17, 1909, the council passed an ordinance (No. 18,976), amending ordinance No. 18,531, so as to fix the date of the election on May 8, 1909, instead of April 23d, as originally specified. On March 31, 1909, the council passed an ordinance (No. 19,174) expressly repealing ordinance No. 18,531 as amended, and no special election was held under any ordinance or resolution. On March 31, 1909, the same date as that of the repealing ordinance, a resolution was passed, authorizing the submission of the charter amendment to a vote of the people at the general election to be held June 7, 1909. More than twenty days prior to the election the auditor of the city published the proposed charter amendment, with the ballot in full, in the city's official newspaper, as required by law, and also sent out and distributed copies of said amendment to the voters of the city."

†1. Can the state of Oregon legally adopt the initiative and referendum amendment to its Constitution, article 4, § 1, attempted to be adopted June 2, 1902, and printed above, pages —?

2. Can the electors of the state of Oregon legally adopt the further initiative and referendum amendments to its Constitution, article 4, § 1a, and article 11, § 2, attempted to be adopted June 4, 1906, by virtue of said article 4, § 1, and printed above, pages —?

3. Can the electors of the city of Portland legally adopt the pretended § 118½ of the charter of the city of Portland, which is printed above in this brief, by virtue of the above-mentioned initiative and referendum amendments to the Oregon Constitution?

4. Can the city of Portland legally issue bonds, tax plaintiff in error, and build said Broadway bridge across the navigable Willamette river owned by the state of Oregon, by virtue of the said § 118½ of the charter, attempted to be adopted at said

questions of a local and state character resulting from the action of the court below, and hence that none of them have a foundation sufficiently substantial to support the exertion of jurisdiction.

In saying this we are not unmindful that one of the assignments is based upon the contention that, as the Willamette river was navigable, there was no power to build a bridge over it without the consent of the government of the United States. But in the first place, we are unable to perceive upon what theory the complainant possessed the right to raise such a question, and in the second place, the ordinance which empowered the bridge expressly exacted [165] *that it should be built in conformity to the requirements of the authorities of the United States. It is to be observed that both sides refer to and insert in their printed arguments an act of the legislature of Oregon passed since this writ of error

was sued out. Nothing could be more complete and comprehensive in the manifestation of a purpose, so far as there was power to do so, to cure any and every possible defect. Its title is an indication of its purpose and scope:

"An act to authorize the construction of a bridge known as the Broadway bridge, to be built across the Willamette river in the city of Portland, in the state of Oregon, and to cure any errors or irregularities in the passage of the amendment to the charter of the city of Portland, authorizing *such bridge, and to validate and con-[166 firm the bonds issued or to be issued for the construction therefor."

We have not deemed it necessary to take into consideration the act of Congress (36 Stat. at L. chap. 253, p. 1348) expressly approving the authority granted to build the bridge, so far as the United States was concerned, and ratifying any infirmity

city election under said system of government?

5. The supreme court of Oregon committed error in deciding that the pretended § 118½ is invalid in so far as it attempts to impose the care and maintenance of the Broadway bridge upon Multnomah county, and then holding that said clause is severable from the rest of the section, and the remainder of the section is valid, as thereby the supreme court of Oregon attempted to legislate and authorize the taxation of plaintiff in error, and deprived him of the law of the land.

6. The supreme court of Oregon committed error in deciding that the granting of a franchise and building a bridge across the Willamette river, owned by the state of Oregon and controlled jointly by the United States of America and the state of Oregon, is a municipal purpose instead of a state purpose, and can be granted by the electors of the city of Portland in amending the charter of the city of Portland under the said "Oregon system," as said decision denied to plaintiff in error the law of the land.

7. The supreme court of Oregon committed error in deciding that the council and electors of the city of Portland can enact a charter amendment to the charter of the city of Portland, under said "Oregon system," by which the city could issue bonds in a large amount and tax the property of plaintiff in error for the payment of the bonds as a municipal purpose, when it is a state purpose, and it is not within the constitutional power of the people of the state of Oregon to delegate the power to tax without limitation, and exercise state powers to the electors of a municipality, and the attempt to do so is in violation of § 1 of the 14th Amendment to the Constitution of the United States; also in violation of §§ 3 and 4 of article 4 of the Con-

stitution of the United States of America, as such grant of power would be for the state of Oregon to commit state suicide, and dissolve the state of Oregon into as many smaller states as there are municipalities within the state, and to change the republican government of the state of Oregon into a confederacy of cities within the state of Oregon, and tends to destroy our system of government created and guaranteed by the Constitution of the United States of America.

8. The supreme court of Oregon erred in holding and deciding that plaintiff, a citizen of the United States; must conform his conduct and hold his property in state matters and tax matters, to a rule of conduct or law enacted by mere numbers of people and assemblages of people within the borders of a municipality, because it is not in accordance with due process of law and is in violation of the law of the land to require any citizen of the United States to conform his conduct, and hold his property in state matters and in tax matters, to a rule of conduct or law, enacted directly by mere numbers of people or assemblages of people within a municipal corporation, and is contrary to § 1 of the 14th Amendment to the Constitution of the United States of America; §§ 3 and 4 of article 4 of the Constitution of the United States of America; and also is contrary to the implied provisions of the Constitution of the United States that government of the several states shall be representative in form, and that the several states shall create and maintain representative legislative assemblies, and that the citizens of the United States shall be protected in their rights of enjoyment of life, liberty, and property by the law of the land, which is an inherent attribute of citizenship of the United States, which no state or its people may impair.

which might otherwise have arisen in that regard.

It follows that the writ of error must be, and it is, dismissed for want of jurisdiction.

THE ABBY DODGE, A. Kalimeris, Claimant Appt.,
v.
UNITED STATES.†

(See S. C. Reporter's ed. 166-178.)

Waters — relative rights of state and United States to sponges within territorial limits.

1. The taking or gathering of sponges from land under water within state territorial limits is not subject to congressional control.

[For other cases, see *Waters*, I. b. 2; *Fisheries*, V., in Digest Sup. Ct. 1908.]

Sponges — Federal regulation.

2. Only sponges taken outside of state territorial limits can be deemed included in the provisions of the act of June 20, 1906 (34 Stat. at L. 313, chap. 3442, U. S. Comp. Stat. Supp. 1909, p. 1087), making it unlawful to land, deliver, cure, or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, since any other construction would plainly render the statute unconstitutional, as in excess of the powers of Congress.

Commerce — Federal power — prohibiting foreign commerce.

3. Congress could validly prohibit, as it did by the act of June 20, 1906, the landing at any port or place in the United States of sponges taken between certain dates outside of state territorial waters.

[For other cases, see *Commerce*, III. b. in Digest Sup. Ct. 1908.]

Admiralty — libel — sufficiency.

4. A libel charging a vessel with violating the act of June 20, 1906, by landing at a Florida port sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, must negative the fact that the sponges

may have been taken from waters within the territorial limits of a state.

[For other cases, see *Admiralty*, III. g. 2, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for amendment of libel.

5. A decree of the Federal Supreme Court which, construing the act of June 20, 1906, regulating the landing of sponges, as applicable only to sponges taken outside of state territorial limits, reverses a decree below, fining a vessel for violating the statute, because the libel fails to negative the fact that the sponges may have been taken from waters within the territorial limits of a state, will be accompanied with directions to permit the government, if it desires, to amend the libel so as to present a case within the statute as so construed.

[For other cases, see *Appeal and Error*, 5446-5454, in Digest Sup. Ct. 1908.]

[No. 41.]

Argued November 6 and 7, 1911. Decided February 19, 1912.

APPEAL from the District Court of the United States for the Southern District of Florida to review a decree fining a vessel for violation of a Federal statute regulating the landing of sponges. Reversed and remanded with directions to permit an amendment of the libel.

The facts are stated in the opinion.

Mr. Edward R. Gunby argued the cause and filed a brief for appellant:

Granting that the landing of an ordinary article of commerce is commerce within the meaning of the law, it is plain that when commerce is confined within the limits of a single state, Congress has no power to regulate or control it.

The *Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The Bright Star*, 1 Woolw. 266, Fed. Cas. No. 1,880; *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867; *United States v. The James Morrison*, *Newberry Adm.* 241, Fed. Cas. No. 15,465; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243.

37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

On state control over navigable waters—see note to *Gibson v. United States*, 41 L. ed. U. S. 997.

On the regulation of oyster fisheries—see note to *Bradshaw v. Lankford*, 11 L.R.A. 583.

On jurisdiction over the sea—see note to *Humboldt Lumber Mfrs. Asso. v. Christopherson*, 46 L.R.A. 264.

On the amendment of libel or information in admiralty—see note to *The Burma*, 110 C. C. A. 333.

†This case is reported by the Official Reporter under the title of "The Abby Dodge."

NOTE.—On governmental control over right of fishery—see note to *People v. Truckee Lumber Co.* 39 L.R.A. 581.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corvin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 390

Even if the acts controlled and regulated by the act of Congress are matters of interstate commerce, if the same are so blended with intrastate commerce that the two are inseparable, the act of Congress would be unconstitutional.

Employers' Liability Case (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Sears v. Warren County, 36 Ind. 267, 10 Am. Rep. 62.

The courts are not bound by mere form; they may, and should, look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The decisions upon the right of the states to legislate in regard to oysters are so nearly parallel that they would practically control the same rights in regard to sponges. The right of the state absolutely to regulate the oyster industry has been so clearly recognized that it seems no longer open to question.

Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Louisiana v. Mississippi, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571; Smith v. Maryland, 18 How. 71, 15 L. ed. 269. See also State v. Harrub, 95 Ala. 176, 15 L.R.A. 761, 4 Inters. Com. Rep. 99, 36 Am. St. Rep. 195, 10 So. 752; Waverly Water-Front & Improv. Co. v. White, 97 Va. 176, 45 L.R.A. 227, 33 S. E. 534; People v. Truckee Lumber Co. 39 L.R.A. 581, and note, 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374; Com. v. Hilton, 174 Mass. 29, 45 L.R.A. 475, 54 N. E. 362; State v. Lewis, 134 Ind. 250, 20 L.R.A. 52, 33 N. E. 1024; Greer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Slaughter-House Cases, 16 Wall. 62, 21 L. ed. 404; State v. Kansas City, Ft. S. & G. R. Co. 32 Fed. 722; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Holderman v. Thompson, 105 Ind. 112, 5 N. E. 175.

On the question of the ownership, sovereignty, and control of the tide water and the right to control the fishing therein, this court has frequently recognized the power of the states, and defined the rights of the general government.

Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pollard v. 56 L. ed.

Hagan, 3 How. 212, 11 L. ed. 565; Illinois v. Illinois C. R. Co. 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 Sup. Ct. Rep. 783; Mann v. Tacoma Land Co. 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

By the express provisions of the act of Congress of March 3, 1845, Florida was "admitted into the Union on equal footing with the original states in all respects whatsoever."

State v. Black River Phosphate Co. 32 Fla. 94, 21 L.R.A. 189, 13 So. 640.

Solicitor General **Lehmann** argued the cause, and, with Mr. Charles E. McNabb, Assistant Attorney, filed a brief for appellee:

Whether the act of Congress in question is unconstitutional as an invasion of the reserved power of the state is a question not presented by this record, inasmuch as it is not shown that any of the sponges landed from the Abby Dodge were taken within the boundaries of the state.

Flint v. Stone Tracy Co. 220 U. S. 107-177, 55 L. ed. 389-423, 31 Sup. Ct. Rep. 342.

The United States has the undoubted right alike in virtue of its power to regulate foreign commerce and as an exercise of its inherent powers of national sovereignty, to regulate the use of fisheries near its shores and outside the boundaries of the states, so far as it concerns operations by its own people or to or from its own shores.

Lord v. Goodall, N. P. S. S. Co. 102 U. S. 541, 26 L. ed. 224; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; North American Commercial Co. v. United States, 171 U. S. 110, 43 L. ed. 98, 18 Sup. Ct. Rep. 817; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Mr. Chief Justice **White** delivered the opinion of the court:

By libel of the vessel Abby Dodge, either her forfeiture or the enforcement of a monetary penalty was sought because of an alleged violation of the act of June 20, 1906, 34 Stat. at L. 313, chap. 3442, U. S. Comp. Stat. Supp. 1909, p. 1087, entitled, "An

Act to Regulate the Landing, Delivery, Cure, and Sale of Sponges." The specific violation alleged was "that there was at the port of Tarpon Springs, within the southern district of Florida, on the 28th day of September, A. D. 1908, landed from the said vessel, Abby Dodge, 1,229 bunches of sponges, taken by means of diving and apparatus from the waters of the Gulf of Mexico and the Straits of Florida, . . . at a time other than between October 1st and May 1st of any year, and at a time subsequent to May 1st, A. D. 1907."

The owner of the vessel appeared and filed exceptions which, although urged in various forms, were all, as stated by counsel, "directed to and based upon the alleged unconstitutionality of the said act of June 20, 1906." The exceptions were overruled, and, the claimant declining further to plead, a decree was entered assessing a fine of \$100 against the vessel. This appeal was then taken.

For the purposes of the questions upon which this case turns, we need only consider the 1st section of the act of June 20, 1906, which is as follows:

"That from and after May first, anno Domini nineteen hundred and seven, it shall be unlawful to land, deliver, cure, or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida: Provided, That sponges taken or gathered by such process between October first and May first of each year in a greater depth of water than fifty feet shall not be subject to the provisions of this act: And provided further, That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."

Broadly, the act, it is insisted, is repugnant to the Constitution because, in one aspect, it deals with a matter exclusively within the authority of the states, and in another because, irrespective of the question of state authority, the statute regulates a subject not within the national grasp, and hence not embraced within the legislative power of Congress. The first proceeds upon the assumption that the act regulates the taking or gathering of sponges attached to the land under water, within the territorial limits of the state of Florida, and it may be of other states bordering on the Gulf of Mexico, prohibits internal commerce in sponges so taken or gathered, and is therefore plainly an unauthorized exercise of power by Congress. The second is based on the theory that, even if the act be construed as concerned only with sponges taken or gathered

from land under water outside of the jurisdiction of any state, then its provisions are in excess of the power of Congress, because, under such hypothesis, the act can only apply to sponges taken from the bed of the ocean, which the national government has no power to deal with.

We briefly consider the two propositions. If the premise upon which the first rests be correct, that is to say, the assumption that the act, when rightly construed, applies to sponges taken or gathered from land under water within the territorial limits of the state of Florida or other states, the repugnancy of the act to the Constitution would plainly be established by the decisions of this court. In *McCready v. Virginia*, [174 94 U. S. 391, 24 L. ed. 248, the question for decision was whether the state of Virginia had such exclusive authority over the planting and gathering of oysters upon the soil in tide waters within the territorial limits of the state as not only to give the state the power to control that subject, but to confer the right to exclude the citizens of other states from participating. In upholding a statute exerting such powers the doctrine was declared to be as follows: "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Smith v. Maryland*, 18 How. 74, 15 L. ed. 270; *Mumford v. Wardwell*, 6 Wall. 436, 18 L. ed. 761; *Weber v. State Harbor Comrs.* 18 Wall. 66, 21 L. ed. 802. In like manner the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012. . . . The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." True it is that the rights which were thus held to exist in the states were declared to be "subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States;" but with that dominant right we are not here concerned.

Again, in *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559, in upholding a statute of the state of Massachusetts regulating the taking of menhaden in Buzzard's bay, the doctrine of the case just cited was expressly reiterated.

True, further in that case, probably having in mind the declaration made in the opinion in the McCready Case, that fish running within the tide waters of the several [175] *states were subject to state ownership "so far as they are capable of ownership while so running," the question was reserved as to whether or not Congress would have the right to control the menhaden fisheries. But here also, for the reason that the question arising relates only to sponges growing on the soil covered by water, we are not concerned with the subject of running fish, and the extent of state and national power over such subject.

The obvious correctness of the deduction which the proposition embodies, that the statute is repugnant to the Constitution when applied to sponges taken or gathered within state territorial limits, however, establishes the want of merit in the contention as a whole. In other words, the premise that the statute is to be construed as applying to sponges taken within the territorial jurisdiction of a state is demonstrated to be unfounded by the deduction of unconstitutionality to which such premise inevitably and plainly leads. This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527, and cases cited.

While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed, and the rule of construction just stated, we are of opinion that its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power.

[176] *In substance the argument is that this case does not come within the rule, since it is insisted to confine the statute to sponges taken or gathered outside of state territorial limits would also, although for a different reason, cause it to be plainly unconstitutional. This but assumes that the second proposition, denying all power in Congress to exert authority in respect to the landing of sponges taken outside

of the territorial jurisdiction of a state, is well founded; and we come, therefore, to the consideration of that proposition. For the sake of brevity we do not stop to review the general considerations which the proposition involves for the purpose of demonstrating its inherent inaccuracy, or to point out its conflict with the law of nations, and its inconsistency with the practices of the government from the beginning. We thus refrain, since there is a simpler and yet more comprehensive point of view disposing of the whole subject.

Undoubtedly (*Lord v. Goodall*, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224), whether the *Abby Dodge* was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by the law of nations, would be regarded as the common property of all, and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States. *Buttfield v. Stranahan*, 192 U. S. 470, 492, 493, 48 L. ed. 525, 534, 535, 24 Sup. Ct. Rep. 349, and authorities there collected. Indeed, as pointed out in the *Buttfield Case*, so complete is the authority of Congress over the subject that no one can be said to have a vested *right to [177] carry on foreign commerce with the United States.

Although, for the reason stated, we think the statute, limited by the construction which we have given it, is not repugnant to the Constitution, we are nevertheless of opinion that, as thus construed, the averments of the libel were not sufficient to authorize the imposition of the penalty which the court below decreed against the vessel. As, by the interpretation which we have given the statute, its operation is confined to the landing of sponges taken outside of the territorial limits of a state, and the libel does not so charge,—that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a state,—it follows that the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute. *United States v. Britton*, 107 U. S.

655, 661, 662, 27 L. ed. 520, 522, 523, 2 Sup. Ct. Rep. 512, and cases cited.

As we deem that it has no relevancy to the power of Congress to deal with a subject not within its constitutional authority, that is, the taking of sponges within the exclusive jurisdiction of a state, we have not considered it necessary to refer to a statement made by the district judge concerning legislation of the state of Florida, making it unlawful to gather or catch sponges "in and upon any of the grounds known as sponging grounds along the coast of Florida from Pensacola to Cape Florida, by diving either with or without a diving suit and armor." Equally, also, have we refrained from attempting to reconcile the enactment of this state law with some reference made by the government in argument to certain statements in testimony given before a committee of the House when the act which is before us was in process of adoption, to the effect that there were no sponge beds within the jurisdiction of Florida, because "the sponge beds were from 15 to 60 and 65 miles out."

178] *In view of the paramount authority of Congress over foreign commerce, through abundance of precaution we say that nothing in this opinion implies a want of power in Congress, when exerting its absolute authority to prohibit the bringing of merchandise, the subject of such commerce, into the United States, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption.

While it necessarily follows from what we have said that the decree must be reversed, we are of opinion that, under the circumstances of the case, it should be accompanied with directions to permit the government, if desired, to amend the libel so as to present a case within the statutes as construed. The *Marv Ann*, 8 Wheat. 389, 5 L. ed. 643.

Reversed.

HAMILTON H. HENDRICKS, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 178-184.)

Error to circuit court — frivolousness of Federal question.

1. The contention that an indictment

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741, and *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333.

charging subornation of perjury before a Federal grand jury did not sufficiently set forth "the nature and cause of the accusation," within the meaning of U. S. Const., 6th Amend., because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality," is too frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a circuit court, to review a conviction under such indictment, where the description therein of the proceeding in which the perjury was committed is as follows: ". . . Sitting as a grand jury . . . and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district."

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Indictment — subornation of perjury — sufficiency.

2. An indictment charging subornation of perjury before a Federal grand jury need not, in describing the proceedings in which the perjury was committed, state the name of a specified defendant under investigation. [For other cases, see Indictment, II., in Digest Sup. Ct. 1908.]

Indictment — subornation of perjury — definiteness.

3. There is no want of definiteness in an indictment charging subornation of perjury before a Federal grand jury because it is in effect simply alleged therein that before the grand jury, after the witness had been sworn, the truth of the recited matters concerning which it was subsequently alleged that he testified falsely, "became and was a material question," and did not specify in just what evidentiary way the perjured testimony became material.

[For other cases, see Indictment, II., in Digest Sup. Ct. 1908.]

[No. 164.]

Argued January 25, 1912. Decided February 19, 1912.

IN ERROR to the Circuit Court of the United States for the District of Oregon to review a conviction for subornation of perjury. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Alfred S. Bennett argued the cause and filed a brief for plaintiff in error:

The provisions of U. S. Const. 6th Amend. give to defendants in criminal cases important constitutional rights of which the courts will not permit them to be deprived, and substantial and serious failure to com-

ply with its terms raises a constitutional question which the defendant may invoke as such, and which cannot be taken away by any act of legislature.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; State v. Webber, 78 Vt. 463, 62 Atl. 1018; Hogue v. United States, 106 C. C. A. 387, 184 Fed. 248; United States v. Pettus, 84 Fed. 791; State v. Silverberg, 78 Miss. 858, 29 So. 761; Moline v. State, 67 Neb. 164, 93 N. W. 228; State v. Mace, 76 Me. 66, 5 Am. Crim. Rep. 588; McLaughlin v. State, 45 Ind. 343; McNair v. People, 89 Ill. 444; Reyes v. State, 34 Fla. 181, 15 So. 876; 1 Bishop, New Crim. Proc. §§ 104, 108-110; Rosen v. United States, 161 U. S. 31, 40 L. ed. 607, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; United States v. Trumbull, 46 Fed. 755; United States v. Potter, 56 Fed. 83.

It has always been held that the particular proceeding in which the alleged false testimony is claimed to have been given, and to which the alleged false testimony is claimed to be material, must be set forth in the indictment, whether the alleged perjury was committed before a grand jury or before any other tribunal.

Com. v. Taylor, 96 Ky. 394, 29 S. W. 138; State v. Webber, 78 Vt. 463, 62 Atl. 1018; State v. McCormick, 52 Ind. 169; Banks v. State, 78 Ala. 14; State v. Wiggins, — Miss. —, 30 So. 712; Buller v. State, 33 Tex. Crim. Rep. 551, 28 S. W. 465; Com. v. Pickering, 8 Gratt. 628, 56 Am. Dec. 158; State v. Koslowesky, 228 Mo. 351, 128 S. W. 741; State v. Ayer, 40 Kan. 43, 19 Pac. 403; State v. Silverberg, 78 Miss. 858, 29 So. 761; State v. McCone, 59 Vt. 117, 7 Atl. 407; State v. See, 4 Wash. 344, 30 Pac. 327, 746; Wilson v. State, 115 Ga. 206, 90 Am. St. Rep. 104, 41 S. E. 696, 15 Am. Crim. Rep. 597; State v. Ela, 91 Me. 309, 39 Atl. 1001; Davis v. State, 79 Ala. 20; United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16,692; Hogue v. United States, 106 C. C. A. 387, 184 Fed. 245; State v. Smith, 40 Kan. 631, 20 Pac. 529; United States v. Robinson, 4 Dak. 72, 23 N. W. 90; Brooks v. State, 29 Tex. App. 582, 16 S. W. 542; Weaver v. State, 34 Tex. Crim. Rep. 282, 30 S. W. 220.

The defendant had an inherent as well as a constitutional right to a fair opportunity to meet and resist that essential element of the offense, and to have notice in advance, so that he could do so.

United States v. Mann, 95 U. S. 580, 24 L. ed. 531.

It is not enough that alleged false testimony may have been material. On the contrary, its materiality must be proved and established the same as any other fact in the case.

56 L. ed.

McClelland v. People, 49 Colo. 538, 32 L.R.A.(N.S.) 1069, 113 Pac. 640; State v. Aikens, 32 Iowa, 403; State v. Dineen, 203 Mo. 628, 102 S. W. 480; State v. Koslowesky, 228 Mo. 351, 128 S. W. 741; State v. Smith, 40 Kan. 631, 20 Pac. 529; Banks v. State, 78 Ala. 14; Com. v. Pollard, 12 Met. 229.

Assistant Attorney General Denison argued the cause, and, with Mr. William W. Lemmond, Assistant Attorney, filed a brief for defendant in error:

A less definite description was held sufficient in *Markham v. United States*, 160 U. S. 319, 320, 325, 40 L. ed. 441, 442, 443, 16 Sup. Ct. Rep. 288, where the indictment specified "and inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States at Washington, in the District of Columbia;" and a similar situation in principle was ruled in *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *Rosen v. United States*, 161 U. S. 29, 34, 40, 40 L. ed. 606, 607, 609, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; *Dunbar v. United States*, 156 U. S. 185, 192, 39 L. ed. 390, 393, 15 Sup. Ct. Rep. 325, also (pointing out that a bill of particulars could have been had); *Bannon v. United States*, 156 U. S. 464, 468, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; *Coffin v. United States*, 156 U. S. 432, 452, 39 L. ed. 481, 490, 15 Sup. Ct. Rep. 394; *Kirby v. United States*, 174 U. S. 47, 64, 43 L. ed. 890, 897, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 574; *United States v. Thompson*, 189 Fed. 839. See also *United States v. Howard*, 132 Fed. 359; *United States v. Ammerman*, 176 Fed. 637; *Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140; *Wharton, Crim. Law*, 10th ed. § 1304; 30 Cyc. p. 1435.

Indeed, the specification of the identity of the defendant and the precise nature of his offense are normally the end, and not the beginning, of grand jury proceedings.

Hale v. Henkel, 201 U. S. 43, 61, 65, 50 L. ed. 652, 660, 661, 26 Sup. Ct. Rep. 370.

The objections, even if originally valid, would not survive verdict.

Holmgren v. United States, 217 U. S. 509, 523, 54 L. ed. 861, 867, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Connors v. United States*, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; *Serra v. Mortiga*, 204 U. S. 470, 475, note, 51 L. ed. 571, 574, note, 27 Sup. Ct. Rep. 343; *Grey v. United States*, 96 C. C. A. 415, 172 Fed. 101; *Hardesty v. United States*, 93 C. C. A. 417, 168 Fed. 25; *Rosen v. United*

States, 161 U. S. 29, 34, 40 L. ed. 606, 607, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; Markham v. United States, 160 U. S. 319, 324, 325, 40 L. ed. 441, 443, 444, 16 Sup. Ct. Rep. 288.

Mr. Chief Justice White delivered the opinion of the court:

The plaintiff in error, upon a conviction and sentence for subornation of perjury, in violation of § 5393, Revised Statutes (U. S. Comp. Stat. 1901, p. 3654), prosecutes this writ of error upon the theory that a question of constitutional right was involved, arising upon a claim made in the court below that the indictment was repugnant to the 6th Amendment to the Constitution. On the assumption that there was jurisdiction to entertain the writ, counsel also in argument assailed as erroneous certain rulings of the trial court "admitting evidence and instructions given and refused in the course of the trial."

The indictment consisted of two counts, —the first charging the subornation of one George W. Hawk, and the second the subornation of one Clyde Brown, to commit perjury in giving the testimony before a Federal grand jury.

181] *As, however, on the trial, the government elected to rely upon the charge of the subornation of Hawk, we are concerned alone with the first count. The sufficiency of this count was assailed by demurrer, it being alleged "that the said count of said indictment and the matters and facts therein contained, in manner and form as the same are stated, are not sufficient in law, and are not sufficient to constitute a crime, and are not direct and certain." The protection of the Constitution was not, however, invoked until after conviction, when a motion to arrest judgment was made, "based upon the ground that the indictment in this case does not charge a crime, and is insufficient, and does not sufficiently describe the offense. 'And does not inform the defendant of the nature and cause of the accusation' against him, and is in violation of and insufficient under the 6th Amendment to the Constitution of the United States."

The portions of the indictment which relate to the particular matter which was under investigation before the grand jury, or which refer to the materiality of the alleged testimony, and which it is claimed exhibit the repugnancy of the indictment to the 6th Amendment, are contained in the excerpt, which is in the margin,† the

italics being *those of counsel, who[182 assert that the italicized portion "is the portion bearing upon the question."

It is urged that the indictment did not sufficiently set *forth "the nature and[183 cause of the accusation" within the meaning of the 6th Amendment, because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality." It is claimed "that the indictment, in order to be sufficient, should have stated *the particular matter* which was being investigated by the grand jury at the time, and to which it was claimed the alleged false testimony was material;" and that if the alleged false testimony concerning Hawk's final proof upon his land "became material collaterally in some other later matter, of which the grand jury did have jurisdiction, . . . the collateral matter should have been set forth, and the indictment should have alleged that it was material in relation to that matter, so that the defendant could have an opportunity to intelligently defend as to the materiality of the alleged evidence, as well as to other elements of the offense."

Reduced to their final analysis the contentions but assert that the indictment did not apprise the accused of the crime charged with such reasonable certainty that he could make his defense and be protected after judgment against another prosecution for the same offense. We are of opinion, however, that the principles settled by many prior adjudications of this court are so controlling as to foreclose discussion of the matter.

The description, in the indictment, of the proceeding in which the perjury was committed, is as follows:

" . . . Sitting as a grand jury . . . and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district."

*That this description adequately[184 advised the defendant as to the identity of the proceeding in which the perjury was committed is settled by the following authorities: Markham v. United States, 160 U. S. 319, 320, 40 L. ed. 441, 442, 16 Sup.

†"That Hamilton H. Hendricks, late of the county of Wheeler, in the said district, on the 15th day of January, in the year of our Lord 1905, at and within the said

county of Wheeler, in the said district, unlawfully did wilfully and corruptly suborn, instigate, and procure one George W. Hawk to appear in person before them, the said

Ct. Rep. 288; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *Rosen v. United States*, 161 U. S. 29, 34, 40, 40 L. ed. 606, 607, 609, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251; *Dunbar v. United States*, 156 U. S. 185, 192, 39 L. ed. 390, 393, 15 Sup. Ct. Rep. 325; *Bannon v. United States*, 156 U. S. 464, 468, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; *Coffin v. United States*, 156 U. S. 432, 452, 39 L. ed. 481, 490, 15 Sup. Ct. Rep. 394;

grand jurors, then and from thence hitherto sitting at the city of Portland, in the said district, as a grand jury of the circuit court of the said United States for the said district, and, amongst other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district, and to take his oath before the said grand jury, and upon his oath so taken to testify, depose, and swear before the said grand jury in substance and to the effect that when he, the said George W. Hawk, made his application dated October 19, 1898, and filed in the land office of the said United States at The Dalles, Oregon, on October 21, 1898, to enter certain public lands known and described as the southeast quarter of the southeast quarter of section 2, the east half of the northeast quarter of section 11, and the southwest quarter of the northwest quarter of section 12, in township 7 south and range 22 east, reference being had to the Willamette meridian and base line, as a homestead, under the laws of the said United States concerning homesteads, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that he, the said George W. Hawk, was not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon; that he was not applying to enter the said lands for the purpose of speculation, but in good faith, and to obtain a home for himself; that he had not made, and would not make, any agreement or contract with any person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of any person except himself, and that he himself paid the fees required by law to be paid upon the filing of such application; that when he, the said George W. Hawk, on the 2d day of March, in the year 1900, subscribed and swore to his affidavit and testimony of final proof of settlement upon and cultivation of the said lands, he had theretofore, to wit, in the month of April, 1899, commenced his residence on the said lands, and had not sold, conveyed, or mortgaged any portion of the said lands; and thereupon the said George W. Hawk, in consequence and by means of the said wilful and corrupt subornation, instigation, and pro-

curement of the said Hamilton H. Hendricks, afterwards, to wit, on the 23d day of January, in the year 1905, in the said district, did appear in person before the said grand jury, at Portland aforesaid, and then and there was in due manner sworn by the foreman thereof, and then and there took his, the said George W. Hawk's, oath before the said grand jury that he would testify truly, and true answers make to all questions which should be put to him, before the said grand jury; the said grand jury then and there being a tribunal having due and competent authority to administer the said oath to the said George W. Hawk in that behalf, and the matter in which he was so sworn and took his oath as last aforesaid, being then and there a case in which a law of the United States then authorized an oath to be administered; and it then and there, at and upon the taking of the said oath by the said George W. Hawk before the said grand jury as aforesaid, became and was a material question whether, when he so made and filed his said application to enter the said lands as a homestead as aforesaid, the same was honestly and in good faith made for the purpose of actual settlement and cultivation, and whether it was made for the benefit of any other person, persons, or corporation, and whether he, the said George W. Hawk, was acting as agent of any person, corporation, or syndicate in making such entry, and whether, in making his said entry, he was in collusion with any person, corporation, or syndicate to give them the benefit of the land so entered, or any part thereof, or the timber thereon, and whether he was not applying to enter the said lands for the purpose of speculation, rather than in good faith to obtain a home for himself, and whether he had not made, and would not make, an agreement or contract with some person or persons, corporation or syndicate, by which the title which he should acquire from the said United States in the said lands would inure to the benefit of some person except himself, and whether he, the said George W. Hawk, himself paid the fees aforesaid; and whether, when he, the said George W. Hawk, so subscribed and swore to his said affidavit and testimony of final proof of settlement upon and cultivation of the said lands as aforesaid, he had, in the month of April, 1899, or at any time, commenced his residence on the said lands, and whether he had sold, conveyed, or mortgaged any portion of the said lands, and whether he himself paid the fees required by law to be paid upon the making of such final proof."

and Kirby v. United States, 174 U. S. 47, 64, 43 L. ed. 890, 897, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330. A less definite description was held sufficient in the Markham Case, where the indictment specified "an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia." As the specification of the identity of a defendant and the precise nature of his offense is normally the end, and not the beginning, of grand jury proceedings (Hale v. Kenkel, 201 U. S. 43, 61, 65, 50 L. ed. 652, 660, 661, 26 Sup. Ct. Rep. 370), and the very object of the proceeding may have been to determine the identity of the criminal, it was not essential that the proceedings should state the name of a specified defendant under investigation.

That the indictment was not wanting in definiteness because therein it was in effect simply alleged that before the grand jury, after Hawk had been sworn, the truth of the recited matters concerning which it was subsequently alleged Hawk testified falsely, "became and was a material question," and it was not specified in just what evidentiary way the perjured testimony became material, is settled by the Markham Case (160 U. S. 324, 325, 40 L. ed. 443, 444, 16 Sup. Ct. Rep. 288), where a similar point was directly held to be without merit.

As, in view of prior decisions, the contention based upon the 6th Amendment was manifestly frivolous, it results that the writ of error must be dismissed.

Writ of error dismissed.

185]*ÆTNA LIFE INSURANCE COMPANY, Plff. in Err.,

v.

PATRICK C. TREMBLAY.

(See S. C. Reporter's ed. 185-190.)

Error to state court—Federal question—effect of Canadian judgment.

The contention that full and proper faith and credit were not given to a judgment of a Canadian court by a decision of a state court does not involve a Federal question

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts

which will support a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1968-2003, in Digest Sup. Ct. 1908.]

[No. 166.]

Argued and submitted January 26, 1912.
Decided February 19, 1912.

IN ERROR to the Supreme Judicial Court of the State of Maine to review a judgment granting only a portion of the relief sought by an insurance company in a proceeding for review of an action at law in which judgment had been recovered for the full amount due upon a policy of life insurance. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Ralph W. Crockett submitted the cause for plaintiff in error.

Mr. Henry W. Oakes argued the cause, and, with Mr. William Frye White, filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

The facts are these: At Quebec, Canada, in 1885, the plaintiff in error issued its policy of insurance for \$2,000 upon the life of Jean O. Tremblay, a resident of Canada, his wife being named as the beneficiary. In 1891 Tremblay assigned the policy as collateral security to J. B. Cloutier, of Quebec. Ten years later Mr. and Mrs. Tremblay assigned the policy to their son, Patrick F. Tremblay, subject to the claim of Cloutier. Soon after this last assignment, Jean O. Tremblay died, and both assignees made claim upon the insurance company. The contending claimants not being able to agree as to the amount of the claim of Cloutier, the insurance company, as authorized by the statutes of Canada, paid the amount of the policy to the Provincial Treasurer of Quebec. Cloutier then brought suit upon the policy, making the heirs, widow and son of the insured, parties defendant. None of the defendants appeared; judgment by default was entered in favor of Cloutier, and the money was paid over to him by the Provincial Treasurer. During the pendency of Cloutier's suit, however, and before the latter obtained his judgment, Patrick F. Tremblay sued the insur-

can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

ance company in a court of the state of Maine, and recovered judgment for the full amount due upon the policy. 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509. The insurance company then unsuccessfully attempted, by a suit in equity, to stay the collection of the judgment in the action at law. 101 Me. 585, 65 Atl. 22. Presumably in consequence of an intimation of the court when dismissing the equity cause, the insurance company began this proceeding for a review of the action at law, and the same culminated in a judgment in favor of the insurance company against Tremblay for \$818.33 and interest, the sum found to be due to Cloutier, as equitable assignee of the policy, for his advances to the original holder of the policy, thereby operating a set-off of the amount against Tremblay's judgment upon the policy. This writ of error was then allowed by the chief justice of the supreme judicial court of Maine.

The assignments of error are three in number, but they merely allege in various forms the commission of error by the state court, sitting as a court of law, in not holding as requested, that the judgment obtained upon the policy by Cloutier, which had been pleaded in bar by the insurance company, was a bar to the action upon the policy brought by Patrick F. Tremblay, thereby denying "full and proper faith and credit" to the Cloutier judgment.

Plainly the writ of error was improvidently allowed. The authority conferred by Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, to review a final judgment or decree in any suit in the highest court of a state, in which 190] a decision in the suit could be had, *is limited to cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority." The 1st section of article 4 of the Constitution confers the right to have full faith and credit "given in each state to the public acts, records, and judicial proceedings in every other state." No such right, privilege, or immunity, however, is 56 L. ed.

conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right.

Neither expressly nor by necessary intendment was there asserted in the state court during the course of the litigation in question any claim on behalf of the insurance company of the possession of a right, etc., protected by the Constitution of the United States. Since, therefore, entirely aside from all question as to the correctness of the judgment below rendered, we are without authority to review the decision made by the state court, it results that the writ of error must be, and it is, dismissed for want of jurisdiction.

Writ of error dismissed.

*UNITED STATES, Petitioner. [191
v.

LEOPOLD BARUCH.

(See S. C. Reporter's ed. 191-200.)

Duties — on cotton featherstitch braid.

Narrow woven cotton strips bearing "featherstitch" or "herringbone" ornamentation, used largely for binding seams, but commercially known as "featherstitch braids" at and prior to the enactment of the tariff act of July 24, 1897 (30 Stat. at L. 181, chap. 11, U. S. Comp. Stat. 1901, p. 1662), which shifted braids from the lower duty of the notions schedule, ¶ 320, to the higher duty of the trimmings schedule, ¶ 339, without any change of phraseology to indicate that it was the purpose to depart from the settled commercial meaning of the word "braids," must be deemed dutiable at 60 per cent under the trimmings schedule, as cotton braids, and not at 45 per cent under the notions schedule, as "bindings" or as "tapes,"—especially in view of the settled administrative construction to such effect.

[Duties on particular articles, see Duties, V., in Digest Sup. Ct. 1908.]

[No. 190.]

Argued November 13 and 14, 1911. Decided February 19, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of New York, affirming the decision of the board

NOTE.—On the interpretation of commercial and trade terms in tariff laws—see note to *Dennison Mfg. Co. v. United States*, 18 C. C. A. 545.

of general appraisers, which sustained the decision of the collector, classifying cotton featherstitch braids under the trimmings schedule. Decree of Circuit Court of Appeals reversed and decree of Circuit Court affirmed.

See same case below, 97 C. C. A. 40, 172 Fed. 342.

The facts are stated in the opinion.

Assistant Attorney General Wemple argued the cause, and, with Mr. Charles E. McNabb, Assistant Attorney, filed a brief for petitioner:

The history of litigation and of legislation supports the government's contention that these articles are dutiable as "braids."

Re Dicckerhoff, 54 Fed. 161; Steinhardt v. United States, 121 Fed. 442; United States v. Hague, T. D. 25,466, 67 C. C. A. 680, 134 Fed. 1022; Vom Baur v. United States, 141 Fed. 439, T. D. 27,397; Marshall Field & Co. v. United States, T. D. 29,548, 30,299.

If words used in a statute imposing duties on imports had at the time of its passage a well-known signification in our trade and commerce, differing from their ordinary meaning, the commercial designation must prevail unless Congress has clearly manifested a contrary intention; and it is only when no commercial usage is called for or proved that the common meaning is to be adopted.

Two Hundred Chests of Tea, 9 Wheat. 430, 438, 439, 6 L. ed. 128-130; Curtis v. Martin, 3 How. 106, 109, 110, 11 L. ed. 516, 517; Arthur v. Morrison, 96 U. S. 108, 111, 112, 24 L. ed. 764-766; Arthur v. Butterfield (Miller v. Butterfield) 125 U. S. 70, 75, 31 L. ed. 643, 645, 8 Sup. Ct. Rep. 714; Robertson v. Salomon, 130 U. S. 412, 415, 32 L. ed. 995, 996, 9 Sup. Ct. Rep. 559; Sonn v. Magone, 159 U. S. 417, 422, 40 L. ed. 203, 204, 16 Sup. Ct. Rep. 67; American Net & Twine Co. v. Worthington, 141 U. S. 468, 471, 472, 35 L. ed. 821-823, 12 Sup. Ct. Rep. 55; Hedden v. Richard, 149 U. S. 346, 348, 349, 37 L. ed. 763, 764, 13 Sup. Ct. Rep. 891; Cadwalader v. Zeh, 151 U. S. 171, 176, 38 L. ed. 115, 117, 14 Sup. Ct. Rep. 288; De Jonge v. Magone, 159 U. S. 562, 569, 40 L. ed. 260, 263, 16 Sup. Ct. Rep. 119; Goat & Sheepskin Import. Co. v. United States, 206 U. S. 194, 202, 203, 51 L. ed. 1022, 1025, 1026, 27 Sup. Ct. Rep. 634.

A descriptive term may have a commercial meaning which differs from the ordinary meaning, and the former must govern.

Arthur v. Cumming, 91 U. S. 362, 363, 23 L. ed. 438, 439; Pickhardt v. Merritt, 132 U. S. 252, 255-257, 33 L. ed. 353, 355, 356,

10 Sup. Ct. Rep. 80; Bogle v. Magone, 152 U. S. 623, 627, 38 L. ed. 574, 575, 14 Sup. Ct. Rep. 718; Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288; United States v. Nordlinger, 58 C. C. A. 438, 121 Fed. 690; United States v. Klumpp, 169 U. S. 209, 212, 216, 42 L. ed. 720-722, 18 Sup. Ct. Rep. 311; Patton v. United States, 159 U. S. 500, 510, 40 L. ed. 233, 237, 16 Sup. Ct. Rep. 89; Arthur v. Davies, 96 U. S. 135, 136, 24 L. ed. 810.

Commercial designation fixes the dutiable character of the articles notwithstanding the phrase, "not elsewhere specially provided for."

Arthur v. Lahey, 96 U. S. 112, 118, 24 L. ed. 766, 768; United States v. Schwarz, 140 Fed. 302; Thomas v. Schwarz, 71 C. C. A. 401, 140 Fed. 989.

The acceptance of a definition in one standard dictionary to the exclusion of others is decisively disapproved in Koechl v. United States, 28 C. C. A. 458, 55 U. S. App. 404, 84 Fed. 448.

The action of the collector is presumptively correct. The burden is upon the protesting importers to establish their contention.

Arthur v. Unkart, 96 U. S. 118, 122, 24 L. ed. 768, 769; Earnshaw v. Cadwalader, 145 U. S. 247, 262, 36 L. ed. 693, 698, 12 Sup. Ct. Rep. 851; Erhardt v. Schroeder, 155 U. S. 124, 130, 39 L. ed. 94, 96, 15 Sup. Ct. Rep. 45; United States v. Ranledd, 172 U. S. 133, 146, 43 L. ed. 393, 398, 19 Sup. Ct. Rep. 114.

The mode of manufacture will not avail in determining dutiable classification as against a commercial usage.

Merritt v. Welsh, 104 U. S. 694, 701, 705, 26 L. ed. 896, 898, 899; Chew Hing Lung v. Wise, 176 U. S. 156, 160, 162, 44 L. ed. 412, 414, 415, 20 Sup. Ct. Rep. 320; Vom Baur v. United States, 141 Fed. 439, T. D. 27,397; Field's Appeal, 50 Fed. 908, 4 C. C. A. 371, 9 U. S. App. 460, 54 Fed. 367; United States v. Wright, T. D. 13,707, 13,974; Wolff v. United States, 116 Fed. 1023; Re Dicckerhoff, 54 Fed. 161.

The concurring decisions of two courts upon a question of fact will be followed unless wholly unwarranted. A conflict in the testimony is insufficient ground for disturbing such finding.

Dravo v. Fabel, 132 U. S. 487, 490, 33 L. ed. 421, 422, 10 Sup. Ct. Rep. 170; Baker v. Cummings, 169 U. S. 189, 198, 42 L. ed. 711, 715, 18 Sup. Ct. Rep. 367; Stuart v. Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; Beyer v. Le Fevre, 186 U. S. 114, 119, 46 L. ed. 1080, 1082, 22 Sup. Ct. Rep. 765; The Carib Prince, 170 U. S. 655, 658, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753; Shappirio v. Goldberg,

192 U. S. 232, 240, 48 L. ed. 419, 424, 24 Sup. Ct. Rep. 259; *The Iroquois*, 194 U. S. 240, 247, 48 L. ed. 955, 959, 24 Sup. Ct. Rep. 640; *Hy-Yu-Tse-Mil-Kin v. Smith*, 104 U. S. 401, 412, 48 L. ed. 1039, 1045, 24 Sup. Ct. Rep. 676; *United States v. Clark*, 200 U. S. 601, 608, 50 L. ed. 613, 616, 26 Sup. Ct. Rep. 340.

This doctrine of concurrence is given more weight by the finding of fact in the first instance by the board of general appraisers, whose findings, when supported by evidence, will not be disturbed on appeal.

Re Van Blankensteyn, 5 C. C. A. 579, 11 U. S. App. 687, 56 Fed. 475; *Apgar v. United States*, 24 C. C. A. 113, 46 U. S. App. 625, 78 Fed. 332, *Vandiver v. United States*, 84 C. C. A. 522, 156 Fed. 961; *United States v. Reibe*, 1 Ct. Customs Appeals, 19, 20; *Carson v. United States*, 2 Ct. of Customs Appeals—.

Braids do not have to be trimmings to come within ¶ 339 of the act of 1897. The law reads "embroideries and all trimmings, including braids . . .," but the word "including" before "braids" in that paragraph was used not by way of specification, but by way of addition.

Hiller v. United States, 45 C. C. A. 229, 106 Fed. 74.

The imported articles cannot be followed into trade to ascertain their use before the assessment of duties. Classification must be determined upon an examination of the merchandise in its condition at the time of importation, when duty attaches.

Worthington v. Robbins, 139 U. S. 337, 341, 35 L. ed. 181, 182, 11 Sup. Ct. Rep. 581; *Loeb v. United States*, 80 C. C. A. 211, 150 Fed. 328.

The test is the name of the articles. They cannot be both braids and bindings for tariff purposes.

Arthur v. Stephani, 96 U. S. 125, 127, 128, 24 L. ed. 771, 772; *Robertson v. Rosenthal*, 132 U. S. 460, 464, 33 L. ed. 392, 393, 10 Sup. Ct. Rep. 120; *Seeberger v. Cahn*, 137 U. S. 95, 98, 34 L. ed. 599, 600, 11 Sup. Ct. Rep. 28.

To classify the braids under ¶ 320, they must be shown by proof to be definitely, uniformly, and generally designated and known in commerce as bindings.

Seeberger v. Schlesinger, 152 U. S. 581, 585, 38 L. ed. 560, 561, 14 Sup. Ct. Rep. 729; *Maddock v. Magone*, 152 U. S. 368, 371, 38 L. ed. 482, 483, 14 Sup. Ct. Rep. 588; *Sonn v. Magone*, 159 U. S. 417, 422, 40 L. ed. 203, 204, 16 Sup. Ct. Rep. 67.

An *eo nomine* provision takes precedence of a mere descriptive term, although the latter may be sufficiently broad to embrace the article.

Arthur v. Lahey, 96 U. S. 112, 24 L. ed. 56 L. ed.

766; *Robertson v. Glendenning*, 132 U. S. 158, 159, 33 L. ed. 298, 299, 10 Sup. Ct. Rep. 44.

Mr. Wade H. Ellis argued the cause, and, with Mr. John A. Kratz, Jr., filed a brief for respondent:

In the present case the question is not "What is the most general commercial name of these goods?" but "was this article in the trade and commerce of this country when Congress legislated in 1897, a variety of binding?"

De Jonge v. Magone, 159 U. S. 562, 40 L. ed. 260, 16 Sup. Ct. Rep. 119; *Drew v. Grinnell*, 115 U. S. 477, 29 L. ed. 453, 6 Sup. Ct. Rep. 117; *Lowenthal v. United States*, 1 Ct. Customs Appeals T. D. 31,592.

The ordinary meaning of the word "bindings," as applied by the circuit court of appeals in this case, is presumed to be the same as the commercial meaning, unless the contrary is shown.

Schmieder v. Barney, 113 U. S. 645, 647, 28 L. ed. 1130, 1131, 5 Sup. Ct. Rep. 624.

It is not the usage of the retail trade which brings a provision within the rule of commercial designation, but it is the understanding of that trade which buys and sells at wholesale.

Morrison v. Miller, 37 Fed. 82; *Stewart, H. & M. Co. v. United States*, 51 C. C. A. 558, 113 Fed. 928.

The commercial meaning of a term in a tariff law must be definite, uniform, and general, and not partial, local, or personal.

Maddock v. Magone, 152 U. S. 368, 371, 38 L. ed. 482, 483, 14 Sup. Ct. Rep. 588; *Berbecker v. Robertson*, 152 U. S. 373, 376, 38 L. ed. 484, 485, 14 Sup. Ct. Rep. 590; *Sonn v. Magone*, 159 U. S. 417, 421, 40 L. ed. 203, 204, 16 Sup. Ct. Rep. 67; *Patton v. United States*, 159 U. S. 500, 506, 40 L. ed. 233, 236, 16 Sup. Ct. Rep. 89.

The language in ¶ 339 is descriptive, and not commercial. The doctrine of commercial designation, therefore, in the present instance, is not of primary importance.

Barber v. Schell (*Cochran v. Schell*) 107 U. S. 617, 27 L. ed. 490, 2 Sup. Ct. Rep. 301; *United States v. Klumpp*, 169 U. S. 209, 216, 42 L. ed. 720, 722, 18 Sup. Ct. Rep. 311; *Schiff v. United States*, 39 C. C. A. 652, 99 Fed. 555.

Congress, in transferring the unqualified provisions for "braids" from the notions paragraph (263) of the act of 1894 to the trimmings paragraph (339) of the act of 1897, making it read "trimmings, including braids," and further restricting its operation by adding the clause "not elsewhere specially provided for," and at the same time inserting a provision for the first

time in tariff legislation for "bindings . . . of cotton" without words of qualification or restriction, clearly expressed its intention to limit the high tax of 60 per cent to such braids as were not bindings.

Komada v. United States, 215 U. S. 392, 54 L. ed. 249, 30 Sup. Ct. Rep. 136; *Goldenberg Bros. v. United States*, 64 C. C. A. 442, 130 Fed. 108; *Re Johnson*, 56 Fed. 822; *H. B. Claffin Co. v. United States*, 78 Fed. 805; *Re John Hope & Sons Engraving & Mfg. Co.* 100 Fed. 286.

A provision which is absolute and exclusive in its phraseology is of a superior governing force to one qualified by the phrase "not elsewhere specifically provided for."

Barber v. Schell (*Cochran v. Schell*) 107 U. S. 617, 620, 27 L. ed. 490, 492, 2 Sup. Ct. Rep. 301; *Hartranft v. Meyer*, 135 U. S. 237, 34 L. ed. 110, 10 Sup. Ct. Rep. 751; *Arthur v. Vietor* (*Miller v. Vietor*) 127 U. S. 572, 32 L. ed. 201, 8 Sup. Ct. Rep. 1225.

Mr. Chief Justice **White** delivered the opinion of the court:

This case concerns the proper classification of merchandise imported in 1899, and 192]subsequent years, by the *respondent, at the port of New York, invoiced as "cotton featherstitch braids." The goods consisted of articles ranging variously from about one fourth to one half of an inch in width, loom woven, of white or colored threads throughout, or of mixed white and variously colored threads of cotton or other vegetable fiber, and ornamented with raised figures in various designs, some of which had plain and others scalloped or looped edges. They were officially appraised as "cotton braids—60 per centum;" and were accordingly classified by the collector as "braids" under paragraph 339 of the tariff act of July 24, 1897, generally referred to as the "trimmings" schedule, the pertinent provision of which is as follows: "Embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands, . . . composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act." [30 Stat at L. 181, chap. 11, U. S. Comp. Stat. 1901, p. 1662.]

Asserting that the articles should not have been assessed at 60 per cent, but were dutiable at the rate of 45 per cent ad valorem under paragraph 320 of said act, usually styled the "notions" schedule, as "bindings" or as "tapes . . . made of cotton or other vegetable fiber," the importers duly protested, and the question of the proper classification was considered by the board of general appraisers. That

body, on July 24, 1906, sustained the decision of the collector, upon the authority of a ruling made in the case of *Straus Brothers & Company*, wherein the board but acted upon the evidence taken in and applied the ruling made in what is known as the *Vom Baur Case*. The importers carried the case to the circuit court, and in that court additional evidence was introduced by both parties. Upon such additional evidence and the evidence taken before the board, the decision of the board was affirmed on November 23, 1907. 159 Fed. 294. On appeal, however, the circuit court of appeals *held the merchandise [193 dutiable at 45 per cent ad valorem as "binding," under paragraph 320, and the decision of the circuit court was reversed. 97 C. C. A. 40, 172 Fed. 342. This writ of certiorari was then allowed.

Under the tariff acts of 1890 [26 Stat. at L. 567, chap. 1244], and 1894 [28 Stat. at L. 509, chap. 349], braids were enumerated in the "notions" schedule, which carried a lower rate of duty than articles in the "trimmings" schedule.

Re Dieckerhoff, 54 Fed. 161, involved a review of the decision of the board of general appraisers (G. A. 1301) in the matter of an importation, in 1891, of articles similar to those here in question, dutiable under the tariff act of 1890. The controversy was whether the goods should have been assessed at the rate of 60 per cent ad valorem as cotton trimmings, under the "trimmings" schedule, paragraph 373 of the tariff act of 1890, or assessed as cotton braids at 35 cents per pound, under the "notions" schedule of the same act. The government, insisting on the higher duty, contended that the articles should be classified as cotton trimmings, and were not braids, because to be such they must be braided. The importers, however, contending for the lower duty, urged that the goods were commonly known as featherstitch braids, and should be classified as braids, and thus be brought under the notion schedule bearing the lower duty. The court overruled the contention of the government, accepted the commercial designation, and sustained the ruling of the board of general appraisers that the goods were braids, and dutiable as such. The government acquiesced in this decision. The administrative rule, therefore, under the tariff act of 1890, was to classify the articles in question as braids embraced within the notions schedule, and thereby cause them to carry a lower duty than they would have carried had they been embraced in the trimmings schedule; and under the act of 1894 the *same practice was pur-[194 sued. When, by the act of 1897, upon

which this case depends, braids were taken out of the notions schedule carrying a lower duty, and put in the trimmings schedule, which carried the higher, the articles continued to be classed as braids, and consequently, because of the change in the law, were assessed for a higher duty. And this administrative construction was applied under the act of 1897 for a considerable number of years. See G. A. 4326 (T. D. 20,515), decided January 3, 1899, and G. A. 4929 (T. D. 23,073), decided May 27, 1901.

When the latter decision was rendered (May 27, 1901), however, the importer appealed from the ruling, and the circuit court for the southern district of New York, in *Steinhardt v. United States*, 121 Fed. 442, reversed the decision of the board of general appraisers, and held that the articles were dutiable as bindings under the notions schedule, and not as braids under the trimmings schedule. The reasoning was this,—the court said: "The articles in question appear to be narrow woven tapes of cotton, used largely for covering the seams of underwear and waists. The Standard Dictionary gives one definition of a 'braid' as 'a narrow, flat tape or woven strip for binding the edges of fabrics or for ornamenting them.' If these articles are braids within this or a like definition, they are also bindings or tapes, within paragraph 320." Thus, finding the articles to be within the dictionary definition of both braids and bindings, as the trimmings schedule in which braids were embraced, paragraph 339 contained a general qualification that articles therein named should be liable to the duty therein specified when "not elsewhere specially provided for in this act," the court held that as the braids in question were within the dictionary definition of bindings, they were therefore otherwise provided for, and should be classed within the notion schedule, paragraph 320, and carry the lower duty. The government did not appeal from 195] this decision, under the *instructions of the Attorney General. Such instructions, however, expressly directed that in all future importations the decision should not be applied, but that duty should be assessed according to the prior practice, so that a test case might be made. T. D. 24,269. It is persuasively indicated by what we shall hereafter state, that this course was followed, because the record in the *Steinhardt* Case did not contain what was deemed to be adequate proof as to the accepted commercial designation of the articles to afford a proper basis for testing the matter in that case,—a deficiency which it may well be surmised arose from the belief on

the part of the government, in making up that case, that the settled administrative practice, based upon the previous judicial construction, would not be departed from.

The classification again came under consideration in what is known as the *Vom Baur Case*, and much testimony was taken before the board "for the purpose of showing that the articles were commercially known as braids, and were so commercially known at and prior to the passage of the tariff act of 1897, and therefore dutiable under paragraph 339." In an exhaustive review of the evidence in that case, the board held that the testimony established that there had been no change in the commercial designation of the articles since 1892, at which time, as heretofore stated, the goods were commercially known as "featherstitch braids," and such had been judicially determined to be the case by the circuit court in the *Dieckerhoff Case*, supra. The board pointed out that in the case before it, the importers had taken a position the opposite to that which had been assumed by the importers in the *Dieckerhoff Case*, since in that case, for the purpose of obtaining the lower duty under the act of 1890, they had insisted that the articles were commercially known as braids, and were dutiable as such; and in the case under consideration, the contention was that there was no general and definite *trade designation of the articles as[196 braids, since they were known as bindings and tapes, as well as by the name of featherstitch braids, and that they were in fact tapes, having been produced by weaving instead of by braiding.

The following questions were considered by the board in connection with an extended review of the testimony:

"First. Were these goods known in the trade and commerce of this country at and immediately prior to July 24, 1897, as 'braids'?"

"Second. If the goods were commercially known as 'braids' at and immediately prior to July 24, 1897, are they dutiable under paragraph 339?"

On the record before it it was found "as matter of fact:"

1. That the goods in question were generally known in the wholesale trade of the United States at and prior to July 24, 1897, as "featherstitch braids."

2. That the term "featherstitch braids" was the only general commercial name under which the goods were known in the trade and commerce of this country at and immediately prior to July 24, 1897, and that the terms "seam bindings," "finishing tapes," and others are subordinate names

which have not been generally employed to designate these goods.

The board concluded its opinion as follows:

"In view of these findings, we think the case is distinguished from the Steinhardt Case, *supra*. That case only decided that if the articles were braids within the lexicographical definitions, they were also bindings or tapes, and were therefore more specifically provided for in paragraph 320. There was no satisfactory testimony in the case as to the commercial designation of the articles, whereas it has now been shown by competent testimony that they are generally known in the commerce of this country as 'braids,' and not as 'tapes' or 'bindings.' The circuit court of appeals in *Hiller v. United States*, 45 C. C. A. 229, 106 Fed. 73, decided that cotton braids of 197]all *classes are included within the scope of paragraph 339. The decision of the court is in part as follows: 'A comparison of the provisions of the cotton schedules in the acts of 1894 and 1897 in regard to the classification of braids is, however, quite significant of the intent of Congress. Paragraph 263 of the act of 1894, which corresponds to paragraph 320 of the act of 1897, imposed a duty of 45 per cent upon cords, braids, etc., made of cotton, but braids are omitted in paragraph 320 of the new act, which imposes the same duty. Paragraph 276 of the act of 1894, which corresponded to paragraph 329 of the new act, omitted braids, which was inserted in paragraph 339,—the one under consideration. A comparison of the two acts indicates that Congress intentionally took braids out of the 45 per cent paragraph, where it had been in 1894, and put the article into a paragraph imposing the higher rate of duty, and that it intended to impose the rate upon the articles, irrespective of the use to which they might be applied.

"Under this decision, featherstitch braids, which were held in the Dieckerhoff Case to be dutiable as 'braids' under the act of 1890, and which we have found were commercially known as 'braids' at the time of the passage of the act of July 24, 1897, are, in our opinion, dutiable as assessed under the provision of paragraph 339 of the act of July 24, 1897."

On the appeal of the importers, the decision was affirmed, "on the opinion of the board," which is set out verbatim in the report of the case. *Vom Baur v. United States*, 141 Fed. 439. An appeal was taken from the decision, but it was subsequently dismissed without prejudice.

As already stated, the board of general

appraisers, in the case at bar, rested their decision upon the evidence taken and its ruling in the *Vom Baur Case*. As also stated, that evidence was supplemented in the circuit *court by evidence taken on[198 behalf of both parties to the controversy. Such further testimony, it was observed by the circuit court, did not tend to weaken the conclusion reached by the board, "that these goods were known generally in the trade as featherstitch braids prior to 1897," but "in truth it serves to strengthen it."

In the opinion of the circuit court of appeals, reversing the decision of the circuit court, the court referred to the "merchandise in question" as consisting "of narrow woven strips bearing 'featherstitch' or 'heringbone' ornamentation," and substantially conceded that the circuit court and board of appraisers correctly decided "that prior to 1897 it was generally commercially designated as 'featherstitch braid.'" Accepting this commercial designation, however, and evidently relying upon the reasoning of the opinion in the Steinhardt Case, it was in effect held that the braids in question were not used "for ornamental purposes solely," but, "being used for the purpose of binding seams, are, in our opinion, the kind of braids properly called bindings." Referring to paragraph 320 of the act of 1897 as the "notions" paragraph, and paragraph 339 as the "trimmings" paragraph, the court then said:

"And we think that it may fairly be assumed that when Congress inserted the word 'bindings' in the 'notions' paragraph, and transferred the word 'braid' to the 'trimmings' paragraph, with words of qualification, it intended to embrace in the latter paragraph only such braids as were not bindings.

"If the articles are bindings as well as braids, the provision in the 'notions' paragraph is the more specific. Bindings are embraced without the words of restriction or qualification. These articles as bindings are necessarily included, and they are specially provided for elsewhere than in paragraph 339."

There is no substantial dispute as to the correctness of the findings of the board of general appraisers that *the goods[199 in question were generally known in the wholesale trade of the United States at and prior to July 24, 1897, as "featherstitch braids," and at such period that designation "was the only general commercial name under which the goods were known in the trade and commerce of this country." That the tariff act of 1897 was drafted and was adopted by Congress in the light of the then fixed practice of the

government to assess such articles as "braids," irrespective of the subsidiary names which may have been applied by some who used the articles, or without regard to some of the special uses of which they were susceptible of being put, is not open to reasonable contention. This being the case, we are unable to conclude that Congress, knowing the commercial as well as the tariff designation of the articles, re-employed the term "braids" in the act of 1897, and yet intended that some of the articles embraced within the commercial designation should be taken out of that designation and treated, for the purpose of assessment of duty, as being that which they were not, because they possessed features of utility as well as ornamentation.

When the contentions which had arisen concerning the dutiable character of the articles under the act of 1890 are taken into view, and the claims there made by the importers as to their nature and character, for the purpose of subjecting them to a lower duty, are borne in mind, we think the shifting of braids from the lower duty of the notions schedule to the higher duty of the trimmings schedule, without any change of phraseology to indicate that it was the purpose to depart from the settled commercial meaning of the word "braids," plainly manifested the purpose of Congress to accept that designation and make it applicable, and hence to subject the articles, under their accepted designation, to the higher duty placed upon the articles embraced in the schedule to which braids were transferred. Any other view 200] would render *necessary the conclusion that it was the intention of Congress in using the word "braids" not to adhere to the then well-settled commercial and tariff meaning of the term, but to use the word in a sense different from that which was accepted, for the purpose of renewing a conflict as to the proper meaning of the word, which had been flagrant under the prior act. While these conclusions need no reinforcement, their soundness is additionally and cogently sustained by the construction given to the act upon its adoption, and the consequent administrative enforcement of the same which prevailed without question for so considerable a time.

The decree of the Circuit Court of Appeals is reversed, and that of the Circuit Court is affirmed; and the case is remanded to the Circuit Court of the United States for the Southern District of New York.

56 L. ed.

RUTHER JACOBS, Lillie Jacobs, and E. D. Wilcox as Guardian of Ruther Jacobs, Plffs. in Err.,

v.

A. G. PRICHARD, Trustee.

(See S. C. Reporter's ed. 200-214.)

Statutes—executive construction.

1. The construction given by the Department of the Interior to the consents of Indian allottees, under the act of March 3, 1893 (27 Stat. at L. 612, chap. 209), to the sale and appraisal of that portion of the allotted land not required for their homes, as surviving the decease of those giving them, would control in case of ambiguity in the statute,—especially since the Secretary of the Interior is directed "to make the necessary regulations to carry out the purposes" of its enactment.

[For other cases, see Statutes, 256-258, in Digest Sup. Ct. 1908.]

Indian allotments — consent to sale — effect of death.

2. The consents of the Puyallup Indian allottees and owners to the sale of such portion of the lands allotted to them under the treaty with the Omahas as was not required for their homes, when given and approved conformably to the act of March 3, 1893, must be deemed to survive their decease, in view of the provision of the act that such consents should make the commissioner appointed thereunder trustee to sell the lands and make deeds to the purchasers for the same, subject to the approval of the Secretary of the Interior, which deeds should operate as a complete conveyance of the land upon the full payment of the purchase money.

[Indian allotments, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 93.]

Submitted December 8, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Washington to review a decree which affirmed a decree of the Superior Court of the County of Pierce, in that state, in favor of plaintiff in a suit to quiet title to land. Affirmed.

See same case below, 46 Wash. 562, 90 Pac. 922.

The facts are stated in the opinion.

Mr. W. H. Doolittle submitted the cause for plaintiffs in error. Messrs. E. D. Wilcox and Jesse Thomas were on the brief:

While the findings of the Department of the Interior, especially the Land Department and its various branches, are held to be binding on questions of fact, no such rule can be found as to questions of law on rulings made by officers of the departments of the government.

Moore v. Robbins, 96 U. S. 530-535, 24

L. ed. 848-851; *Marquez v. Frisbie*, 101 U. S. 473-475, 25 L. ed. 800, 801; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Quinby v. Conlan*, 104 U. S. 420-424, 26 L. ed. 800-802.

The regulation of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain.

Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328.

When the government patented the land, the title in fee simple passed to the Indian, subject only to the restriction against alienation, which the government had the right to make.

Lykins v. McGrath, 184 U. S. 169, 46 L. ed. 485, 22 Sup. Ct. Rep. 450; *United States v. Kopp*, 110 Fed. 160; *Goudy v. Meath*, 38 Wash. 129, 80 Pac. 295, affirmed in 203 U. S. 146, 51 L. ed. 130, 27 Sup. Ct. Rep. 48; *Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho, 85, 53 Pac. 106; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

The so-called consent to sale of land in controversy is nothing more than a naked authority to sell and convey the land in the name of the principal, and could have been revoked at any time by the givers, and was revoked by death.

Norton v. Sjolseth, 43 Wash. 327, 86 Pac. 573; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Galt v. Galloway*, 4 Pet. 332-342, 7 L. ed. 876-880; *McClaskey v. Barr*, 50 Fed. 712; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 824; *Staples v. Bradbury*, 8 Me. 181, 23 Am. Dec. 494; *Story, Agency*, § 489.

Even if there had been a trust imposed upon the commissioner by the consent, it was revoked by the death of the patentee prior to its execution.

Harmon v. Smith, 38 Fed. 482; 4 Kent, Com. 310, and note; *Gartland v. Dunn*, 11 Ark. 720; *Bradstreet v. Kinsella*, 76 Mo. 63; 28 Am. & Eng. Enc. Law, 2d ed. 1000.

The Secretary of the Interior has no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent.

Richardville v. Thorp, 28 Fed. 52; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

Mr. Stanton Warburton submitted the cause for defendant in error. Messrs. Overton G. Ellis and John D. Fletcher were on the brief:

Where a statute intrusted the carrying out of its own provisions to one of the executive departments of the government, the interpretation of the statute by such department will be followed by the courts unless

there are most cogent reasons to the contrary.

Prichard v. Jacobs, 46 Wash. 570, 90 Pac. 922; *Eells v. Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 420; *United States v. Moore*, 95 U. S. 760-764, 24 L. ed. 588, 589; *Edwards v. Darby*, 12 Wheat. 206-210, 6 L. ed. 603-605; *Brown v. United States*, 113 U. S. 568-574, 28 L. ed. 1079-1081, 5 Sup. Ct. Rep. 648; *Louisiana v. Garfield*, 211 U. S. 70-78, 53 L. ed. 92-97, 29 Sup. Ct. Rep. 31; *Robertson v. Downing*, 127 U. S. 607-614, 32 L. ed. 269-271, 8 Sup. Ct. Rep. 1328; *United States v. State Bank*, 6 Pet. 29-40, 8 L. ed. 308-312; *Schell v. Fauché*, 138 U. S. 562-573, 34 L. ed. 1040-1043, 11 Sup. Ct. Rep. 376; *United States v. Cerecedo Hermanos y Compañía*, 209 U. S. 337-339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357-366, 33 L. ed. 363-367, 10 Sup. Ct. Rep. 112; *United States v. Burlington & M. River R. Co.* 98 U. S. 334-342, 25 L. ed. 198-201; *United States v. Pugh*, 99 U. S. 265-272, 25 L. ed. 322-324; *Hahn v. United States*, 107 U. S. 402-406, 27 L. ed. 527-529, 2 Sup. Ct. Rep. 494; *Smythe v. Fiske*, 23 Wall. 374-383, 23 L. ed. 47-50; *United States v. Johnston*, 124 U. S. 236-255, 31 L. ed. 389-396, 8 Sup. Ct. Rep. 446; *United States v. Finnell*, 185 U. S. 236-254, 46 L. ed. 890-897, 22 Sup. Ct. Rep. 633; *United States v. Alabama G. S. R. Co.* 142 U. S. 615-622, 35 L. ed. 1134-1136, 12 Sup. Ct. Rep. 306; *United States v. Philbrick*, 120 U. S. 52-59, 30 L. ed. 559-561, 7 Sup. Ct. Rep. 413; *Stuart v. Laird*, 1 Cranch, 299-309, 2 L. ed. 115-118; *McSorley v. Hill*, 2 Wash. 651, 27 Pac. 552; *Keane v. Brygger*, 3 Wash. 351, 28 Pac. 653; *Sutherland, Stat. Constr.* 2d ed. § 474; *State ex rel. Smith v. Ross*, 42 Wash. 445, 85 Pac. 29; *Blair v. Brown*, 17 Wash. 570, 50 Pac. 483; *Harrington v. Smith*, 28 Wis. 68; *Bloxham v. Consumers' Electric Light & Street R. Co.* 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 446; *Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization*, 9 Ariz. 383, 84 Pac. 516; *Van Veen v. Graham County*, 13 Ariz. 167, 108 Pac. 253.

Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land.

Pickering v. Lomax, 145 U. S. 310-316, 36 L. ed. 716-719, 12 Sup. Ct. Rep. 860; *Lomax v. Pickering*, 173 U. S. 26, 43 L. ed.

601, 19 Sup. Ct. Rep. 446; *Lykins v. McCrath*, 184 U. S. 169, 46 L. ed. 485, 22 Sup. Ct. Rep. 450.

On the question of Indian lands and the government supervision over the same, see *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Starr v. Campbell*, 208 U. S. 527, 52 L. ed. 602, 28 Sup. Ct. Rep. 365; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800.

Mr. Justice McKenna delivered the opinion of the court:

Error to the supreme court of Washington to review a decree of that court which affirmed a decree of the superior court of the county of Pierce, adjudging defendant in error, who was plaintiff in the trial court, to be the owner of the east half and the east half of the east half of the west half of the northeast quarter of the northwest quarter of section 35, township 21 N. R. 3 east of the Willamette meridian, Pierce county, Washington, formerly in King county, Washington.

The land lies in the Puyallup Indian Reservation and was allotted or patented by the United States on January 30, 1886, to Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank, and Oscar, all Puyallup Indians, the allotment or patent being subject to the stipulations and conditions contained in article 6 of the treaty of the United States with the Omaha Indians. [10 Stat. at L. 1043.] Plaintiffs in error were not named in the patent, they not then being born.

208] *Defendant in error claims title under a deed dated February 27, 1901, from C. A. Snowden, trustee and commissioner of Puyallup lands, appointed by the United States government under an act of Congress dated March 3, 1893 [27 Stat. at L. 612, chap. 209], and an amendatory act passed June 7, 1897. [30 Stat. at L. 62, chap. 3.]

Plaintiffs in error claim title to an undivided one-third part of the lands as heirs of Charley and Julia Jacobs, deceased, and contend that the deed from Snowden is void as to them or as to the interest they would take as such heirs, for the reason that the Snowden sale and deed were after the death of Charley and Julia Jacobs.

Article 6 of the treaty of the United States with the Omaha Indians, to the conditions of which the patent to Charley Jacobs was made subject, empowered the President to cause allotments to be made from reservation lands to such Indians as were willing to avail themselves of the privilege, and who would locate on the same as permanent homes. The patent was to be issued upon the further condition that the assigned land should not "be aliened or

leased for a longer term than two years," and "should be exempt from levy, sale, or forfeiture." Upon the formation of a state these restrictions could be removed by the legislature, but it was provided that they could not be removed without the consent of Congress. It was also provided that lands not necessary for assignment might be sold for the benefit of the Indians under such rules and regulations as might thereafter be prescribed by Congress or the President of the United States.

Under the act of March 3, 1893, the President was empowered to appoint a commission of three persons to select and appraise such portion of the allotted lands not required for homes of the Indian allottees. It was provided that if the Secretary of the Interior approved the selections and the appraisement, the lands selected should *be sold for the benefit of the allot- [209] tees, after due notice, at public auction, at no less than the appraised value.

It was the duty of the commission to superintend the sale of the lands, ascertain the true owners thereof, and have guardians appointed for minor heirs of deceased allottees, and make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior. The deeds, it was provided, should operate as a complete conveyance of the lands upon a full payment of the purchase money. The disposition of the money was provided for, and it was provided further that no part of the lands should be offered for sale until the Indian or Indians entitled to the same should sign a written agreement consenting to the sale thereof, and appointing the commissioners, or a majority of them, trustees to sell the land and make deeds to the purchasers. The approval of the Secretary was made necessary to the validity of the deeds, and he was directed to make all necessary regulations to carry out the provisions of the act.

On November 6, 1893, the Secretary instructed the commissioners, in accordance with the terms of the act, as to the appraisement of the lands, and to ascertain who were allottees or the heirs of allottees, or heads of families under the laws of Washington, to have guardians appointed for the minor heirs of deceased allottees, and to obtain the consent of the heirs of twenty-one years and of such guardians. The commissioners were directed to report to the Secretary their action for approval, and, if approved, further instructions were to be given.

By an act subsequent to that of March 3, 1893, to wit, an act of June 7, 1897, the number of commissioners was reduced to one, and Clinton A. Snowden was appointed

commissicner. Instructions were given to him and he was informed as follows: "That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family." It is *necessary to obtain the written consent of all the members of the family named in the patent. That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

On January 18, 1901, in answer to an inquiry of Snowden, the Secretary instructed him that where the allottees and true owners of the lands had executed consents of sale which had been approved by the Secretary, it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died, and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary added: "These lands are sold under the provision of the act of Congress, March 3, 1893, and not under the laws of Washington. . . . It is for the Department to pass upon the sufficiency of consents, and not the courts of Washington."

Charley Jacobs was, as we have seen, the grantee in the patent as the head of a family consisting of himself, Julia, Annie, Frank, and Oscar. Julia was his wife, Annie his sister, Frank his son by a former wife, and Oscar his son by his wife, Julia.

Lillie Jacobs and Ruther Jacobs, plaintiffs in error, are, respectively, a daughter and son of Charley and Julia, and were born, respectively, in the years 1888 and 1891,—that is, after the patent was issued,—and necessarily were not named therein. 211] *Annie, who was named in the patent, died in November, 1888, never having been married, and leaving Charley Jacobs her sole heir. He, on the 7th of March, 1898, Julia Jacobs, and Frank Jacobs, all of age and named in the patent, executed a written consent required by the statute, directing Commissioner Snowden to sell the lands

Charley Jacobs, as guardian of Oscar Jacobs, named in the patent, having been previously appointed by the superior court

of Pierce county, executed a similar consent, and also a similar consent as the sole heir of Annie, named in the patent.

These consents and other papers were duly transmitted to the Secretary of the Interior and approved by him, and Snowden, on the 27th of February, 1901, duly offered the lands for sale at public auction. They were purchased by A. G. Prichard, trustee, in accordance with the statute, he making the payment required. Snowden executed a deed to him, which was duly approved by the Secretary of the Interior and duly recorded in the Office of Indian Affairs.

Prior to the commencement of this action, Prichard made the payments required, which were received and accepted by the Interior Department for distribution to those entitled to the same, including Ruther Jacobs and Lillie Jacobs, plaintiffs in error. Their guardian, E. D. Wilcox, has not received the same, and refused to accept the sum, except a cash payment of \$420.

Charley Jacobs died January 2, 1900, leaving surviving him, among others, the plaintiffs in error, who, as we have said, were not named in the patent. His death was reported to the Commissioner of Indian Affairs by Snowden May 1, 1900.

Wilcox is the duly appointed guardian of plaintiffs in error, and reported to the court the receipt by him of the payment of \$420, made by Prichard. He did not know, however, that the sale by Snowden was after the death of *Charley Jacobs, father [212 of plaintiffs in error, until after the commencement of this suit; and, as soon as he discovered that fact, refused to receive any further payment. The money received by plaintiffs in error as their share of the purchase price of the land was tendered to defendant in error prior to the trial of the action.

At the time Prichard, defendant in error, purchased the land, he did not know of the death of Charley Jacobs, and was at no time advised of it or of the existence of plaintiffs in error until shortly before bringing this action. He purchased the property in good faith, relying upon the representations of Snowden, and in the full belief of the regularity of the proceedings.

We have stated the facts thus fully, although they are not disputed, as they exhibit clearly upon what right the Secretary of the Interior proceeded in his instructions to Commissioner Snowden, and the strict compliance of the latter with those instructions. It will be observed that where the allottees and true owners executed consents which had been approved by the Secretary, it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died,

and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary expressed the view that the "lands are sold under the provisions of the act of Congress, March 3, 1893, and not under the laws of Washington. . . . It is for the department to pass upon the sufficiency of consents, and not the courts of Washington."

Defendant in error takes the view that the consents remained good after the decease of the Indian who gave them, in this case Charley Jacobs, and were "in the nature of a permanent power to trusteeship." On the other hand, plaintiffs in error contend that the consent was a "naked power to sell," and terminated with the death of the giver.

There can be no doubt of the power of Congress to give character to the consents. *United States ex rel. Lowe v. Fisher*, 223 U. S. 95, ante 364, 32 Sup. Ct. Rep. 196; *Cherokee Nation v. Whitmire*, 223 U. S. 108, ante, 370, 32 Sup. Ct. Rep. 200. The questions in the case, therefore, turn upon the statute, and both sides invoke it to sustain their respective contentions.

The patent to Charley Jacobs was made subject to the conditions and restrictions of the 6th article of the treaty. In other words, there was a limitation upon the right of alienation of the patented lands, and the ultimate power to remove this restriction and grant a right of full alienation was reserved to Congress. The act of 1893 was an exercise of this power. It provided for the sale of such part of the allotted lands as was not required for the homes of the Indians, and prescribed the conditions of the sale to be "a written agreement consenting to the sale," signed by the Indian or Indians entitled to the allotted land offered for sale. And it was provided further that the agreement should constitute the commissioners, or a majority of them (subsequently one commissioner), trustees to sell the lands and "make deeds to the purchasers for the same," subject to the approval of the Secretary of the Interior, which deeds should "operate as a complete conveyance of the land upon the full payment of the purchase money." It is manifest that the "consent" required created something more than a mere revocable agency. It was a written agreement giving the commissioner (we drop the plural) full power to execute the provision and policy of the act of Congress,—a power which could be confidently counted on as

continuing against contingencies, and to terminate in a "complete conveyance of the land."

That the "consent" was to have this character was the "immediate and continued construction of the act of Congress by the Interior Department, and such construction would determine against ambiguity in the act even if we should admit ambiguity existed. The rule which gives strength to the construction of the officers who are directed to execute the law, and who, it has been said, may have written or suggested it, is given an added force from one of the provisions of the act of Congress. It directs the Secretary of the Interior "to make the necessary regulations to carry out the purposes" of its enactment.

But we find no ambiguity in the act when we consider its purpose and the habits of Indian life. It could not have been intended that when proceedings had been instituted under it, they should be embarrassed always by the possibility of defeat, and, it may be, progressing up to the moment of the delivery of the deed to a purchaser, should be made useless and nugatory by the death of some roving Indian. It is to be noted that all the proceedings are under the control of the Secretary of the Interior, and that any irregularity in them or improvidence in the consents can be corrected by him.

We do not answer in detail the argument of plaintiffs in error based on the law of agency, because we do not think its analogies are applicable to the situation.

The Supreme Court of Washington has repeated its ruling in this case in two others, *Little Bill v. Swanson*, 64 Wash. 650, 117 Pac. 481; *Little Bill v. Dyslin*, 64 Wash. 697, 117 Pac. 487.

Judgment affirmed.

*ANNIE FAIRBANKS, a Minor by
Her Guardian *ad Litem*, Benj. L. Fairbanks, Appt.,

v.

UNITED STATES. (No. 112.)

EDWARD L. WARREN, Appt.,

v.

UNITED STATES. (No. 113.)

(See S. C. Reporter's ed. 215-226.)

Indians — Chippewa allotments — pine lands.

1. Nothing contained in the general allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119), nor the amendatory act of February 28, 1891 (26 Stat. at L. 794, chap. 383), which would forbid the allotment of pine lands, was imported into the Steenerson act of April 28, 1904 (33 Stat.

at L. 539, chap. 1786), providing for allotments to the Chippewa Indians residing upon the White Earth Reservation by the provision of that act that "the allotment shall be, and the patent issued therefor, in the manner and having the same effect as provided in the general allotment act," the later act being very direct as to quantity, and containing no qualifications as to the character of the land to be allotted.

[Indian allotments, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — residence on reservation.

2. An Indian need not have been on the reservation at the instant when the act of February 28, 1891, amending the general allotment act of February 8, 1887, was passed, in order to avail himself of the benefit of the provision of the later act giving to each Indian "located" thereon $\frac{1}{2}$ section of land.

[Indian allotments, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Chippewa allotments — general congressional scheme.

3. The Steenerson act of April 28, 1904, providing for the allotment of lands to the Chippewa Indians on the White Earth Reservation, was part of a general congressional scheme, and modified and changed the prior acts of February 8, 1887, January 14, 1889, and February 28, 1891, by superseding certain of their provisions and enlarging the quantity of land to be allotted.

[Indian allotments, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — cancellation — notice and hearing.

4. The cancellation of Indian allotments by the Secretary of the Interior after repeated changes in views and decisions in the Department cannot be said to have been ordered without notice and opportunity to be heard, where the proceedings leading up to such action were single and continuous, at one time one party prevailing, and at other times the other party, the first party finally succeeding.

[Indian allotments, see Indians, VIII., in Digest Sup. Ct. 1908.]

[Nos. 112 and 113.]

Argued January 18 and 19, 1912. Decided February 19, 1912.

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which, reversing decrees of the Circuit Court for the District of Minnesota, directed the dismissal of bills seeking the determination of the rights of Indian allottees. Affirmed.

See same case below, 96 C. C. A. 229, 171 Fed. 337.

The facts are stated in the opinion.

Mr. F. W. Houghton argued the cause, and, with Mr. George B. Edgerton, filed a brief for appellants:

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On August 8, 1904, neither Lewis nor Alice Mooers had any greater equity or right to an original allotment of 80 acres of pine land on White Earth Reservation than each of plaintiffs had to an additional allotment of 80 acres of pine land on such reservation on June 29 and 30, 1904.

Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

The Secretary of the Interior had no authority to allot pine lands on White Earth Reservation to Lewis and Alice Mooers, or to any Chippewa Indian.

Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

Until April 24, 1905, no Chippewa Indian was entitled to an allotment of pine land on the White Earth Reservation.

Woodbury v. United States, supra.

The Secretary of the Interior cannot legally, on an *ex parte* hearing, set aside and overrule a final order made by the land commissioner in a controversy in which a full hearing was had and all parties interested took part.

Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Hawley v. Diller, 178 U. S. 476, 489, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986; Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

Since the order of Secretary Garfield overruling the order of the acting Commissioner of the Land Department was made *ex parte*, on a mere question of law, it is properly before this court for determination.

Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellee.

Mr. Justice McKenna delivered the opinion of the court:

The appellants were plaintiffs in the court below, and we shall so designate them.

The plaintiffs, one a minor (No. 112) and the other an adult (113), residing on the White Earth Indian Reservation, brought these actions to determine their rights, respectively, to allotments of land under the provisions of a treaty with the Chippewa Indians proclaimed April 18, 1867 [16 Stat. at L. 719], and certain acts of Congress relating to such Indians.

The government claims that two minor children of Samuel Mooers, also Chippewa Indians, residing on the reservation with their father, have been justly allotted the lands on account of a superior right under the treaty and acts of Congress. The cases were tried together and a decree was en-

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tered in each case in accordance with the prayer of the plaintiffs, respectively. The decrees were reversed by the circuit court of appeals and the bills directed to be dismissed. 96 C. C. A. 229, 171 Fed. 337.

The treaty of March 19, 1867, and certain acts of Congress, are elements in the controversy. The treaty provided that as soon as the location of the reservation should have been approximately ascertained, it should be surveyed in conformity with the system of government surveys, and that any Indian of bands parties to the treaty, either male or female, who should have 10 acres of land under cultivation, should be entitled to a certificate showing him to be entitled to 40 acres and a like number 217] of* acres for every additional 10 acres cultivated until the full amount of 160 acres should be certified. 16 Stat. at L. 721. This was denominated the "cultivation clause," and many allotments of 160 acres were made under it.

On February 8, 1887, Congress passed an act "to provide for the allotment of lands in severalty to Indians on the various reservations." [24 Stat. at L. 388, chap. 119.] The 1st section of the act provided that where any tribe or band of Indians had been or should be located upon any reservation created for their use by treaty, act of Congress, or executive order, the President was authorized, if the reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause the reservation to be surveyed or resurveyed, and to allot the lands in severalty as follows: To each head of a family, $\frac{1}{4}$ of a section; to each single person over eighteen years of age, $\frac{1}{8}$ of a section; a like fraction to an orphan child under eighteen years; to each single person under eighteen then living, or who might be born prior to the date of the President's order directing allotment, $\frac{1}{16}$ of a section. In case of deficiency, the allotments were to be made *pro rata*. It was provided further that where the treaty or act of Congress setting apart the reservation provided for allotments in excess of those designated, the allotments should be made in the quantities specified in such treaty or act.

This act was amended February 28, 1891. [26 Stat. at L. 794, chap. 383.] The allotment to which each Indian was to be entitled was made $\frac{1}{8}$ of a section of land. In case of an insufficiency, a *pro rata* allotment as near as might be, according to legal subdivision, was provided. On January 14, 1889, an act was passed entitled, "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota." [25 Stat. at L. 642, chap. 24.] It is known as the Nelson act, and provided

for the appointment by the President of three commissioners to negotiate with the different bands of Chippewas for the cession of all their *lands except so much [218 of the White Earth and Red Lake Reservations as the commissioner should deem necessary for allotments to be made to the Indians. It also provided for the removal to the White Earth Reservation of all but Red Lake Indians, and for allotments to such Indians on White Earth Reservation under the direction of such commissioners.

Section 4 of the act provided for the survey of the lands after the cession and relinquishment of the Indian title, and that, upon the report of the survey, the Secretary of the Interior should appoint a sufficient number of competent examiners to go upon the lands thus surveyed, and personally make a careful, complete, and thorough examination of the same by 40-acre lots, for the purpose of ascertaining upon which lots there was growing or standing pine timber, and the tract upon which such timber was standing or growing should be termed pine lands. The minutes of examination were directed to be entered in books, showing with particularity the quantity of timber, to be estimated by feet, and the quality of timber, which estimates and reports should be filed with the Commissioner of the General Land Office as a part of its permanent records, and that officer should thereupon make up a list of such lands, describing each 40-acre tract separately, and opposite each description place the actual cash value of the same, according to his best judgment and information, but such valuation should not be less than \$3 per thousand feet, board measure. The list should thereupon be transmitted to the Secretary of the Interior for his approval, modification, or rejection, as he may deem proper. It is further provided that "all other lands acquired from the said Indians on said reservation, other than pine lands, are, for the purposes of this act, termed agricultural lands." There are provisions for the sale of the pine lands in 40-acre parcels, for the disposal to actual settlers only of the agricultural lands, and that the money *received from both shall be [219 deposited in the Treasury of the United States for the benefit of the Indians.

There are amending acts which need not be noticed. Then came the act of April 28, 1904, entitled, "An Act to Provide Allotments to Indians on White Earth Reservation in Minnesota." [33 Stat. at L. 539, chap. 1786.] It is called the Steenerson act. It authorized the President to allot to each Chippewa Indian legally residing on the White Earth Reservation, under the treaty or laws of the United States, 160

acres of land. The act recited that it was enacted in accordance with the express promise made to the Indians by previous acts and the treaty, and that the allotments should be made and the patents issued therefor should be in the manner and have the same effect as provided in the acts of February 8, 1887, and February 28, 1891. And it was provided "that where any allotment of less than 160 acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed 160 acres." There is a provision, in case of insufficiency, for *pro rata* allotment, as follows: "That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment, each Indian entitled to allotments under the provisions of this act shall receive a *pro rata* allotment."

These acts constitute the statutory law of the case.

The facts are as follows: On June 29, 1904, and June 30, 1904, respectively, the plaintiffs, Annie Fairbanks, through her father, Warren, for himself, applied at the White Earth Agency for an additional allotment of 80 acres each, respectively, being the W. $\frac{1}{2}$ and E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, T. 142, R. 39. The applications were under the Steenerson act, the plaintiffs having received their full quota under the Nelson act. The applications were refused, on the ground that they could not then be received.

On August 8, 1904, Lewis and Alice 220] Mooers, aged, respectively, *four and six years, made application through their father, Samuel Mooers, for an original allotment of 80 acres of land each under the Nelson act, the act of Congress approved January 14, 1889. The selection for Lewis was the same 80 acres applied for by Annie Fairbanks; the selection for Alice the same 80 acres applied for by Warren. In the Mooers application the land was described as not pine land. At the time of the applications the Indian agent was away, but his clerk received the applications, marking the land on the agency plats as allotted to them, and made the usual entries on the allotment roll. He made the allotment, therefore, as far as he could.

Subsequently the agent required the clerk to cancel the allotment, on the ground that the lands were pine lands, and notified Mooers of such cancelation, which was done by mail, and he was directed to select other lands for his children.

On April 24, 1905, the allotments were commenced on the reservation under the Steenerson act, and on that date the plaintiffs, respectively, made application and

were allotted the lands in controversy, they being the same as applied for by them on June 29th and 30th, 1904.

Against the action of the agent, canceling the allotments to Lewis and Alice on August 8, 1904, Mooers appealed to the Indian Office. The Commissioner ruled in favor of his contention, and directed the agent to reallocate the lands to Mooers's children. The agent, however, suspended action pending an investigation, which resulted in the Commissioner, under the directions of the Secretary of the Interior, revoking his ruling and sustaining the allotments to plaintiffs. Other lands were directed to be allotted to the Mooers. Upon Mooers's appeal, the last decision of the Commissioner was reversed and the land directed to be allotted to his children.

The Commissioner in his letter directing the restoration *of the allotment to [221 the Mooers children, discussing the right of selection of pine lands, said: "It is true that in the early work of the Chippewa commission in making allotments on the White Earth Reservation, the office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all the Indians on the reservation; but after the passage of the Steenerson act, which contemplated the allotment of all of the lands of the reservation, such instructions necessarily could have no application."

The order of the Commissioner allotting the land to the Mooers children, as we have seen, was reversed by the then Secretary of the Interior, but not on the ground that pine lands could not be selected. The ruling of the Secretary was on the ground that the selection by the Mooers was premature. The Secretary said: "The testimony shows that Mr. Mooers was at the agency, arrived on Sunday, the day before the allotting began, but he did not take his place in line until quite late, if at all, but seems to have relied upon the fact that he had designated to a clerk at the agency the particular lands which he desired, even after he had been told that the selections would not be recognized as against other claimants."

Secretary Garfield, in reversing the decision of his predecessor, took the view that "the applications of the Mooers children were for original allotments, were actually allowed, and that there was no valid reason against such action." The Secretary also said that it was "plain that there was no reason for laying upon Mooers the rule governing additional allotments under the Steenerson act;" that is, that Mooers should appear in line and take his chances with other Indians. Concluding his opin-

ion, the Secretary said: "It appears that allotments have been made to the Mooers children, for which Samuel A. Mooers says he did not apply. Our office will also adjust this matter accordingly."

222] *From these repeated changes in views and decisions in the Interior Department we gain little light upon the controversy between the parties, so far as it depends upon the interpretation of the statutes, and even the government in this case is somewhat uncertain as to what position it will ultimately take. "It might," it says, "find occasion to reverse its former attitude by conceding the plaintiffs' claim or denying that any of the contestants is entitled." But it concedes "that lands classified as pine lands *outside* of the reservation, which had been ceded by the Indians to be sold for their benefit, were not allotable."

We may gather, notwithstanding the confusion, that the Department and all of the claimants regarded the Nelson act as still effective as to Indians who had not received its benefits, and the Steenerson act as applying to additional allotments, leaving only the question whether allotments could be made of pine lands. If so, the allotments to the Mooers children were good, because selections under the Nelson act were not required to wait for proceedings under the Steenerson act. But, notwithstanding the uncertainty and seeming confusion, the question in the case is simple when certain elements are kept in mind,—that is, the distinction between the lands ceded and those not ceded, but reserved for allotments.

Section 1 of the Nelson act provides for the negotiation with the Chippewas "for the cession and relinquishment" of their title to their reservations, "except White Earth and Red Lake, and to all of those two *which may not be required to fill the allotments required by this and existing acts.*" (Italics ours). The land reserved for allotments is the diminished reservation, to which we shall presently refer, and § 3 provides for its allotment. Section 4 applies to the lands ceded, not those reserved for allotments, and provides for the examination of the pine lands and for their sale in 40-acre pieces. It provides also (§ 6) for the disposal of agricultural lands 223] to settlers under the* homestead laws at \$1.25 per acre, the proceeds of which and of the sale of pine lands to be put into the Treasury of the United States for the benefit of the Indians. Section 7.

The Department at first, as we have seen, regarded only agricultural lands as allottable, making no distinction between ceded and the reserved part of the reservation.

In the reserved part (diminished reservation), that is, the part that was to be allotted, there was no distinction made between pine land and agricultural lands. In the ceded part there was a distinction, but only in the manner of their disposition. Neither was allottable, not because of their character, but because of their situation. The Indian Department, as we have seen, took back its ruling, and even if it was not done under the compulsion of the Steenerson act, plaintiffs might have no ground of complaint. Certainly not if the first ruling was made under a misapprehension of the Nelson act, as the court of appeals strongly intimates. However, the Department justifies its last ruling under the Steenerson act, and upon the decision of the court of appeals sustaining that ruling plaintiffs assign error.

It becomes necessary, therefore, to consider the Steenerson act, and it may be well to repeat somewhat. The Steenerson act authorized the President to allot 160 acres of land "to each Chippewa Indian now legally residing upon the White Earth Reservation under the treaty or laws of the United States." And it was provided that where an allotment had theretofore been made of less than 160 acres, and additional allotment should be made, which, together with the land already allotted, should not exceed that amount. The act is very direct as to quantity, and there is no qualification as to the character of the land to be allotted, and no classification of the lands to cause misunderstanding. The general allotment act and the act of February 28, 1891, are referred to, but only to adopt the manner of the allotment and the effect of the patent. *The provision is: "The al-[224 lotment shall be, and the patent issued therefor, in the manner and having the same effect as provided in the general allotment act." The manner of allotment is one thing and the kind of land to be allotted is another, and cannot well be confounded, and we cannot hold that Congress did not observe or intend to make the distinction.

It is contended further that the Mooers children, being, respectively, four and six years of age, were not entitled to an original allotment under the Nelson act.

The lower courts disagreed as to this contention, the circuit court supporting it and the circuit court of appeals deciding that it was untenable. Plaintiffs urge that the circuit court of appeals fell into error by assuming that § 1 of the act of February 8, 1887, was part of the Nelson act, and hence decided that the power of the President to make allotments, which was given by the

former, was a continuing power, and could be exercised from time to time in favor of those born upon the reservation subsequent to the first order. It is, however, insisted that under the Nelson act the power to make allotments was taken from the President and vested in commissioners, and that the provision relied on by the circuit court of appeals was omitted from the act, and it is insisted further that if it be considered part of the act, the whole of the provision must be considered, and that it limits an allotment to $\frac{1}{8}$ of a section to any single person then living, or who should be born prior to the date of the order directing an allotment of lands. Undoubtedly, if that part of the provision had remained the law, an allotment of 80 acres could not have been made; but plaintiffs concede that it did not remain the law. It was superseded by the act of February 28, 1891, and they admit that "the Land Department has treated the act of February 28, 1891, as amending § 1 of the act of 1887. By such amendment 225] the classification* found in the act of February 8, 1887, is entirely omitted, and the language is: "To each Indian located thereon, one-eighth of a section of land." The conclusion that plaintiffs draw from that provision is that being on the reservation at the instant of time the act was passed is a necessary condition. But such conclusion misses the meaning of the word "located." Of itself it has no reference to time. It has reference entirely to place, and is used to designate upon what Indians the powers given by the act, when exercised, should operate,—that is, "to each Indian located" on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See *Oakes v. United States*, 97 C. C. A. 139, 172 Fed. 304.

This being so, the Steencerson act is easily seen to be a part of the plan of legislation, and, contrary to the contention of plaintiffs, did modify and change the prior acts of Congress by superseding certain of their provisions and enlarging the quantity of land to be allotted.

It is finally contended that Secretary Garfield had no power to set aside the allotments to plaintiffs on an *ex parte* appeal. In other words they were entitled to notice and opportunity to be heard. *Garfield v. United States*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62. The only evidence offered to sustain the contention is that of an attorney, who testified that he appeared "before the Department for Warren and

Fairbanks in this case," and that he "did not learn until after the decision had been rendered on the rehearing or appeal" that an appeal had been taken from the letter or order of the Commissioner of Indian Affairs of July 13, 1906, in which the Commissioner directed the agent not to cancel the allotments to Warren and Fairbanks, and to restore the allotments to them. It may well be, urged by the government, that such testimony does not preclude the inference that other attorneys, or Warren, or the father of the Fairbanks, had notice. We, however, do not consider *the in-[226 ference material. It is manifest that the proceedings were single and continuous,—at one time the Mooers prevailing, at others the plaintiffs, and finally the Mooers; and all were chargeable with notice of what was happening in regard to their rights. We have seen that an allotment to the Mooers children and that to plaintiffs were made without notice. The Mooers had a subsequent hearing, it is true, and the cancellation of the allotments to them ordered to be set aside. The latter order was suspended and an investigation instituted, upon which one Secretary decided in favor of plaintiffs and another Secretary decided in favor of the Mooers. The latter was considered as the final decision, and plaintiffs have sought its review in this proceeding.

It is objected by the government that the Mooers children are necessary parties. The point was suggested by the court of appeals, but passed by, as the court said, because counsel had not raised it. A doubt was expressed, however, if a decree could be rendered seriously affecting the rights of the Mooers children without their being made parties. A query to the same effect was made in *Oakes v. United States*, *supra*.

The jurisdictional act has this provision as to a suit brought under it:

"In said suit the parties thereto shall be the claimant, as plaintiff, and the United States, as party defendant." It may well be contended, therefore, that the United States stands in judgment for all opposing claimants; not, it may be, excluding the power of the court to permit them to come in, or, in its discretion, to order them to be brought in. However, we are not called upon to decide the question. Upon the suit brought and case made by plaintiffs we decide that they have no grounds for the relief they pray.

The decree of the Circuit Court of Appeals is affirmed.

227]*UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.,

v.

A. SANDOVAL and P. Sandoval.

(See S. C. Reporter's ed. 227-233.)

Principal and surety — reimbursement of surety — voluntary payment.

1. The payment of the judgment in good faith by the surety on an appeal bond, after an affirmance on the appeal to a territorial supreme court, and after receiving notice from the governor that unless the judgment were paid the surety would forfeit its right to do business in the territory, cannot be said to have been made voluntarily or negligently, so as to defeat the surety's right to reimbursement from its principals, although execution had not then issued on the judgment, and the governor may not have had the power to carry out his threat. [For other cases, see *Principal and Surety*, 70-83, in *Digest Sup. Ct.* 1908.]

Principal and surety — right of surety on appeal bond — taking security from judgment creditor.

2. The surety on an appeal bond may recover from its principals the amount of the judgment which it paid after an affirmance on the appeal to a territorial supreme court, although, when making such payment, it took from the judgment creditor a bond with collateral security conditioned for the reimbursement of the money so paid in case the judgment should be reversed on a proposed further appeal to the Federal Supreme Court, since the surety, by so acting, was not speculating out of its principals, but was benefiting them by acquiring security to which they could be subrogated in case of a reversal of the judgment. [For other cases, see *Principal and Surety*, 70-83, in *Digest Sup. Ct.* 1908.]

[No. 125.]

Submitted December 18, 1911. Decided February 19, 1912.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which modified, and affirmed as modified, a judgment of the District Court of Santa Cruz County, in that territory, in favor of plaintiff in an action on an appeal bond. Reversed and remanded for further proceedings.

See same case below, 12 Ariz. 348, 100 Pac. 816.

The facts are stated in the opinion.

Mr. Eugene S. Ives submitted the cause for appellant:

The written obligation given by Randolph

expressed nothing more than the obligation implied in law in any event.

Scholey v. Halscy, 72 N. Y. 578; *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299; *Haebler v. Myers*, 132 N. Y. 363, 15 L.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963.

The principle that a surety is entitled to nothing more than a reimbursement, and that he shall not speculate out of the principal, applies to a case where the surety makes his payment either in property other than money, which is worth less than the amount of the debt, or as in the case of *Stone v. Hammell*, 83 Cal. 547, 8 L.R.A. 425, 17 Am. St. Rep. 272, 23 Pac. 703, by giving his own note, which is no payment at all.

For money paid out by the surety, the surety has an instant cause of action, and this without respect to the fact that it holds indemnity which may protect it against eventual loss.

Williams v. Riehl, 127 Cal. 365, 59 Pac. 764, 78 Am. St. Rep. 60; *Paulin v. Kaighn*, 29 N. J. L. 483; *Bachelor v. Fiske*, 17 Mass. 464.

When a surety pays the debt for which he becomes surety, he has an immediate right of action against the principal for reimbursement. His cause of action then accrues, and from that time on the statute of limitation commences to run. Though he may have taken security to indemnify him against loss, he may nevertheless maintain an action for reimbursement, unless it has been agreed that he shall look only to the security for his indemnity.

Cornwall v. Gould, 4 Pick. 444.

His rights in such case are those of the ordinary creditor who has taken collateral security for his debt; he may reimburse himself from the security, or he may ignore it and sue on the debt. But the giving of collateral security, in itself, never changes his rights, and he may pursue the same remedies as if no security had been given, in the absence of an express agreement to the contrary.

Polhemus v. Prudential Realty Corp. 74 N. J. L. 570, 67 Atl. 303.

Payment of the judgment rendered by the court of first instance in this case would at once subrogate the Sandovals to every security held by the surety company for repayment of the amount of the former judgment in case of reversal.

Nelson v. Webster, 68 L.R.A. 513, and note, (72 Neb. 332, 117 Am. St. Rep. 799, 100 N. W. 411).

Forms of action are abolished in Arizona, and equitable defenses may be pleaded in legal actions, and the proper course, if the Sandovals desired subrogation, would be to

NOTE.—On the right of surety who has paid judgment to enforce it for his own benefit—see note to *Frank v. Praylar*, 16 L.R.A. 117.

plead the matters entitling them to it, as suggested in *Knoblauch v. Foglesong*, 37 Minn. 320, 33 N. W. 865.

The suggestion in the opinion of the supreme court of the territory, that the surety company should have surrendered its security in order to maintain this action, is wholly untenable. A surety is not required to surrender his security until he is relieved of liability, or reimbursed for liability incurred and paid.

Smith v. Wigler, 72 N. J. Eq. 559, 65 Atl. 900; 27 Am. & Eng. Enc. Law, 2d ed. 473.

A tender is necessary only where a right is made dependent upon the payment of money or delivery of property.

28 Am. & Eng. Enc. Law, 2d ed. 4.

The contention that nonpayment by the appellees and breach of contract are not properly alleged is without merit.

Gardner v. Donnelly, 86 Cal. 373, 24 Pac. 1072; *Rarkin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. 1134; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094.

The application made by the appellees for the bond, set forth in the complaint, and admitted by the answer, constitutes an express contract of indemnity, and the rule is that if there is such an express contract, a suit for reimbursement may be brought thereon.

22 Am. & Eng. Enc. Law, 484, note 11; *Powell v. Smith*, 8 Johns. 249; *Thompson v. Ketchum*, 8 Johns. 192, 5 Am. Dec. 332; *Lane v. Westmoreland*, 79 Ala. 374.

The ordinary rule is that a surety may pay the debt at any time he becomes liable therefor. It is unnecessary that suit be brought or judgment rendered or execution issue. It is enough if the surety be subject to be coerced to pay before he discharges the debt.

May v. Ball, 108 Ky. 180, 56 S. W. 9; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 132; *Martin v. Ellerbe*, 70 Ala. 326; *Feamster v. Withrow*, 12 W. Va. 611.

And it is unnecessary that the surety wait longer than the maturity of the debt.

Nixon v. Beard, 111 Ind. 137, 12 N. E. 132.

And some authorities even hold that the surety may pay the debt before the maturity, and at the maturity of the obligation may bring a suit for reimbursement against the principal.

Ross v. Menefee, 125 Ind. 432, 25 N. E. 546.

The rendition of judgment against the surety entitles him to pay the judgment without issuance of execution, and entitles the surety to protection even without paying the judgment.

Babbitt v. Finn (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820; 27 Am. & Eng. Enc.

Law, 2d ed. 462, note, 16; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004.

The mere affirmance of a judgment fixes the liability of the principal and sureties on the supersedeas bond, and no execution or other steps are necessary.

Davis v. Patrick, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909.

Messrs. **Frank P. Flint** and **Henry S. Van Dyke** submitted the cause for appellees. Mr. G. Bullard was on the brief:

The right to reimbursement of the surety from the principal is limited to the actual loss to the surety, caused by its payment of the debt of the principal which it, the surety, is obliged to pay.

1 Brandt, *Suretyship & Guaranty*, 3d ed. § 233; *Stone v. Hammell*, 83 Cal. 547, 8 L.R.A. 425, 17 Am. St. Rep. 272, 23 Pac. 703; *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1065; 12 Current Law, 2017.

The very term "payment," when voluntary and with full knowledge of the facts, excludes the idea of an implied promise to refund.

Morton v. Chandler, 6 Me. 144.

Mr. Justice **McKenna** delivered the opinion of the court:

Action to recover the sum of \$10,528.33 and certain *expenses on account of a [228 judgment recovered against appellees and paid by appellant, as surety on an appeal bond executed at the request of appellees.

The action was brought and tried in the district court of Santa Cruz county, second judicial district of the territory of Arizona, and resulted in a judgment for the sum of \$14,683.25 in favor of appellant. On appeal to the supreme court of the territory the judgment was reversed. Thereupon the case was brought here.

There is no dispute about the facts. One *Epes Randolph* recovered a judgment against the appellees for the sum of \$10,528.33, from which they appealed to the supreme court of the territory. They applied to appellant for a bond to be given on appeal to stay the judgment. In the application for the bond they covenanted "to reimburse said company [appellant] for any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature which said company shall, or may, for any cause, at any time, sustain or incur or be put to for or by reason or in consequence of said company having entered into or executed said bond."

The judgment against appellees was affirmed by the supreme court and a judgment rendered against them and the guaranty company (appellant here) for the amount recovered in the lower court, with

interest and costs, on the 27th of March, 1908.

About the 24th of June, 1908, the company received notice from the governor of the territory to the effect that the judgment of the supreme court had not been paid; that more than thirty days had elapsed from its rendition; and that unless it was paid or sufficient excuse for its nonpayment shown, the company would forfeit its rights to transact business as a surety company in Arizona. The company notified appellees by telegraph of this notice, but they failed to pay the judgment or to perfect an appeal from it to 229] this court, and therefore the *company (appellant) paid Randolph the amount due on the judgment, and interest, amounting to the sum of \$11,484.95. The appellant also incurred certain expenses which, with the judgment paid, amounted in all to the sum of \$13,911.70.

With unimportant variations, the complaint alleged the facts which were found by the court. The appellees demurred to the complaint for insufficiency, and also answered, denying some of its allegations and admitting others. They admitted the recovery of judgment against them and the application for the bond, but denied that the surety company had received notice from the governor, as alleged, or that the company paid Randolph for them in satisfaction of the judgment any sum of money, or that any sum was due. They alleged that after the judgment was affirmed by the supreme court of the territory and a rehearing denied, notice of appeal to this court was duly given, and that the cause was transferred to this court, where it was at the time of the answer; that no execution had been issued on the judgment, and that if the company had paid the judgment, it did so by reason of its own negligence, voluntarily, and not at the request of appellees, or by any order of the court, or in satisfaction of the judgment.

"The testimony shows," the supreme court said, "that on March 27, 1908, the judgment of the district court was affirmed in this court, and that, pursuant to the provisions of paragraph 1592, Rev. Stat. 1901, judgment was also entered against the guaranty company as surety upon the appeal bond. Thereafter, within the time allowed by law, a motion for a rehearing was made, which motion was denied by this court May 19, 1908. The action having been tried before the court without a jury, an appeal to the Supreme Court of the United States from the judgment of this court was prayed, and was allowed by one of the justices of 230] the court on June 20, 1908. In the 56 L. ed.

order allowing the appeal it was directed that the judgment be stayed upon the appellants' filing their supersedeas bond in the sum of \$20,000, to be approved by any justice of this court. This order was filed with the clerk June 22, 1908. A bond in proper form was approved by one of the justices on July 14th, and filed with the clerk on July 15, 1908. Citation was issued July 18, 1908, and served on July 31, 1908. It also appears that on or about June 18th the judgment creditor, Randolph, demanded of the guaranty company that it pay the judgment; that on June 24, 1908, the guaranty company paid the judgment in full, and thereafter, and as part of the transaction, took from Randolph a bond, with collateral security, for the return of the amount paid him, with interest, should the Supreme Court of the United States reverse the judgment of this court." [12 Ariz. 352, 100 Pac. 816.]

The supreme court sustained the trial court in holding the complaint sufficient and stating a cause of action, but it decided that the court erred in giving judgment for the amount paid by the company to Randolph, because it had not surrendered to appellees, its principals, the security it had taken from Randolph. The court, however, decided that the company could recover from appellees "such amount as it reasonably expended in connection with the adjustment of the matters for which it holds no security." These expenses were found to amount to the sum of \$544.50, upon which interest was adjudged at 6 per cent from August 3, 1908, to the date of the judgment. The judgment of the district court was modified and reduced to the amount indicated, and, as modified, affirmed, "but without prejudice to the rights of the guaranty company to bring such further action as may be necessary to establish its rights, should a right of reimbursement of the amount of the judgment accrue to it."

The bond taken by appellant of Randolph, the judgment *creditor, is made the [231 determining element by the supreme court of the territory. The bond was the outcome of certain conversations, prior to the payment of the judgment, between a representative of the company and Randolph. A disagreement arose as to the effect of the conversations, the representative contending that Randolph agreed to refund the money if it should appear under any proceeding which should be started that it was not proper for the company to have paid the money. Randolph's attorney contended that, as a supersedeas bond might have been filed at the very moment that the money was being paid in the event that it should trans-

pire that such bond was filed prior to the payment, Randolph would return the money. In consequence of this dispute, Randolph executed a bond to the guaranty company in the sum of \$20,000, which recited the proceedings in the litigation and payment of the judgment to Randolph, and that the appellees herein were, on the 24th of June, 1908, proceeding to appeal to the Supreme Court of the United States, but had not, on said date, perfected their appeal, but "have, at the date of these presents, duly appealed to the Supreme Court of the United States from the said judgment;" it was agreed that if that court should affirm the judgment, or if it should reverse the judgment, and Randolph should refund the money paid to him by the company, then the obligation to be void; otherwise to remain in full force and effect. Randolph further agreed as collateral security for the bond that he would deposit, and he did deposit, with the guaranty company, 25,000 shares of the capital stock of the Huntington Beach Company, with the right in the company, if Randolph should not refund the money after the reversal of the judgment by the Supreme Court of the United States, to sell the stock and apply the proceeds to the payment of the amount paid by it, the company. Upon the affirmance of the judgment or dismissal of the appeal, *the stock was to be returned to Randolph, and Randolph had the right to withdraw such stock and substitute other collateral security.

The supreme court of the territory, as we have seen, made this bond and security the controlling factor in its decision. The court held that the payment of the judgment was not premature,—in other words, not voluntary. In this we agree with the court. Appellant was not bound to wait the issuance of an execution. The affirmance of the judgment fixed its liability. *Babbitt v. Finn* (*Babbitt v. Shields*), 101 U. S. 7, 15, 25 L. ed. 820, 822. And in determining the character of the payment as voluntary or negligent, as alleged by appellees in their answer, the threat of the governor must be given account, even if it be granted that he had no power, as held by the supreme court of the territory in this case, to revoke the license of appellant to do business in the territory. Such ruling had not then been made, and an attempted exercise of such power would have been injurious to appellant to yield to or resist. Appellant certainly acted in good faith, and discharged the duty that it was assured it had assumed under the law. However, this may not be of consequence, and we pass to the consideration of the

ground upon which the supreme court of the territory based its decision. The court held, as we have seen, that appellant was justified in paying the judgment, and, having paid the judgment, it was entitled to reimbursement, but to no more, the court said, than reimbursement, and held that the only outlay it had incurred was for certain expenses, and limited the judgment to their amount.

The court argued that appellant was secured for all else, and that therefore its payment was not "an absolute one, but one conditioned that the judgment be affirmed by the Supreme Court, since it has taken and holds security satisfactory to it for the return of the money, with interest, in the event the judgment is reversed." *And[233 such event happening, the court concluded, would result in the payment to appellant twice. In other words, if the judgment should be sustained, it would collect the amount of appellees; if the judgment should be reversed, it would collect the amount of Randolph. This, the court said, would be inequitable; and that therefore appellant could not "claim reimbursement from its principals until its actual loss is ascertained; or, at least, it may not recover without surrendering the security to its principals."

The court's conclusion, we think, is not justified. It would indeed be inequitable to permit appellant to collect more than once the money paid by it, but once, at least, it is entitled,—a result which it seeks by this suit. Having paid money for its principals, it did not "speculate" out of them by reinforcing their responsibility to it by taking security from Randolph. It was bound by the judgment, which it paid equally with appellees, though on account of them. It was under an absolute duty to pay, but there were contingencies upon which the payment would have to be refunded by Randolph, and to secure itself it took security from him. We repeat, it was not speculating out of its principals, but was benefiting them. It acquired securities to which they could be subrogated in the event the judgment obtained by Randolph should be reversed. This represents the parties' rights on this record. In addition, however, we may say that we know that the judgment was not reversed, and that appellees' liability to Randolph has been affirmed. *Sandoval v. Randolph*, 222 U. S. 161, ante, 142, 32 Sup. Ct. Rep. 48.

Judgment reversed and cause remanded to the Supreme Court of the State of Arizona for further proceedings not inconsistent with this opinion.

234]*NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Petitioner,
v.

J. WILLIAM McCUE, Samuel O. McCue, Harry M. McCue, and Ruby G. McCue, Infants, by Marshall Dinwiddie, Their Next Friend, et al.

(See S. C. Reporter's ed. 234-252.)

Life insurance — risk — death by execution for crime.

1. Death by a legal execution for crime is not covered by a policy of life insurance, though the policy contains no provision excepting such manner of death from the risks covered by it.

[For other cases, see Insurance, XI. d, in Digest Sup. Ct. 1908.]

Conflict of laws — insurance — place of contract.

2. A policy of life insurance, though executed at the company's office in Wisconsin, is a Virginia contract, where the application was made by a resident of the latter state at a place in that state, and the policy was delivered to him there, when he gave his note for the premium, which was payable at that place, and subsequently paid there, the policy providing that it should not take effect until the first premium should be actually paid.

[For other cases, see Conflict of Laws, I. b, 3, in Digest Sup. Ct. 1908.]

Life insurance — risk — death by execution for crime.

3. Provisions in the charter of a foreign life insurance company making a person who insures therein a member of the company, and fixing his interest at the amount of his insurance, give no right of recovery for death by legal execution for crime, where, under the laws of the place of contract, the policy, by which alone the rights of the insured and the beneficiaries must be measured, does not cover a death so caused.

[For other cases, see Insurance, XI. d, in Digest Sup. Ct. 1908.]

[No. 138.]

Argued December 20 and 21, 1911. Decided February 19, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which, reversing a decree of the Circuit Court for the Western District of Virginia, upheld the right to recover upon a policy of life insurance for a death caused by legal execution for crime. Judgment of Circuit Court of Appeals reversed, and that of the Circuit Court affirmed.

See same case below, — L.R.A.(N.S.) —, 93 C. C. A. 71, 167 Fed. 435.

The facts are stated in the opinion.

Messrs. William H. White and William H. White, Jr., argued the cause, and, with Messrs. George H. Noyes and John R. Dyer, filed a brief for petitioner:

Can there be a recovery on a life insurance policy where the insured is legally executed, the policy being silent on the subject?

Amicable Soc. v. Bolland, 4 Bligh, N. R. 194, 2 Dow & C. 1; Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; Hatch v. Mutual L. Ins. Co. 120 Mass. 550, 21 Am. Rep. 541; Wells v. New England Mut. L. Ins. Co. 191 Pa. 207, 53 L.R.A. 327, 71 Am. St. Rep. 763, 43 Atl. 126; Burt v. Union Cent. L. Ins. Co. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139; Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538; Murray v. New York L. Ins. Co. 96 N. Y. 614, 48 Am. Rep. 658; Bloom v. Franklin L. Ins. Co. 97 Ind. 478, 49 Am. Rep. 469.

The policy was not a Wisconsin contract, but a Virginia contract, because the application was made, the premium paid, and the policy delivered in Virginia.

Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 264, 45 L. ed. 181, 183, 21 Sup. Ct. Rep. 106; Northwestern Mut. L. Ins. Co. v. Elliott, 7 Sawy. 17, 5 Fed. 228; Supreme Lodge, K. P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. Rep. 754; Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; Hicks v. National L. Ins. Co. 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690; 25 Cyc. 748; Minor, Confl. L. p. 399; Cravens v. New York L. Ins. Co. 148 Mo. 600, 53 L.R.A. 305, 71 Am. St. Rep. 637, 50 S. W. 519; Wall v. Equitable Life Assur. Soc. 32 Fed. 273; Mutual Ben. L. Ins. Co. v. Robison, 54 Fed. 580; Equitable Life Assur. Soc. v. Winning, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541; McMaster v. New York L. Ins. Co. 78 Fed. 37.

A policy of insurance is a contract, whether it be fire, life, marine, accident, or personal liability, and therefore is in all respects and in all its phases to be treated and construed as any other contract.

Ritter v. Mutual L. Ins. Co. 169 U. S.

NOTE.—On the necessity that the assured's death be a reasonable legitimate consequence of violation in order to relieve insurer—see note to Supreme Lodge, K. P. v. Crenshaw, 13 L.R.A.(N.S.) 258.

On conflict of laws as to insurance contracts—see notes to Johnson v. Mutual L. Ins. Co. 63 L.R.A. 833, and McElroy v. Metropolitan L. Ins. Co. 23 L.R.A.(N.S.) 968.

139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 38, 64 Am. Dec. 529; *Rosenplanter v. Provident Sav. Life Assur. Soc.* 46 L.R.A. 473, 37 C. C. A. 566, 96 Fed. 721.

On all questions of general commercial law, such as contracts, and especially insurance contracts, the Federal courts follow their own rules.

Swift v. Tyson, 16 Pet. 1, 18, 10 L. ed. 865, 871; *Oates v. First Nat. Bank*, 100 U. S. 239, 246, 25 L. ed. 580, 583; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878; *Pleasant Twp. v. Ætna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 106, 37 L. ed. 97, 101, 13 Sup. Ct. Rep. 261; *Carpenter v. Providence Ins. Co.* 16 Pet. 495, 511, 10 L. ed. 1044, 1051; *Washburn & M. Mfg. Co. v. Reliance M. Ins. Co.* 106 Fed. 117, affirmed in 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. Rep. 1; *The Barnstable*, 181 U. S. 464, 470, 45 L. ed. 954, 958, 21 Sup. Ct. Rep. 684.

McCue's policy could not be a special Wisconsin contract, to be construed by any law or policy of that state inconsistent with those of Virginia and the general commercial law.

Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 255, 51 L. ed. 174, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104; *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106.

The law of Virginia prohibits a recovery in a case like this.

Plunkett v. Supreme Conclave, I. O. H. 105 Va. 643, 55 S. E. 9.

Mr. Daniel Harmon argued the cause, and, with Messrs. G. B. Sinclair and H. W. Walsh, filed a brief for respondents:

Opinion as to what is public policy varies from time to time. Courts are careful not to encroach unduly upon the liberty of contract. Contracts are not interfered with except where they clearly appear to be prejudicial to the public interest. No contract will be interfered with unless it embraces by its terms or necessary implication an agreement to do an act which is illegal or which has a corrupting tendency.

Richardson v. Mellish, 2 Bing. 252, 9 J. B. Moore, 435, 1 Car. & P. 241, Ryan & M. 66, 3 L. J. C. P. 265, 27 Revised Rep. 603; *Davies v. Davies*, L. R. 36 Ch. Div. 364, 56 L. J. Ch. N. S. 962, 58 L. T. N. S. 209, 36 Week. Rep. 86; *Mogul S. S. Co. v. McGregor, G. & Co.* [1892] A. C. 45, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep.

337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; *Thackoorseydass v. Dhondmull*, 6 Moore, P. C. C. 310, 4 Moore Ind. App. 339, 12 Jur. 315; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; *Moore v. Woolsey*, 4 El. & Bl. 243, 1 Jur. N. S. 468, 3 C. L. R. 207, 24 L. J. Q. B. N. S. 40, 3 Week. Rep. 66; *Smith v. DuBose*, 78 Ga. 413, 6 Am. St. Rep. 260, 3 S. E. 309; *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 190; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Swann v. Swann*, 21 Fed. 299; *Equitable Loan & Secur. Co. v. Warning*, 117 Ga. 599, 62 L.R.A. 93, 97 Am. St. Rep. 177, 44 S. E. 320; *Homestead Cases*, 22 Gratt. 301; 12 Am. Rep. 507; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Vidal v. Philadelphia*, 2 How. 128, 11 L. ed. 206; *Pierce v. Randolph*, 12 Tex. 290; *Houlton v. Nichol*, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715.

There being no agreement, express or implied, to do an illegal act, and the contract not having induced the parties to commit a crime, no interest is prejudiced by it, and there would seem to be no sound principle on which it could be avoided.

Moore v. Woolsey, 4 El. & Bl. 243, 1 Jur. N. S. 468, 3 C. L. R. 207, 24 L. J. Q. B. N. S. 40, 3 Week. Rep. 66; *Wetherell v. Jones*, 3 Barn. & Ad. 221, 1 L. J. K. B. N. S. 139; *Waugh v. Morris*, 42 L. J. Q. B. N. S. 57, L. R. 8 Q. B. 202, 28 L. T. N. S. 265, 21 Week. Rep. 438, 1 Asp. Mar. L. Cas. 573; *Bier v. Dozier*, 24 Gratt. 1; *McDonald v. Order of Triple Alliance*, 57 Mo. App. 87; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372; *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Thackoorseydass v. Dhondmull*, 6 Moore, P. C. C. 310, 4 Moore Ind. App. 339, 12 Jur. 315.

The inquiry in the Federal courts is not general, independent of any specific law, but specific as to the law of the state of the obligation.

Washburn & M. Mfg. Co. v. Reliance M. Ins. Co. 106 Fed. 117; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Phipps v. Harding (Hudson Furniture Co. v. Harding)* 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 112, 28 L.R.A. 556, 63 N. W. 589; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *McClain v. Provident Sav.*

Life Assur. Soc. 49 C. C. A. 31, 110 Fed. 80; Burgess v. Seligman, 107 U. S. 32, 27 L. ed. 365, 2 Sup. Ct. Rep. 10.

In matters of general commercial law or general jurisprudence, the decisions of the state tribunals are of great authority.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; Swift v. Tyson, 16 Pet. 18, 10 L. ed. 871.

In the enforcement of statutes or the construction of statutes, the Federal courts make no extrinsic inquiry.

Williams v. Gaylord, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578.

In questions of policy, the statutes and decisions of the state courts are controlling.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The law of this obligation is the law of Wisconsin.

LeMesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 86, 35 Pac. 1054; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229.

The charter controls the rights of members, irrespective of the place where such rights may have been acquired.

Glenn v. Liggett, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; Smith v. Kernochen, 7 How. 199, 12 L. ed. 667; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

Under the charter of the company, McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this membership passed to his executors.

21 Am. & Eng. Enc. Law, 269; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 196, 42 Atl. 944; Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400.

Where, as in this case, a statute prescribes the manner in which property shall pass upon death of the owner, no consideration of public policy can change the course of descent prescribed by the statute, even in the case—the most extreme than can arise—where the person designated to receive the property upon the death of the owner murders such owner for the purpose of coming into possession of the property.

Broom, Legal Maxims, 289; Shellenberger 56 L. ed.

v. Ransom, 41 Neb. 631, 25 L.R.A. 565, 59 N. W. 935; Owens v. Owens, 100 N. C. 242, 6 S. E. 794; Holdom v. Ancient Order, U. W. 159 Ill. 619, 31 L.R.A. 70, 50 Am. St. Rep. 183, 43 N. E. 772; Deem v. Milliken, 6 Ohio C. C. 357, 3 Ohio C. D. 491; Carpenter's Estate, 170 Pa. 203, 29 L.R.A. 147, 50 Am. St. Rep. 765, 32 Atl. 637; McKinnon v. Lundy, 24 Ont. Rep. 132, reversing 21 Ont. App. Rep. 560; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540; Collins v. Metropolitan L. Ins. Co. 232 Ill. 37, 14 L.R.A.(N.S.) 356, 122 Am. St. Rep. 54, 83 N. E. 542, 13 Ann. Cas. 129.

The canon of construction, *expressio unius*, etc., forbids a construction excepting this risk.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; McDonald v. Order of Triple Alliance, 57 Mo. App. 87; Harper v. Phoenix Ins. Co. 19 Mo. 506; Cleaver v. Mutual Reserve Fund Life Asso. [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247; Patterson v. Natural Premium Mut. L. Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980; Moore v. Woolsey, 4 El. & Bl. 243, 1 Jur. N. S. 468, 3 C. L. R. 207, 24 L. J. Q. B. N. S. 40, 3 Week. Rep. 66.

The company has been paid to assume this risk.

Campbell v. Supreme Conclave, I. O. H. 66 N. J. L. 274, 54 L.R.A. 576, 49 Atl. 550; Lange v. Royal Highlanders, 75 Neb. 196, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110.

If the McCue estate cannot recover, the innocent parties interested will be admitted as claimants.

Cleaver v. Mutual Reserve Fund Life Asso. [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; Mullen v. Reed, 64 Conn. 240, 24 L.R.A. 664, 42 Am. St. Rep. 174, 29 Atl. 478; Hodge's Appeal, 8 W. N. C. 209; Mullins v. Thompson, 51 Tex. 7; Tompkins v. Levy, 87 Ala. 263, 13 Am. St. Rep. 31, 6 So. 346; 4 Words & Phrases, p. 3254, "Heirs"; 4 Cooley, Briefs on Insurance, pp. 3226, 3729; Patterson v. Natural Premium Mut. L. Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 903, 75 N. W. 980; Whitehurst v. Whitehurst, 83 Va. 153, 1 S. E. 801; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Fuller v. Linzee, 135 Mass. 469; Bancroft v. Russell, 157 Mass. 47, 31 N. E. 710; Haskins v.

Kendall, 158 Mass. 224, 35 Am. St. Rep. 490, 33 N. E. 495; Newman v. Covenant Mut. Ins. Asso. 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360; Schonfield v. Turner, 75 Tex. 324, 7 L.R.A. 189, 12 S. W. 626; Order of Railway Conductors v. Koster, 55 Mo. App. 186; New York L. Ins. Co. v. Davis, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; Cardwell v. Kelly, 95 Va. 573, 40 L.R.A. 240, 28 S. E. 953; Montefiori v. Montefiori, 1 W. Bl. 363.

The present policy of the law is to require of insurance companies a strict liability for their losses.

Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38; Fidelity & C. Co. v. Eickhoff, 63 Minn. 170, 30 L.R.A. 587, 56 Am. St. Rep. 464, 65 N. W. 351; Boston & A. R. Co. v. Mercantile Trust & D. Co. 82 Md. 535, 38 L.R.A. 116, 34 Atl. 778; Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co. 60 N. J. L. 246, 44 L.R.A. 213, 37 Atl. 689; Waters v. Merchants' Louisville Ins. Co. 11 Pet. 213, 9 L. ed. 691; Phoenix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 1176; Courtenmanche v. Supreme Court, I. O. O. F. 136 Mich. 30, 64 L.R.A. 668, 112 Am. St. Rep. 345, 98 N. W. 749; Supreme Lodge, O. M. P. Asso. v. Gelbke, 198 Ill. 365, 64 N. E. 1058; Patterson v. Natural Premium Mut. L. Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980; Darrow v. Family Fund Soc. 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1093; Goetzman v. Connecticut Mut. L. Ins. Co. 3 Hun, 515; Harpers v. Phoenix Ins. Co. 19 Mo. 506; Griffin v. Western Mut. Benev. Asso. 20 Neb. 620, 57 Am. Rep. 848, 31 N. W. 122; Cluff v. Mutual Ben. L. Ins. Co. 99 Mass. 318; Mareck v. Mutual Reserve Fund Life Asso. 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68; Simpson v. Life Ins. Co. 115 N. C. 393, 20 S. E. 517; Mutual Reserve Fund Life Asso. v. Payne, — Tex. Civ. App. —, 32 S. W. 1063; Supreme Court of Honor v. Updegraff, 68 Kan. 474, 75 Pac. 477, 1 Ann. Cas. 309.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is whether death by the hand of the law in execution of a conviction and sentence for murder is covered by a policy of life insurance, though

such manner of death is not excepted from the policy, there being no question of the justness of the sentence.

The case was in equity, and brought in the corporation court for the city of Charlottesville, state of Virginia, by respondents, children and sole heirs of James S. McCue, by Marshall Dinwiddie, their next friend, upon a policy of life insurance issued to McCue by petitioner, named herein as the insurance company.

The main defense of the insurance company was (there were some technical defenses with which we are not concerned) that McCue came to his death by hanging after conviction and sentence for the murder of his wife.

The suit was brought under the laws of the commonwealth of Virginia against the insurance company, the People's National Bank of Charlottesville, as garnishee, and the executors of McCue's estate.

The case was removed on the petition of the insurance company, on the ground of a separable controversy, to the circuit court of the United States for the western district of Virginia. In that court there was a demurrer filed to the bill which raised the question as to the proper arrangement of the parties, and whether the heirs or the executors were the parties to recover on the policy, assuming that the insurance company was liable. In the answer *the same questions were again[244 raised and all liability of the insurance company denied, principally on the ground of the manner by which McCue came to his death.

At the trial the technical defenses were waived, and by agreement of the parties the heirs of McCue and his executors were treated as parties plaintiff. The court, considering the cause as one at law, and a jury having been waived by the parties, adjudged on the pleadings and an agreed statement of facts, "that the plaintiffs take nothing by their bill, and that said defendant go without day," with costs, the latter to be paid by a deposit made in the registry of the court in refund of the premium paid by McCue, as far as it would go. The judgment was reversed by the court of appeals and a new trial ordered. This certiorari was then petitioned for and allowed.

The facts as agreed are these: The insurance company is a corporation duly organized under the laws of Wisconsin, and a citizen and resident thereof. It is a mutual insurance company, with the power and obligations given to and imposed upon it by certain acts of the legislature of Wisconsin, which acts constitute its charter.

The People's National Bank of Charlottesville

vile was made a party solely as garnishee, it having certain sums of money belonging to the insurance company in its possession.

McCue made written application to the insurance company in his own handwriting for the policy in suit, in pursuance of which the policy was issued for the sum of \$15,000 on his life. He paid premiums as follows: When the policy was delivered to him he gave his note for the sum of \$427.50 for the premium to E. L. Carroll and L. Fitzgerald, payable to their order, six months after date, at the Jefferson National Bank, Charlottesville, Virginia. Carroll & Fitzgerald at the time were soliciting insurance for T. A. Cary, the general agent of the insurance company in Virginia. The [245]note was indorsed by Carroll & Fitzgerald to Cary, with the following memorandum attached: "\$427.50. Hold this note in Mr. Cary's office (don't use bank.) Notify Mr. McC. about thirty days before due, and send it to E. L. Carroll for collection." Carroll & Fitzgerald gave their individual notes to Mr. Cary, amounting to \$427.50, on which he advanced the money to the company and held the notes for collection, with McCue's note as collateral.

The company received, at its home office in Milwaukee, the amount of the premium in cash from Cary on May 2, 1904, but had no knowledge of the note arrangement between McCue, Carroll & Fitzgerald, and Cary. The note was paid by McCue by checks after he had been arrested, he protesting his innocence, "which facts were known to Cary." The note arrangement was a general custom among soliciting agents for the company. Other facts will be noted hereafter.

The main question in the case is, as we said, the liability of the company under the circumstances. Or, to put it more abstractly for the present purpose of our discussion, whether a policy of life insurance insures against death by a legal execution for crime.

The question was before this court in *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139. In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: "Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?" And answering, after discussion, we said: "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing

to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion *in a contract of a condition[246 which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under the circumstances which cannot be lawfully stipulated for." Cases were cited, among others *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying that "a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."

These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made. We come, therefore, immediately to the special contention of respondents, that the contract in controversy is a Wisconsin contract, and is not offensive to the public policy of that state or to its laws, but was indeed, as it is contended, made in conformity to the laws of that state, and carries all of their obligations.

The obligation of a contract undoubtedly depends upon *the law under which it[247 is made. In which state, then, Virginia or Wisconsin, was the policy made? In *Equitable Life Assur. Soc. v. Clements* (*Equitable Life Assur. Soc. v. Pettus*), 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822, the question arose whether the contract of insurance sued on was made in New York or Missouri. The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the office of the company, provided that the contract between the parties was completely set forth in the pol-

icy and the application therefor, taken together. The application declared that the contract should not take effect until the first premium should have been actually paid during the life of the person proposed for assurance. Two annual premiums were paid in Missouri, and the policy, at the request of the assured, was transmitted to him in Missouri, and there delivered to him. The court said: "Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract, and governed by the laws of Missouri."

In *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106, the insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in Montana. It was held that "under these circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state." Citing *Equitable Life Assur. Soc. v. Clements*, supra.

The same conditions existed in *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538, and it was decided, the two cases above mentioned being cited, that the policy of insurance involved was a Washington contract, not a New York contract.

248] *In the case at bar the application was made by McCue at Charlottesville, Virginia, February 25, 1904, and the policy was delivered to him there on March 15, 1904, when he gave his note for the premium which was payable at that place and subsequently paid there. And it is provided in the policy that it should not take effect until the first premium should be actually paid. Following that provision is this: "In witness whereof the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this 15th day of March, 1904." But manifestly this was not intended to affect the preceding provision, fixing the time when the policy should go into effect, nor the legal consequences which followed from it. In *Equitable Life Assur. Soc. v. Clements* the policy was executed at the company's office in New York. The exact conditions, therefore, existed which made, in the cases cited, the policies involved therein not New York contracts, but, respectively, Missouri, Montana, and Washington contracts. The policy, there-

fore, in the case at bar, must be held to be a Virginia, and not a Wisconsin, contract.

Respondents, however, contend that "the right asserted is a property right, vested by the special statute of incorporation, which is not divested by crime;" and that "the charter controls the rights of members irrespective of the place where such rights may have been acquired." To support the contention that the right asserted is a property right, respondents adduce §§ 1, 4, 7, and 20 of the charter. Their argument is brief and direct, and we may quote it. It is as follows: "Under the charter of the company, McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this membership passed to his executors." And further: "The charter of the company, § 1, provided that certain persons *named 'and all other persons who may [249 hereafter associate with them in the manner hereinafter prescribed shall be, and are, declared a body politic and corporate. Section 4 prescribes that persons who shall hereafter insure with the company 'shall thereby become members thereof.' And § 7 prescribes the manner in which this membership is to be perfected. 'Every person who shall become a member of this association, by effecting insurance therein, shall, the first time he effects insurance, pay the rates fixed by the trustees,' etc. There can be no doubt, then, that McCue was a member of this corporation. He insured with the company, and thereby he became a member. His interest in the company was fixed by the amount of his insurance. This membership constituted a vested property right. He was eligible as an officer, and entitled to vote in the management of the company (§ 20); entitled to the dividends on the surplus and profits (§ 2, § 13); and was a joint owner of the assets of the company." But this is assuming what is to be proved. It may be true that a person who insures with the company becomes a member thereof, and that his interest is fixed at the amount of his insurance. But what constitutes his title or right? Necessarily his policy. What entitles him to a realization of the benefits of his membership? Necessarily, again, his policy, if the manner of his death be not a violation of it. We need not follow counsel, therefore, through their argument as to the rights of property and the rules of its devolution, which, it is contended, must obtain, whatever be the act or guilt of the person producing it. The question before us, and the only question, is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dis-

pute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the Federal courts of Virginia, in which state the contract was made. And it is consonant with the ruling in the 250]*state courts. In *Plunkett v. Supreme Conclave*, I. O. H. 105 Va. 643, 55 S. E. 9, a certificate of membership in the Conclave, which was issued to one Charles W. Plunkett, his wife being beneficiary, was considered. One of the conditions was that Plunkett comply with the laws, rules, and regulations then governing the Conclave, or that might in the future be enacted. There was no provision against suicide in the laws, rules, or regulations when the certificate was issued. Such a provision was subsequently enacted. Plunkett committed suicide, and the Order refused to pay benefits. Plunkett's wife brought suit to recover them, and asserted a vested interest in the benefits under the certificate. The contention was rejected. The trial court held that the forfeiture of the rights under the certificate, if the insured while sane committed suicide, was valid, because (1) it involved no vested right of the insured, and (2) because it was a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. And the court added: "Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception."

The supreme court of appeals affirmed the judgment, quoting the reasoning of the trial court, and added to it the considerations of public policy expressed in the *Burt Case* and *Ritter Case*, *supra*, and other cases. If the public policy of Virginia were the same as, it is contended, that of Wisconsin is, whether this court should have to yield it, we are not called upon to decide.

Being of opinion that McCue's policy was a Virginia contract, it may be unnecessary 251]*to review the cases relied *on by the respondents, which they contend declare the public policy of the state of Wisconsin. It may, however, be said that the cases are not absolutely definite.

Two cases only are cited, *McCoy v. Northwestern Mut. Relief Asso.* 92 Wis. 577, 47 L.R.A. 681, 66 N. W. 697, and *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 56 L. ed.

899, 75 N. W. 980. We will not consider the facts in the first case. It is enough to say that the court, following a ruling that it had pronounced in other cases, said: "If a contract for life insurance does not provide against death by suicide or self-destruction, then such cause of death does not constitute a defense," citing four cases. The second also presented one of suicide, the insured being sane. It was contended that the policy did not cover such a risk, because (1) an incontestable clause (there being one) in the contract did not cover such a death; (2) if it could be held so in terms, it would be void, as against public policy; (3) suicide was a crime, and hence within a stipulation against death in violation of law.

The reliance of the insurance company to support its contentions was upon the *Ritter Case*, *supra*. The court, however, reiterated its former ruling as to death by suicide, though it recognized the cogency of the reasoning of the *Ritter Case*, that the insured should do nothing to accelerate the contingency of the policy, saying (page 122): "Were the question a new one in the law, the argument would be well nigh irresistible; especially where, as in the *Ritter Case*, the policy runs in favor of the estate of the insured, and the proceeds will go to the enrichment of such estate, instead of to other beneficiaries."

There were other beneficiaries in the case, the policy having been assigned, with the consent of the company, to the children of the insured. Commenting further on that fact, the court said it brought the case within the principle of certain cases, which were cited, but added, "nor would the application of that principle to this case necessarily *conflict with the *Ritter Case*, [252 where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives and yet not prevent a recovery in case a policy in favor of beneficiaries who had a subsisting vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured." McCue's policy was in favor of his estate, and comes within the concession made by the supreme court to the reasoning of the *Ritter Case*.

The court did not discuss considerations of public policy, but we may assume it found nothing offensive to such policy in a contract of insurance which covered death by suicide, and it may be supposed that the court would find nothing repugnant to public policy in a contract which did not except death for crime. However, we need

not speculate, as the Wisconsin law does not control the policy in suit.

One other contention of respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above,—the policy is the measure of the rights of everybody under it, and as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children.

Judgment of the Court of Appeals is reversed, and that of the Circuit Court is affirmed.

253]*NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plff. in Err.,

v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 253-261.)

District of Columbia — contracts — construction.

The cost of changing sewers and water mains both inside and outside of a railroad right of way, made necessary by the elimination of grade crossings, pursuant to the act of February 12, 1901 (31 Stat. at L. 767, chap. 353), and February 28, 1903 (32 Stat. at L. 909, chap. 856), is chargeable to the railway company's contract or, under an agreement between such contractor and the District of Columbia, by which the District was to make the necessary changes in sewers and water mains upon deposit by the contractor of the estimated cost, where such estimate was more than 50 per cent in excess of what the changes within the right of way would cost, and where a different conclusion could only be reached upon the supposition that the earlier act controlled and was thought by the District to control, while in fact the District thought that the later act controlled, and required all the changes to be made at the expense of the railway company, and therefore of the contractor, its agent.

[For other cases, see District of Columbia, VII., in Digest Sup. Ct. 1908.]

[No. 145.]

Argued December 22, 1911. Decided February 19, 1912.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action of assumpsit, for less than the amount claimed. Affirmed.

See same case below, 33 App. D. C. 377.

The facts are stated in the opinion.

Mr. James H. Hayden argued the cause and filed a brief for plaintiff in error.

Mr. Edward H. Thomas argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Action of assumpsit by plaintiff in error in the supreme court of the District of Columbia to recover the sum of \$7,172.97, claimed by it as the amount of unexpended balances of three deposits made by it with the District, to cover the cost of certain work undertaken by the District for it.

The case was tried to a jury, which, under the instructions of the court, returned a verdict for the plaintiff in the sum of \$1,089.79, with interest, upon which judgment was duly entered. The judgment was affirmed by the court of appeals. We shall refer to plaintiff in error as plaintiff and to the defendant in error as the District.

The controversy grows out of work required to be done by certain acts of Congress for the elimination of grade crossings on the line of the Baltimore & Potomac Railroad Company, in the city of Washington, and requiring the railroad company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes. 31 Stat. at L. 767, chap. 353. The scheme of improvement was quite extensive, and the act described in detail the changes to be made in the grades of streets in connection with the change of the location of the railroad company's tracks and station.

Section 9 of the act is the one with which we have most concern. It provides as follows, omitting parts not essential to be quoted:

"Sec. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by the preceding sections of this act, and of all structures connected therewith or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore & Potomac Railroad Company shall bear, pay, and defray all cost and expense of the relocations, elevation and depression of its tracks, within the limits of its right of way, as are authorized and required by this act. . . . All other costs, expenses, damages resulting from, incidental to, or *to, or connected with, the revisions, [255 changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this act required and authorized, and from changes in the grades of the streets or the railroad . . . shall be

borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia. . . . All work within the limits of said railroad company's right of way . . . shall be done by said railroad company to the satisfaction and approval of the commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. And all work which is without the limits of the right of way . . . shall be done by the District of Columbia."

There were quite radical modifications of the plan for the railroad terminal, made by an act passed in 1903. 32 Stat. at L. 909, chap. 856. Among other things, it provided for the construction of tunnels. It is, however, contended by plaintiff that the distribution of the cost of the work, as provided in § 9 of the prior act, was not changed. The District contends that the deposits made by the plaintiff were for work to be done by the latter, and that the work which was done by it, the District, was upon construction neither contemplated nor authorized by the act of 1901, but was embraced in the new location directed by the act of 1903, and was imposed by the latter act upon the railroad company, and was done by the plaintiff as agent of the railroad company.

In pursuance of the acts of Congress, the railroad company prepared a plat of its proposed line, extending from Second street and Virginia avenue southwest to First street and Massachusetts avenue northeast. This embraced the change necessary to connect its tracks with the *new Union station. The plat shows the course of the tunnels in question. The railroad company engaged plaintiff to construct the tunnels, and plaintiff proposed to the District that the District perform that portion of the work involved in changing and relocating the sewers and water mains.

The following letter was written by the engineer commissioner of the District to plaintiff:

Washington, July 22, 1903.

The New York Continental Jewell Filtration Company,

New York, N. Y.

Gentlemen:—

Referring to our oral conversation of July 16, in which you requested that the sewer and water changes necessary on account of the construction of the tunnel of the Pennsylvania R. R. Company, this city, be made by this office, and the plat which you left with me, I would state that the estimated

cost of making the changes in the sewers is \$7,693, and of changes in water mains is \$488. Deposit slips for these amounts are herewith, and the deposits should be made separately, and upon receipt of the deposits the work will be done by this office. The water department made some modifications of the plan suggested by you in the drawings which you left, with the object of obtaining better circulation, and the sewer division increases the size and slope of the proposed new portion of sewer. I return your suggested plan.

Very respectfully,

John Biddle,

Major, Corps of Engineers, U. S. A.,
Engineer Commissioner, D. C.

Subsequently letters were addressed to plaintiff containing estimates of necessary changes in the water mains and sewers, caused by the construction of the tunnels, respectively, \$488 and \$7,693, and stating that if plaintiff wished the District to do the work, it should deposit those amounts with the collector of taxes of the District. The *letters were dated, respectively, [257 the 20th and 21st of July, 1903.

The plaintiff accepted the District's offer to make the changes upon making the deposit indicated.

There was another change requested by plaintiff and undertaken by the District, an estimate of which was furnished and a deposit of the amount made by plaintiff.

On May 11, 1904, and after the completion of the work, the plaintiff wrote a letter to the District, in which it stated that it had deposited with the collector of taxes of the District certain amounts for sewer changes and water main changes "within the right of way" at certain designated points, and asking for a statement of the work and a return of the unexpended balances. Receiving no reply, plaintiff addressed another letter to the District of the same purport. There was other correspondence, which need not be given, as it is agreed that plaintiff had deposited \$7,693 to cover the cost of changes in sewers and the sums of \$488 and \$600 to cover the cost of changes in water mains; that there was expended on sewers within the right of way the sum of \$1,565.41, and on water mains \$42.62, total \$1,608.03, which, being deducted from the amount deposited by plaintiff, would leave an unexpended balance of \$7,172.97, if plaintiff's contention be correct. If, on the other hand, the contention of the District be correct, and plaintiff is chargeable with costs of work done outside of the right of way, there would be a balance returnable of only \$1,089.79.

The contention of the plaintiff is, as we

have seen, that the railroad company was only required to defray the cost of work within the limits of its right of way, and that plaintiff's obligation is not greater, as it only undertook to do the work for the railroad company. In other words, plaintiff contends that the acts of 1901 and 1903 are the test of the rights of the parties. The District contends, on the other hand, that those acts do not control the case. 258]*The case made by the pleadings and the evidence, the District insists, "is one of simple contract, composed of an offer or request by the plaintiff to the defendant, which the defendant accepted and performed." It is further urged by the District that if the acts of 1901 and 1903 can be regarded as pertinent, all of the parties, the District, the plaintiff, and the railroad, construed them in accordance with the contention of the District. It is urged further that the act of 1901 contained no reference to changes in water mains and tunnels, and that the act of 1903 "imposed upon the railroad the obligation to do the entire work, thus modifying the former act, and, in return, provided for the payment of a large sum of money to the railroad."

It is very certain that the act of 1903 introduced new features into the scheme provided for by the act of 1901, and gives support to the contention of the District. It was testified by the assistant engineer of the District as follows: "The tunnel was not contemplated in the act of 1901. It was built pursuant to the act of 1903, and takes the place of the connection that would have been made to the Sixth street station, had that station remained as contemplated by the act of 1901. There was no tunnel at this point contemplated by the act of 1901."

But, without dwelling further upon this contention, we shall pass to the other contention of the District. The declaration in the case alleges that plaintiff, "acting in that behalf as the agent of the Philadelphia, Baltimore, & Washington Railroad Company, was engaged in constructing for said company certain tunnels at and about the intersection of New Jersey avenue and D street," which the railroad company was required to construct under the acts of Congress of 1901 and 1903.

It is alleged that the construction of the tunnels made necessary the change in the location of certain sewers and water mains. That estimates were made by the 259]District *and notice given thereof to plaintiff, conveying an offer by it to make the changes, provided plaintiff would deposit the cost thereof with the District. That the plaintiff did so upon the condition that the District would use so much of the

deposit as would be necessary to make the changes "which the railroad company was required to perform or pay for," and return whatever balances there might be to plaintiff. The balances due are stated.

Issue was joined on the declaration by the District, and it set up, besides, affirmative matter of defense.

It will be observed that a contract between the plaintiff and the District is alleged, and we are to inquire whether it was established or whether some other contract was established. The facts show that the company approached the commissioners for the purpose of having the District undertake the work, as will be seen by the letter of July 22, 1903, which we have quoted above, submitting a plan of the work, which was changed somewhat by the commissioners. The letter was addressed to plaintiff, and contained these significant words: "The estimated cost to you for making the necessary charges in sewers, caused by the construction of tunnel N. J. ave. and D street, S. E., is \$7,693." In the other letters the same words are used as to water main, the expense being stated at \$488 and \$600.

Plaintiff contends that under the circumstances those words were sufficient to cause it "to believe that the District understood that the 'necessary changes' would involve costs to be defrayed by the government, or, at any rate, some party other than the company." But this could only be on the supposition that the act of 1901 controlled and was thought by the District to control. The District thought otherwise,—thought the act of 1903 controlled, and required the work to be done at the expense of the railroad company, and therefore by its agent, the plaintiff; and, granting this position could be disputed, *it[260 nevertheless gives meaning to the language it used when addressing plaintiff as undertaking the work and all of the work, that outside and that within, of the railroad's right of way. And we do not see how plaintiff could have understood otherwise. If the words did not necessarily of themselves point to plaintiff as the party to defray the expense, the amount of the deposit required indicated that it was to cover the work outside of the right of way. The estimate of costs and deposits required amounted to \$8,781, and yet it is admitted that the cost of the work within the right of way or space covered by the tunnels was only \$1,608.03. The difference is too great to have been overlooked or its importance and meaning misunderstood. It is attempted to be explained, but inadequately. The necessity of the work was seen by plaintiff's engineer in charge, and

he also saw the work going on daily outside of the right of way. He explained as follows: "We knew that the estimated amount was excessive for that which was solely within the right of way, but we considered that we were protected in the matter by the law. I did not know the cost of taking out 64 feet of sewer and putting it back. I had no estimate on it. I consider \$7,693 for taking out 64 feet of sewer an excessive amount. I did not know that it could be done within \$1,600. I made no estimate at all. I know that the total estimate submitted was largely in excess of the cost of work required within the right of way. . . . It was largely in excess, 50 per cent or more, but I only looked at it in a general way. I did not know it was 80 per cent more, and did not figure out the actual or approximate cost."

We repeat, the explanation is inadequate. An excess of more than fifty per cent in an estimate of the work within the right of way necessarily pointed to some other work, and plaintiff was called upon then to make objection if it had any. If it had objected, the District might have [261]*refused to deal with it, and insisted upon the responsibility of the railroad company. It is now in a different situation. This record does not show that the railroad company ever disputed its responsibility. Indeed, there is evidence which makes the other way.

Judgment affirmed.

THOMAS E. JACOB and Frank Hobson,
Plffs. in Err.,
v.

S. L. ROBERTS.

(See S. C. Reporter's ed. 261-267.)

Constitutional law — due process of law — substituted service.

An order for the substituted service of summons in a suit to quiet title to certain lots in San Diego, California, made conformably to Cal. Code Civ. Proc. § 412, is supported by a sufficient showing of diligent inquiry to satisfy the due-process-of-

NOTE.—As to what service of process is sufficient to constitute due process of law—see note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 577.

On character of inquiry as to whereabouts of party, necessary to sustain constructive service of process, see note to *Grigsby v. Wopschall*, 37 L.R.A. (N.S.) 206.
56 L. ed.

law clause of U. S. Const., 14th Amend., where it was made upon an affidavit which, after reciting the proceedings, including the issue of the summons and the certificate of the sheriff that "after diligent search and inquiry" he was unable to find the "defendants or either or any of them in this, San Diego, County," further states that unsuccessful inquiries as to the whereabouts of defendants were made of their former neighbors and other residents of San Diego, and of certain county and state officers, and that plaintiff himself made diligent inquiry, and had no knowledge of their residence or post-office address, or where they could be found. [For other cases, see Constitutional Law, 696-773, in Digest Sup. Ct. 1908.]

[No. 169.]

Argued January 25, 1912. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of California to review a judgment which reversed an order of the Superior Court of the County of San Diego, in that state, setting aside a judgment quieting title to land upon substituted service of the summons. Affirmed.

See same case below, 154 Cal. 307, 97 Pac. 671.

The facts are stated in the opinion.

Mr. Sam Ferry Smith argued the cause and filed a brief for plaintiffs in error:

To constitute due process of law there must be a regular course of judicial proceedings, which means that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; *McGehee*, *Due Process of Law*, p. 73.

The clauses in our Constitution guarantying "the law of the land" and "due process of law" have always been held to include the opportunity to present any defenses which might affect the decision of the court or tribunal. The opportunity to defend implies notice of an official inquiry into the facts, and notice and hearing are necessary to "due process of law,"—are indeed the essential elements thereof.

Simon v. Craft, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836; *Hooker v. Los Angeles*, 188 U. S. 314-318, 47 L. ed. 487-491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Wilson v. Standefer*, 184 U. S. 399-415, 46 L. ed. 612-619, 22 Sup. Ct. Rep. 384.

Substituted service of judicial process is only authorized by reason of the necessity of the particular case, and because it is impossible and impracticable to obtain actual service; and when so authorized the substituted service provided for in the statute

must be of such character that it will be reasonably probable that the party whose property is placed in jeopardy will be apprised of the pendency of the action, and will be afforded a reasonable opportunity to appear therein and make his defense.

Cooley, Const. Lim. p. 404; Arndt v. Griggs, 134 U. S. 321, 33 L. ed. 919, 10 Sup. Ct. Rep. 557; Pennoyer v. Neff, 95 U. S. 737, 24 L. ed. 573; Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Holden v. Hardy, 169 U. S. 389, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 557; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Happy v. Mosher, 48 N. Y. 317; Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 903; Roller v. Holly, 176 U. S. 402, 44 L. ed. 522, 20 Sup. Ct. Rep. 410; De la Montanya v. De la Montanya, 112 Cal. 109, 44 Pac. 345, 32 L.R.A. 82, 53 Am. St. Rep. 165.

Substituted service can be had only where it is legally shown by satisfactory evidence contained in an affidavit that the necessity exists therefor.

Hahn v. Kelly, 34 Cal. 407, 94 Am. Dec. 742; Marx v. Ebner, 180 U. S. 314, 45 L. ed. 547, 21 Sup. Ct. Rep. 376; Thompson v. Circuit Judge, 54 Mich. 237, 19 N. W. 967; Ricketson v. Richardson, 26 Cal. 149; Braly v. Seaman, 30 Cal. 611; Neff v. Pennoyer, 3 Sawy. 274, Fed. Cas. No. 10,083; Johnson v. Hunter, 77 C. C. A. 359, 147 Fed. 133; Flint v. Coffin, 100 C. C. A. 342, 176 Fed. 877; Wheeler v. Cobb, 75 N. C. 22; Romig v. Gillett, 187 U. S. 111-117, 47 L. ed. 97-100, 23 Sup. Ct. Rep. 40; Stillman v. Rosenberg, — Iowa, —, 78 N. W. 913; Grigsby v. Wopschall, 25 S. D. 564, 37 L.R.A.(N.S.) 206, 127 N. W. 605; Coughran v. Markley, 15 S. D. 37, 87 N. W. 2; Howard v. De Cordova, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817.

Mr. William J. Mossholder argued the cause, and, with Mr. Samuel Herrick, filed a brief for defendant in error:

Where there is a nonresident, no showing of diligence is necessary.

Anderson v. Goff, 72 Cal. 69, 1 Am. St. Rep. 34, 13 Pac. 73; Ligare v. California Southern R. Co. 76 Cal. 610, 18 Pac. 777.

The affidavit in this case was more copious and complete and had a fuller statement of facts than was contained in the affidavit passed upon by the supreme court of California in Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

See also Weis v. Cain, — Cal. —, 73 Pac. 980; People v. Wrin, 143 Cal. 11, 76 Pac. 646; People v. Norris, 144 Cal. 422, 77

Pac. 998; People v. Mason, 144 Cal. 770. 78 Pac. 1113; Sharp v. Salisbury, 144 Cal. 721, 78 Pac. 282; Shepard v. Mace, 148 Cal. 272, 82 Pac. 1046; Cargile v. Silsbee, 148 Cal. 260, 82 Pac. 1044; Emery v. Kipp, 154 Cal. 83, 19 L.R.A.(N.S.) 983, 129 Am. St. Rep. 141, 97 Pac. 17, 16 Ann. Cas. 792.

The contents of the affidavit were a sufficient basis for the court's order to publish the summons.

Ligare v. California Southern R. Co. 76 Cal. 614, 18 Pac. 777; Forbes v. Hyde, 31 Cal. 342; Miller v. Brinkerhoff, 4 Denio, 118, 47 Am. Dec. 242, Atkins v. Atkins, 9 Neb. 200, 2 N. W. 466; Britton v. Larson, 23 Neb. 806, 37 N. W. 681; Slocum v. Slocum, 17 Wis. 150; Harris v. Claflin, 36 Kan. 543, 13 Pac. 830; Pennoyer v. Neff, 95 U. S. 714, 730, 24 L. ed. 565, 571; People v. Dodge, 104 Cal. 487, 38 Pac. 203; Little v. Chambers, 27 Iowa, 522; Marx v. Ebner, 180 U. S. 314, 45 L. ed. 547, 21 Sup. Ct. Rep. 376; Kennedy v. New York Life Ins. & T. Co. 101 N. Y. 487, 5 N. E. 774; McDonald v. Cooper, 32 Fed. 745; Storm v. Adams, 56 Wis. 137, 14 N. W. 69; Pike v. Kennedy, 15 Or. 420, 15 Pac. 637; Martin v. Pond, 30 Fed. 18; Cohen v. Portland Lodge No. 142, B. P. O. E. 144 Fed. 266, 81 C. C. A. 483, 152 Fed. 357; Re Faulkner, 4 Hill, 598; Skinnion v. Kelley, 18 N. Y. 355; Belmont v. Cornen, 82 N. Y. 256; Long v. Fife, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594; Davis v. Cook, 9 S. D. 319, 69 N. W. 20; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; George v. Nowlan, 38 Or. 537, 64 Pac. 1; Colton v. Rupert, 60 Mich. 318, 27 N. W. 520; Horton v. Monroe, 98 Mich. 195, 57 N. W. 109; Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 726; Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740; Salisbury v. McGibbon, 58 App. Div. 524, 69 N. Y. Supp. 258; Weis v. Cain, — Cal. —, 73 Pac. 980; Merchant Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58.

*Mr. Justice McKenna delivered [263 the opinion of the court:

The question involved is whether a judgment quieting title to a piece of land in California, against plaintiffs in error, upon substituted process of the publication of the summons under the statutes of that state, constitutes due process of law under the 14th Amendment to the Constitution of the United States.

The judgment was rendered in 1897, and eight years afterwards the entry of judgment was set aside by the trial court upon petition of plaintiffs in error, on the ground that the facts set out in the affidavit for the order of publication did not show the due diligence required by § 412 of the Code

of Civil Procedure of the state. The order was reversed by the supreme court of the state. 154 Cal. 307, 97 Pac. 671.

The action against plaintiffs in error was brought by defendant in error in the superior court in the county of San Diego, state of California, by verified complaint on March 25, 1897, upon which summons was issued and returned not served because defendants in the action (plaintiffs in error) could not be found. An amended complaint was filed April 3, 1897. It described the land as lots in the city of San Diego, of which it alleged that the plaintiffs, defendants in error here, were then and had been for a long time in possession, claiming title in fee. It also contained the usual allegations that the defendants, and each of them, claimed some estate or interest in the land, and that it was entirely without any right whatever. It was prayed that the defendants be required to set forth the nature of their or his claim, that it be determined by the decree of the court, and that they and each of them be forever enjoined from asserting any claim in and to the lands adverse to the plaintiffs. General relief was prayed.

Summons was issued and the sheriff's certificate of return recited that "after diligent search and inquiry" he was unable to find the "defendants or either or any of them in this, San Diego, county."

An affidavit for publication of summons was then presented to the court and filed. It recited the proceedings, including the issue of the summons and its return by the sheriff, as we have stated, and further set forth the following, among other matters:

"That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this state, and this affiant, in support thereof, states the following facts and circumstances:

"That affiant, for the purpose of finding said defendants and ascertaining their place of residence, has made due and diligent inquiry of the old residents of the city of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the city of San Diego over twenty-five years, that he thinks the defendants are not within the state of California, and he does not know of their residence, and has not heard anything of them, or either of them, or of their residence or postoffice address, for more than twenty years; and this affiant is informed by George W. Hazard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made

inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence, or where the defendants, or either of them, could be found, and did not believe that they were in the state."

The affidavit also stated that inquiry was made of certain county and city officers, and that they all—

"stated to affiant that they did not know the residence of the defendants, or either of them, their postoffice address, or [265] where they could be found; and none of the above-named parties had heard of the postoffice address or residence of the defendants, or either of them, since they have resided in the said city of San Diego.

"The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within —. The affiant has no knowledge of the residence or postoffice address of the defendants or either of them, or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants, Thomas E. Jacobs, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, either or any of them."

An order of publication was duly made, and the summons duly published in accordance therewith. Judgment by default was subsequently duly entered.

The assignments of error all express the contention that the trial court was without jurisdiction to render the judgment against plaintiffs in error, and that hence their property has been taken without due process of law.

Undoubtedly, as contended by plaintiffs in error, the essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice. *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836. But personal notice is not in all cases necessary. There may be, and necessarily must be, some form of constructive service. *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261. Upon this, however, we do not enlarge, as we do not understand plaintiffs in error contest it. They recognize that substituted service of judicial process may be authorized, but they contend that it can only be authorized when "it is impossible or impractical to obtain actual service, and when so authorized, the substituted service provided for in the statute must be of such character that it will be reasonably probable that the party whose property is placed in jeopardy will be ap-

prised of the pendency of the action and will be afforded a *reasonable opportunity* to appear therein and make his defenses." (The italics are ours.) We do not understand that plaintiffs in error attack the kind or time of publication, as not giving a reasonable probability of notice or opportunity to be heard, but attack the showing upon which it was made; in other words, that the showing was not sufficient to authorize the publication of notice, the showing not being legally sufficient to justify a resort to that form of notice. It is true plaintiffs in error say that "the designation of the newspaper and the length of time of publication must necessarily depend upon the residence of the defendant, or, at least, his probable whereabouts, unless it is disclosed by the affidavit that plaintiff has no knowledge on the subject, and that he has exercised due diligence to inform himself." These quotations from the argument of plaintiffs in error we make as exhibiting the elements of their contentions.

We make no reference to the statute of the state, as that, as written, is not attacked except, it may be, as it is applied by the supreme court of the state in this and prior decisions. We say "prior decisions," because the court puts its ruling explicitly on one of its prior decisions, and rejects the contention that it had overruled other decisions.

We now turn to what the papers in the case exhibit and what they explicitly or impliedly establish. The property involved were lots in the city of San Diego, of which the plaintiffs in the action, defendants in error here, were in possession at the time of commencing the action, and had been for a long time. The fact has some force. San Diego was of size and importance enough to make it worth while for those having interest in property to assert it. Plaintiffs in error, however, permitted defendants in error to be in possession of property which they now say was and is theirs. Why, they do not explain, 267] nor *where they were. They rest upon the face of the papers, and they having that right, we will consider the sufficiency of the papers under the statute.

We have set out the affidavit. It shows inquiry of the whereabouts of plaintiffs in error of their former neighbors and other residents of San Diego. One of them replied that he had not heard of them, of their residence or postoffice address, for over twenty-five years. Another also had not heard from them and did not believe they were in the state. Inquiry was also made of nineteen county officers and three state officers, sheriffs, county clerks,

tax collectors, county and state; assessors, county and state; and of the postmasters of the state. Neighbors, residents, and officers who, in the intercourse and business of life would almost necessarily come in contact with plaintiffs in error or hear from them, had no knowledge of them. It may, however, be said, and indeed is said, that other parts of the state were not searched, and that this was necessary, as the process of the court could run to every county in the state. The requirement is extreme and we are cited to no cases in which it is decided to be necessary. The affidavit shows, besides, that defendant in error made diligent inquiry to find plaintiffs in error, and had no knowledge of their residence or postoffice address, or of either of them, or where they or either of them could be found.

We think plaintiffs in error were afforded due process.

Judgment affirmed.

*KER & COMPANY Plffs. in Err., [268
v.

ALBERT R. COUDEN.

(See S. C. Reporter's ed. 268-279.)

Waters — alluvion — seashore.

Land formed gradually in the Philippine Islands since 1811 by the action of the sea must be deemed to belong to the Sovereign, and not to the owner of the upland, in view of the declaration of the Spanish Law of Waters of 1866, effective in the Philippine Islands in 1871, that lands added to the shores by the accessions and accretions caused by the sea shall belong to the public domain unless the government shall declare otherwise, which must be regarded as expressing the understanding of the codifiers as to what the earlier law had been.

[For other cases, see Waters, 122-141, in Digest Sup. Ct. 1908.]

[No. 11.]

Argued April 27, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of

NOTE.—On the law of accretion to shore lands—see note to *De Lassus v. Faherty*, 58 L.R.A. 193.

As to the law of alluvion, accretion, and reliction—see notes to *Kennedy v. Hunt*, 12 L. ed. U. S. 829; *St. Clair County v. Lovington*, 23 L. ed. U. S. 59; *Jefferies v. East Omaha Land Co.* 33 L. ed. U. S. 872; and *Kansas v. Meriwether*, 106 C. C. A. 198.

First Instance of the Province of Cavite, in favor of defendant in an action of ejectment. Affirmed.

See same case below, 6 Philippine, 732.

The facts are stated in the opinion.

Mr. Oscar Sutro argued the cause, and, with Messrs. E. S. Pillsbury, Aldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for plaintiffs in error:

The very language used in the Partidas is wholly inconsistent with the construction thereof adopted by the courts below, that land which is once seashore continues to be such even after, by reason of accretion, the high-water line has receded therefrom.

Having expressly mentioned the particular things which "belong in common to all creatures," the lawmakers have thereby impliedly said that no other things than those enumerated "belonging in common to all creatures." *Expressio unius est exclusio alterius*.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Sturges v. The Collector (Sturges v. Draper) 12 Wall. 19, 20 L. ed. 255; Arthur v. Cumming, 91 U. S. 362, 23 L. ed. 438.

The "shore" at the civil law extended to that part of the land washed by the highest tides.

Galveston v. Menard, 23 Tex. 399; Hall, Mexican Law, 448; United States v. Pacheco, 2 Wall. 587, 590, 17 L. ed. 865, 866.

The rule at common law, as under the Partidas, is that the "shore" of the sea belongs to the Crown, for the use of the public. But the rule at common law is that accretions from the sea belong to the riparian owner.

Rex v. Yarborough, 1 Dow. & C. 178, 2 Bligh, N. R. 147, 5 Bing. 163, 1 Eng. Rul. Cas. 458; 3 Kent, Com. 428; 2 Bl. Com. 262; New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573; Saulet v. Shepherd, 4 Wall. 502, 18 L. ed. 442; Banks v. Ogden, 2 Wall. 57, 17 L. ed. 818; St. Clair County v. Lovington, 23 Wall. 46, 23 L. ed. 59; Jefferies v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

Where it appears from a later statute *in pari materia* that a term is therein used in a particular sense, then it is to be presumed that, in the earlier statute, such term was used in the same sense.

Alexander v. Alexandria, 5 Cranch, 1, 3 L. ed. 19; United States v. Freeman, 3 How. 556, 11 L. ed. 724; Harrison v. Vose, 9 How. 372, 13 L. ed. 179; Harris v. Runnels, 12 How. 80, 13 L. ed. 901; Farmers' & M. 56 L. ed.

Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

The appellate court below wholly misconceived the purpose and effect of the maxim *expressio unius*, etc., as a rule of interpretation.

Hare v. Horton, 5 Barn. & Ad. 715, 2 Nev. & M. 428, 3 L. J. K. B. N. S. 41, 14 Eng. Rul. Cas. 699.

Under the rule that statutes, if doubtful, must receive a reasonable construction, it follows that, under the Partidas, the title to land formed by accretion on the borders of the sea is not in the Crown, but is in the riparian proprietor.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Beley v. Naphtaly, 169 U. S. 353, 42 L. ed. 775, 18 Sup. Ct. Rep. 354; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 187, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; New Orleans v. United States, 10 Pet. 662, 717, 9 L. ed. 573, 594; Jefferis v. East Omaha Land Co. 134 U. S. 178, 192, 33 L. ed. 872, 877, 10 Sup. Ct. Rep. 518; Banks v. Ogden, 2 Wall. 57, 67, 17 L. ed. 818, 821; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139.

The laws of Spain, as embodied in the Partidas, were drawn largely from the Institutes of Justinian.

Taylor, Science of Jurisprudence, p. 162.

The interpretation placed upon the provisions of the Roman law by the writers upon that subject ought to be followed in construing a statute of a country which has adopted such statute from the civil law.

Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; Groves v. Sentell, 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. Rep. 898; Meyer v. Richards, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. Rep. 1148.

The Roman law writers all agree that, under the provisions of the Justinian Code, accretions from the sea belong to the riparian owner.

Browne, Roman Law, 1802, 2d ed. p. 239; Hale, De Jure Maris; Lord Mackenzie, Roman Law, p. 177; Angell, Tide Waters, 2d ed. p. 249.

The doctrine of the Roman law is the same as that of the common law of England, that accretions from the sea belong to the riparian proprietor.

St. Clair County v. Lovington, 23 Wall. 46, 67, 23 L. ed. 59, 63.

Under the Partidas, accretions formed by the action of the sea, when they become dry land by reason of the recession of the high-water mark, belong to the riparian owner.

2 Amandi, Civil Code, p. 95; 6 Scaevola, Commentary on Civil Code, p. 338; Escriche, Dictionary of Law, p. 449.

Under the civil law as well as under the common law, the right to future alluvion is considered a vested right, which, once existing, cannot be taken away by any act of the lawmaking body.

Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; *St. Clair County v. Lovington*, 23 Wall. 46, 23 L. ed. 59; *Nebraska v. Iowa*, 143 U. S. 369, 36 L. ed. 190, 12 Sup. Ct. Rep. 396; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Freeland v. Pennsylvania R. Co.* 197 Pa. 529, 58 L.R.A. 206, 80 Am. St. Rep. 850, 47 Atl. 745; *Knudsen v. Omanson*, 10 Utah, 124, 37 Pac. 250.

In England what is gained to the land by gradual and imperceptible addition goes to the neighboring proprietor, while that which is gained to the shore by similar imperceptible change is added to the right of the Crown.

Bell, *Law of Scotland*, 10th ed. § 642.

The provisions of the Spanish Law of Ports of 1880 make it clear that art. 4 of the Law of Waters of 1866 does not have the effect of vesting title to accretions, which have become dry land, in the government.

Alexander v. Alexandria, 5 Cranch, 1, 3 L. ed. 19.

If the lawmakers had intended that, under the Law of Waters, accretions from the sea should be a part of the public domain, even after they had become dry land, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision.

Union Nat. Bank v. Matthews, 98 U. S. 621, 627, 25 L. ed. 188, 189; *Carino v. Philippine Islands*, 212 U. S. 449, 460, 53 L. ed. 594, 597, 29 Sup. Ct. Rep. 334.

Accretions by the sea to the land adjoining the shore belong to the owner of the adjacent land.

Guyot, *Repertoire Universelle*, cited in 2 Hall, Am. L. J. p. 324; Lavasle, cited in 2 Hall, Am. L. J. p. 328; Desinart, cited in 2 Hall, Am. L. J. p. 329; Eseriche, *Diccionario*, title, "Aluvion."

Solicitor General Lehmann argued the cause and filed a brief for defendant in error:

Spanish commentators upon the law of Spain support the position of the government.

2 Arrazola, *Enciclopedia Española*, *Decreto y Administración*, Madrid, 1849, pp. 580-583; 2 Fernandez, *Codigos 6 Estudios Fundamentales*, p. 86; 7 Alcubilla, *Diccionario de la Administración Española*,

1887, p. 108. See also 2 Marcadé, *Explication du Code Napoleon*, 5th ed. p. 439; Littré, *French Dictionary*, "lais," "alluvion;" *Zeller v. Southern Yacht Club*, 34 La. Ann. 839.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by Ker & Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley point, in the province of Cavite and island of Luzon, projecting into Manila bay. It has been formed gradually by action of the sea; all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time the property was used by the Spanish Navy, and it now is occupied by the present government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that under the *Partidas*, III., tit. 28, laws 3, 4, 6, 24, and 26, and the Law of Waters of 1866, the title to the accretions remained in the government, and the vexed question has been brought to this court.

That the question is a vexed one is shown not only by the different views of Spanish commentators, but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's *Institutes*, 2, 1, 20 (Gaius, II. 70), followed by the *Partidas*, 3, 28, 26, give the alluvial increase of river banks to the owner of the bank. If this is to be taken as an example illustrating a general principle, there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*. History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds (D. 41, 1, 12),—a rule often repeated in the civil law codes; *e. g.*, Philippine Civil Code of 1889, arts. 366, 367; Code Napoleon, art. 550; Italy, Civil Code 1865, art. 454; Mexico, art. 797. If we are to generalize, the analogy of lakes to the sea is closer than that of rivers. We find further that *In agris limitatis jus alluvionis locum non habet*. And the right of alluvion is denied for the *agrum manu captum*, which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accursius treats this as the reason for denying the *jus alluvionis*. If this reason again were generalized, it might lead to a contrary result from the

passage in the Institutes. Grotius treats the whole matter as arbitrary, to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De J. B. & P. Lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain, 2d ed. 441 ("antiquit, Puchta, Pandekten, § 165), but, so far as we have observed, this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain, 4th ed. 324, this passage seems to be accepted as a part of the law. At all events, it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine, we may add that Donellus mentions *the opinion that alluvion from the sea goes to the private owner, only to remark that the texts cited do not support it (De Jur. Civ. IV., c. 27, 1 Opera, 1828 ed. 839.n), and treats the rule of the Institutes as peculiar to rivers, as also Vin-
 nius, in his comment on the passage stating the rule, seems to do; while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Prae-
 lectiones, II., tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain, belonging to the sovereign power. Inst. II. tit. 1, 3, 4, 5. D. 43, 8, 3. Partidas, III., tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers, if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III. tit. 28. Law 31. Inst. 2. 2, 23. D. 41. 1. 7, 5. But we are less concerned with theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring, like the Partidas, that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use (arts. 1, 3), goes on thus: "Art. 4. The lands added to the

shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the *coast guard service, the[278 government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense, that is, washed by the tide, we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the government shall decide that they are not needed for the purposes mentioned, and shall declare them to belong to the adjacent estates. The later provision in article 9, that the public easement for salvage, etc., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the state, although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been, becomes almost inexpugnable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoleon, after laying down the Roman rule for alluvion in rivers (arts. 556, 557), adds at the end of the latter article: "Ce droit n'a pas lieu à l'égard des relais des la mer," which seems to have been adopted without controversy at the conférence. See further, Marcadé, Explication, 5th ed. vol. 2, p. 439. And compare 2 Hall's Am. Law Journal, 307. 324, 329. 333. The Civil Code of Italy, 1865, art. 454, is to similar effect. See also Chile, Civil Code, art. 650. The supreme court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies *the[279 private right in the case of lakes and the sea. Zeller v. Southern Yacht Club, 34 La. Ann. 837. And the provision of the Louisiana Code, art. 510, is like those of France, Italy, and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the con-

current opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course, we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed, the judgment of the court below must be affirmed.

Judgment affirmed.

Mr. Justice McKenna, dissenting:

I cannot agree with the conclusion of the court. It seems to be conceded that it is not necessarily determined by the authorities which are cited. I think the better deduction from them is that they only declare the constant integrity of the shore, and the dominion of the government over it, whether it recede or advance. When it ceases to be washed by the tides or the seas, it becomes part of the upland, and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks v. Ogden*, 2 Wall. 57, 67, 17 L. ed. 818, 821.

280]* *ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY*, Plff. in Err.,

v.

TIMOTHY O'CONNOR.

(See S. C. Reporter's ed. 280-287.)

Foreign corporations — state taxation — excluding from doing local business — commerce — due process of law.

1. The tax imposed under Colo. Laws 1907, chap. 211, upon the capital stock of a foreign railway company, the greater part of whose property and business is outside the state, and whose business done within the state is principally interstate commerce, is invalid under the commerce and due process of law clauses of the Federal Constitution, even if the temporary forfeiture of the right to do business, declared by the statute in case of failure to pay the tax, can be

confined by construction to business wholly within the state.

[For other cases, see *Corporations*, XII. b, 2; *Commerce*, 250-255; *Constitutional Law*, 536-540, in *Digest Sup. Ct.* 1908.]

Taxes — payment under protest — recovery back.

2. Payment of the unconstitutional tax imposed under Colo. Laws 1907, chap. 211, upon the capital stock of a foreign railway company whose business is principally interstate commerce, cannot be deemed voluntary, so as to defeat an action to recover it back, where the company, failing to pay the tax, would incur the risk of having its contracts disputed and its business injured by reason of the forfeiture clause in such statute, and of finding the tax greatly increased in case it finally had to pay.

[For other cases, see *Taxes*, 608-612, in *Digest Sup. Ct.* 1908.]

Taxes — recovering back — liability of officer to suit.

3. The secretary of state who collects and retains the unconstitutional tax imposed by Colo. Sess. Laws 1907, chap. 211, upon the capital stock of a foreign railway company engaged principally in interstate commerce, is liable to a suit to recover back the tax, as paid under duress and protest,—especially in view of the provisions of § 6, that, if it shall be judicially determined that any corporation has erroneously paid the tax, the auditor may draw a warrant for its refunding upon the filing of a certified copy of the judgment.

[Recovery back of taxes paid under protest, see *Taxes*, 608-612, in *Digest Sup. Ct.* 1908.]

[No. 162.]

Argued January 24 and 25, 1912. Decided February 19, 1912.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment sustaining a demurrer to the complaint in a suit to recover back a tax upon the capital stock of a foreign railway company. Reversed.

The facts are stated in the opinion.

Mr. Robert Dunlap argued the cause, and, with Messrs. H. T. Rogers and Gardiner Lathrop, filed a brief for plaintiff in error:

Payment of the tax by plaintiff was involuntary.

NOTE.—On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L.R.A. 641.

On the recognition or exclusion of foreign corporations—see notes to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 289, and *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

State licenses or taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.R.A. 366; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A.

179; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 217; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311; and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

As to when taxes illegally assessed may be recovered back—see note to *Erskine v. Van Arsdale*, 21 L. ed. U. S. 63.

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Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Robertson v. Frank Bros. Co. 132 U. S. 17, 23, 33 L. ed. 236, 238, 10 Sup. Ct. Rep. 5; United States v. Edmondston, 181 U. S. 505, 506, 45 L. ed. 974, 975, 21 Sup. Ct. Rep. 718; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; Philadelphia v. The Collector (Philadelphia v. Diehl) 5 Wall. 720, 18 L. ed. 614; Herold v. Kahn, 86 C. C. A. 598, 159 Fed. 608; Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; Steele v. Williams, 8 Exch. 625, 22 L. J. Exch. N. S. 225, 17 Jur. 464; Ratterman v. American Exp. Co. 49 Ohio St. 608, 32 N. E. 754; Catoir v. Watterson, 38 Ohio St. 319; United States v. Rothstein, 109 C. C. A. 521, 187 Fed. 268; Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A. (N.S.) 770, 75 N. E. 803; State ex rel. McCarty v. Nelson, 41 Minn. 27, 4 L.R.A. 300, 42 N. W. 548; Brisbane v. Dacres, 5 Taunt. 153, 14 Revised Rep. 718; Dew v. Parsons, 2 Barn. & Ald. 562, 1 Chitty, 295, 21 Revised Rep. 404; Atkinson v. Denby, 6 Hurlst. & N. 778; Morgan v. Palmer, 2 Barn. & C. 734, 4 Dowl. & R. 283, 2 L. J. K. B. 145, 26 Revised Rep. 537; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 527; Baker v. Cincinnati, 11 Ohio St. 538; Hendy v. Soule, 1 Deady, 400, Fed. Cas. No. 6,359; Harvey v. Olney, 42 Ill. 336.

The officer who, under color of office, exacts and receives an illegal fee or charge, is not protected by law, because he acts without the law, and is therefore personally liable, especially if notified at the time that suit will be brought to recover back the amount.

Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; Steele v. Williams, 8 Exch. 625, 22 L. J. Exch. N. S. 225, 17 Jur. 464; Ripley v. Gelston, 9 Johns. 201, 6 Am. Dec. 271; First Nat. Bank v. Watkins, 21 Mich. 489; Ogden v. Maxwell, 3 Blatchf. 319, Fed. Cas. No. 10,458; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373.

The action is properly maintainable against defendant individually, as he made the illegal demand and received the money with notice of protest. It is alleged he still retains the money, but that is not important. He could protect himself and will in fact be protected. He should be held liable because the state could not be sued and plaintiff would be remediless. This action under an unconstitutional statute is not that of the state. It is unlawful, and he cannot set up the statute, because, being
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void, it affords no lawful authority or protection.

Poindexter v. Greenhow, 114 U. S. 270, 286-291, 29 L. ed. 185, 191-193, 5 Sup. Ct. Rep. 903, 962.

This court has held in two cases that injunction to restrain the collection of a license tax would not be maintainable because plaintiff might pay under protest and recover back at law.

Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

Mr. Archibald A. Lee, Deputy Attorney General of Colorado, argued the cause, and, with Mr. Benjamin Griffith, Attorney General, filed a brief for defendant in error:

The payment by plaintiff was voluntary and is not recoverable.

Radich v. Hutchins, 95 U. S. 210, 213, 24 L. ed. 409, 410; Union P. R. Co. v. Dodge County, 98 U. S. 541, 543, 25 L. ed. 196, 197; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Chesebrough v. United States, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; Oceanic S. S. Co. v. Tappan, 16 Blatchf. 296, Fed. Cas. No. 10,405; Benson v. Monroe, 7 Cush. 131, 54 Am. Dec. 716; Wolfe v. Marshal, 52 Mo. 170; Baltimore v. Lefferman, 4 Gill, 425, 45 Am. Dec. 145; Johnson v. Crook County, 53 Or. 329, 133 Am. St. Rep. 834, 100 Pac. 294; San Francisco & N. P. R. Co. v. Dinwiddie, 8 Sawy. 312, 13 Fed. 789; 2 Cooley, Tax. 3d ed. pp. 1495-1501; 30 Cyc. 1311; Manning v. Poling, 114 Iowa, 24, 83 N. W. 895, 86 N. W. 30; Wessel v. D. S. B. Johnston Land & Mortg. Co. 3 N. D. 162, 44 Am. St. Rep. 529, 54 N. W. 922; DeGraff v. Ramsey County, 46 Minn. 319, 48 N. W. 1135; Maxwell v. San Luis Obispo County, 71 Cal. 466, 12 Pac. 484; Southern R. Co. v. Florence, 141 Ala. 493, 37 So. 844, 3 Ann. Cas. 106; Betts v. Reading, 93 Mich. 77, 52 N. W. 940; C. & J. Michel Brewing Co. v. State, 19 S. D. 302, 70 L.R.A. 911, 103 N. W. 40; Weber v. Kirkendall, 44 Neb. 770, 63 N. W. 35.

The plaintiff could have enjoined any effort to enforce the collection of the tax.

Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280.

Money paid to an official under compulsion cannot be recovered from him individually in an action for money had and received, for it was received, not to the use or for the

benefit of the individual making the payment, but for the use and benefit of the state or other body or principal for whom the collection is made.

Davis v. Bader, 54 Mo. 169; Fish v. Higbee, 22 R. I. 223, 47 Atl. 212; King v. United States, 99 U. S. 229, 25 L. ed. 373; Loring v. Frue, 104 U. S. 223, 26 L. ed. 713; Waters v. State, 1 Gill, 308.

285] *Mr. Justice Holmes delivered the opinion of the court:

This is an action to recover taxes paid under duress and protest, the plaintiff contending that the law under which the tax was levied is unconstitutional. A demurrer to the declaration was sustained by the circuit court. The tax is a tax of 2 cents upon each one thousand dollars of the plaintiff's capital stock. Session Laws of Colorado, 1907, chap. 211. The plaintiff is a Kansas corporation. The greater part of its property and business is outside of the state of Colorado, and of the business done within that state but a small proportion is local, the greater part being commerce among the states. Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the state. *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280. The defendant did not argue that the tax could be maintained, but contended only that the payment was voluntary, and that the defendant is not the proper person to be sued.

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense; but when, as is common, the state has a [286] more summary remedy, such as *distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But

even if the state is driven to an action, if, at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms. See *Ex parte Young*, 209 U. S. 123, 146, 52 L. ed. 714, 723, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. If he should seek an injunction on the principle of that case and of *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286, he would run the same risk as if he waited to be sued.

In this case the law, besides giving an action of debt to the state, provides that every corporation that fails to pay the tax shall forfeit its right to do business within the state until the tax is paid, and also shall pay a penalty of 10 per cent for every six months or fractional part of six months of default after May 1 of each year. It may be that the forfeiture of the right to do business would not be authoritatively established except by a quo warranto provided for in a following section, but before or without the proceeding, the effect of the forfeiture clause upon the plaintiff's subsequent contracts and business might be serious (see *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280), and in any event the penalty would go on accruing during all the time that might be spent before the validity of the defense could be adjudged. As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured, and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the payment *was made under duress. See [287] *Gaar, S. & Co. v. Shannon*, decided this day. [223 U. S. 468, post, 510, 32 Sup. Ct. Rep. 236.]

The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that the plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. ed. 63. See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money, as soon as collected, belonged to the state.

Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum. Moreover, it would seem that the statute contemplated the course taken by the plaintiff, and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax. For it provides by § 6 that "if it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State," upon the filing of a certified copy of the judgment the auditor may draw a warrant for the refunding of the tax, and the state treasurer may pay it. We must presume that a judgment in the present action would satisfy the law.

Judgment reversed.

288] *IRA W. COLLINS, Plff. in Err.,

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 288-298.)

Constitutional law — due process of law — equal protection of the laws — licensing physicians — osteopaths.

1. The requirements of Tex. Laws 1907, chap. 123, with respect to licensing and

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to *Pugh v. Pugh*, 32 L.R.A.(N.S.) 954.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme 56 L. ed.

registering medical practitioners, which do not contemplate any inquiry into the applicant's knowledge of therapeutics or materia medica, do not infringe the rights, under U. S. Const., 14th Amend., of a person holding a diploma from a school of osteopathy, who has not presented this diploma to the board of medical examiners created by the statute, or attempted to secure a license in any form.

[For other cases, see Constitutional Law. IV. a, 5, a; IV. b, 7, a, in Digest Sup. Ct. 1908.]

Statutes — who may question validity.

2. An osteopath whose constitutional rights are not infringed by the requirements of Tex. Laws 1907, chap. 123, with respect to registering and licensing medical practitioners, cannot complain that the statute may be unconstitutional in other cases, or as to followers of Christian Science, or others.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — statutory construction.

3. The ruling of the state court that osteopaths are persons practising medicine, within the meaning of Tex. Laws 1907, chap. 123, providing for licensing and registering medical practitioners, will be followed by the Federal Supreme Court in determining the constitutionality of such statute on writ of error to the state court.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Physicians — licensing — osteopaths — scientific training.

4. The state may constitutionally require, as is done by Tex. Laws 1907, chap. 123, that osteopaths professing to help certain human ailments by scientific manipulation affecting the nerve centers shall have had a scientific training.

[For other cases, see Physicians and Surgeons, in Digest Sup. Ct. 1908.]

Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

As to what constitutes practising medicine within the state—see note to *Missouri v. Davis*, 4 L.R.A.(N.S.) 1023.

As to application of statutes regulating the practice of medicine to persons giving special kinds of treatment—see notes to *State v. Smith*, 33 L.R.A.(N.S.) 179; *Witty v. State*, 25 L.R.A.(N.S.) 1297; *State v. Bresee*, 24 L.R.A.(N.S.) 103; and *O'Neil v. State*, 3 L.R.A.(N.S.) 763.

On determining character or standing of professional school or college for purpose of license statutes—see note to *State ex rel. Mauldin v. Matthews*, 22 L.R.A.(N.S.) 735.

Physicians — licensing — single treatment.

5. The state legislature, when prohibiting the general practice of medicine for money by persons not licensed or registered, under Tex. Laws 1907, chap. 123, could constitutionally attach the same condition to a single transaction of a kind not likely to occur otherwise than as an instance of a general practice, such as the treatment of a single patient for hay fever by osteopathy.

[For other cases, see *Physicians and Surgeons*, in Digest Sup. Ct. 1908.]

Physicians — licensing — paid and gratuitous services.

6. The distinction between gratuitous medical services and those paid for, made by Tex. Laws 1907, chap. 123, providing for registering and licensing medical practitioners who charge a compensation for services, does not render the statute repugnant to the Federal Constitution.

[For other cases, see *Physicians and Surgeons*, in Digest Sup. Ct. 1908.]

Physicians — licensing established business.

7. The prohibition against the practice of medicine by persons not licensed or registered, which is made by Tex. Laws 1907, chap. 123, is not invalid as to one who had an established business when the law was passed.

[For other cases, see *Physicians and Surgeons*, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — habeas corpus.

8. The Federal Supreme Court will review by writ of error a decision of a state court, refusing habeas corpus to a person in custody upon the charge of practising medicine without complying with the requirements of Tex. Laws 1907, chap. 123, with respect to licensing and registration, where, the facts being admitted, the question of the validity of that statute under the Federal Constitution appears as plainly as it ever will.

[For other cases, see *Appeal and Error*, 1143, 1144, in Digest Sup. Ct. 1908.]

[No. 165.]

Argued January 25 and 26, 1912. Decided February 19, 1912.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a judgment of the County Court of El Paso County in that state, refusing relief by habeas corpus to a person in custody upon the charge of practising osteopathy without a license. Affirmed.

See same case below, 57 Tex. Crim. Rep. 2, 121 S. W. 501.

The facts are stated in the opinion.

Mr. Millard Patterson argued the cause, and, with Mr. John F. Woodson, filed a brief for plaintiff in error:

The Texas statute in question is unconstitutional.

Dent v. West Virginia, 129 U. S. 114-128, 32 L. ed. 623-628, 9 Sup. Ct. Rep. 231; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Nelson v. State Bd. of Health*, 108 Ky. 769, 50 L.R.A. 383, 57 S. W. 501; *State v. Mylod*, 20 R. I. 632, 41 L.R.A. 428, 40 Atl. 753, 11 Am. Crim. Rep. 238; *State v. Biggs*, 133 N. C. 729, 64 L.R.A. 139, 98 Am. St. Rep. 731, 46 S. E. 401; *Bennett v. Ware*, 4 Ga. App. 293, 61 S. E. 546; *State v. Liffing*, 61 Ohio St. 39, 46 L.R.A. 334, 76 Am. St. Rep. 358, 55 N. E. 168, 15 Am. Crim. Rep. 516; *State v. McKnight*, 131 N. C. 717, 59 L.R.A. 187, 42 S. E. 580; *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

Mr. Jewell P. Lightfoot, Attorney General of Texas, argued the cause, and, with Mr. James D. Walthall, First Assistant Attorney General, filed a brief for defendant in error:

The power of a state to make reasonable provisions for determining the qualifications of those engaged in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is firmly settled.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 195, 42 L. ed. 1005, 18 Sup. Ct. Rep. 573; *Gray v. Connecticut*, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; *Foster v. Police Comrs.* 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Meffert v. State Bd. of Medical Registration (Meffert v. Packer)* 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *State ex rel. Feller v. State Medical Examiners*, 34 Minn. 391, 26 N. W. 125.

There is no vested right to practise either the medical or legal profession, free from supervision and regulation by the state.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.

The 14th Amendment to the Constitution of the United States does not prohibit the state, in the exercise of its police power, to

pass and enforce such law as, in its judgment, will promote the health, morals, and general welfare of the people.

People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245.

The constitutionality of statutes regulating the admission of members of the various branches of the medical profession has frequently been passed upon by the courts, and they have been uniformly upheld as a valid exercise of the police power of the state, infringing no provisions of either Federal or state Constitutions.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *People v. Reetz*, 127 Mich. 87, 86 N. W. 396, affirmed in 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; 22 Am. & Eng. Enc. Law, 2d ed. 780, 781; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Eastman v. State*, 109 Ind. 281, 58 Am. Rep. 400, 10 N. E. 97; *State v. Creditor*, 44 Kan. 568, 21 Am. St. Rep. 306, 24 Pac. 346; *Craig v. State Medical Examiners*, 12 Mont. 211, 29 Pac. 532; *State ex rel. Hygea Medical College v. Coleman*, 64 Ohio St. 377, 55 L.R.A. 105, 60 N. E. 568; *Allopathic State Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809; *People v. Moorman*, 86 Mich. 433, 49 N. W. 263; *State ex rel. Burroughs v. Webster*, 150 Ind. 616, 41 L.R.A. 212, 50 N. E. 750; *Williams v. People*, 121 Ill. 87, 11 N. E. 881; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 325, 50 Am. Rep. 575, 20 N. W. 238; *Thompson v. Staats*, 15 Wend. 395; *Hewitt v. Charier*, 16 Pick. 353; *State v. Hale*, 15 Mo. 606; *Bibber v. Simpson*, 59 Me. 181; *Dankworth v. State*, — Tex. Crim. Rep. —, 136 S. W. 788.

The statute does not provide for an unreasonable and unjust classification.

Parks v. State, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862.

One who practises what is known as osteopathy is a practitioner of medicine.

Little v. State, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325. See also *State v. Edmunds*, 127 Iowa, 333, 101 N. W. 431; *State v. Wilhite*, 132 Iowa, 226, 109 N. W. 730, 11 Ann. Cas. 180.

The giving of Christian Science treatment for a fee for the cure of disease is practising medicine within the meaning of the statutes regulating such practise in the state of Ohio.

State v. Marble, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 191, 64 N. E. 862.

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Mr. C. E. Lane, Assistant Attorney General of Texas, with Messrs. James N. Wilkerson, Timothy J. Scofield, and Frank J. Loesch, also filed a brief for defendant in error:

The act under consideration does not violate that part of § 1 of the 14th Amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

A. This prohibition applies only to those privileges and immunities which are incident to citizenship of the United States, as distinguished from citizenship of the several states.

Slaughter-House Cases, 16 Wall. 36, 74, 21 L. ed. 394, 408; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Hall v. Cuir*, 95 U. S. 485, 24 L. ed. 547; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580.

B. The right to practise medicine without regulation is not one of the privileges and immunities incident to citizenship of the United States.

Slaughter-House Cases, 16 Wall. 36, 74, 21 L. ed. 394, 408; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

This act was passed under the police power of the state of Texas and is a proper exercise of that power in scope and purpose. The details of such legislation rest primarily within the discretion of the state legislature. This court can only interfere when fundamental rights guaranteed under the Federal Constitution are violated by such statutes.

Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *State v. Smith*, 233 Mo. 242, 33 L.R.A.(N.S.) 179, 135 S. W. 465; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 212, 50 N. E. 750; *Bragg v. State*,

134 Ala. 165, 58 L.R.A. 925, 32 So. 767; *State v. Buswell*, 40 Neb. 158, 24 L.R.A. 68, 58 N. W. 728; *Little v. State*, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; *State v. Marble*, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *People v. Allcutt*, 117 App. Div. 546, 102 N. Y. Supp. 678, affirmed in 189 N. Y. 517, 81 N. E. 1171; *People v. Mulford*, 140 App. Div. 716, 125 N. Y. Supp. 680, affirmed in 202 N. Y. 624, 96 N. E. 1125; *People v. Reetz*, 127 Mich. 87, 86 N. W. 396; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *State v. Miller*, 146 Iowa, 521, 124 N. W. 167; *State v. Adkins*, 145 Iowa, 671, 124 N. W. 627; *State v. Wilhite*, 132 Iowa, 226, 109 N. W. 730, 11 Ann. Cas. 180; *State v. Edmunds*, 127 Iowa, 333, 101 N. W. 431; *State v. Heath*, 125 Iowa, 585, 101 N. W. 429; *State v. Bair*, 112 Iowa, 466, 51 L.R.A. 776, 84 N. W. 532; *Scholle v. State*, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; *State v. Yegge*, 19 S. D. 234, 69 L.R.A. 504, 103 N. W. 17, 9 Ann. Cas. 202.

The provisions of this statute are not such as result in any arbitrary deprivation of plaintiff in error's liberty or property, or of his right to engage in a lawful calling.

1. The qualifications of learning, skill, and character required by such acts depend primarily upon the judgment of the state as to their necessity. They are in this case appropriate to the profession of healing, and are attainable by reasonable study and application, and no objection can be made to them merely on account of their stringency or difficulty.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; *State v. Bair*, 112 Iowa, 466, 51 L.R.A. 776, 84 N. W. 532; *State v. Heath*, 125 Iowa, 585, 101 N. W. 429; *State v. Marble*, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *Com. v. Porn*, 196 Mass. 326, 17 L.R.A.(N.S.) 94, 82 N. E. 31, 13 Ann. Cas. 569.

2. The statute is general in its operation upon the subjects to which it relates. The classification as to persons who shall be regarded as "practising medicine" thereunder, their qualification, etc., is reasonable, and not arbitrary or capricious. It has a

logical relation to the ends sought to be attained by the statute, and applies equally to all persons similarly situated.

Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *State v. Smith*, 233 Mo. 242, 33 L.R.A.(N.S.) 179, 135 S. W. 465; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862.

3. The provisions and regulations of the statute are enforceable in the usual mode established in the administration of government with respect to kindred matters,—that is, by proceedings adapted to the nature of the case. Due process is not necessarily judicial process. The power reposed by the statute in the board of medical examiners is proper, and no point is raised as to any arbitrary, capricious, or unfair action of the board.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790, affirming 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 212, 50 N. E. 750; *Bragg v. State*, 134 Ala. 165, 58 L.R.A. 925, 32 So. 767; *State v. Miller*, 146 Iowa, 525, 124 N. W. 167; *State v. Buswell*, 40 Neb. 158, 24 L.R.A. 68, 58 N. W. 728; *Re Bandel*, 193 N. Y. 133, 21 L.R.A.(N.S.) 49, 85 N. E. 1067; *McGehee*, *Due Process of Law*, 52.

This court is not concerned with the wisdom or policy of the act, so long as the act fairly secures or tends to secure the objects sought to be attained by it, and is not patently unreasonable.

Otis v. Parker, 187 U. S. 606, 608, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Hawker v. New York*, 170 U. S. 189, 197, 42 L. ed. 1002, 1006, 18 Sup. Ct. Rep. 573; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 216, 50 N. E. 750; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 195, 64 N. E. 862.

The state legislature has the power to make regulations of the character involved herein, and the details of such legislation rest primarily within the discretion of the state legislature.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Reetz v. Michigan*, 188 U. S. 505, 507, 47 L. ed. 563, 565, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 192, 42 L. ed. 1002, 1004, 18 Sup.

Ct. Rep. 573; *Meffert v. Paeker*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865.

The classification made in the statute is not arbitrary, unreasonable, or oppressive, and was within the legislative power of the state, as having a fair relation to the objects of the statute. Within the sphere of its operation it affects alike all persons similarly situated.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 212, 50 N. E. 750; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; *People v. Allcutt*, 117 App. Div. 546, 102 N. Y. Supp. 678, affirmed in 189 N. Y. 517, 81 N. E. 1171; *Little v. State*, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549; *Com. v. Jewelle*, 199 Mass. 558, 85 N. E. 858; *Scholle v. State*, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; *Bragg v. State*, 134 Ala. 165, 58 L.R.A. 925, 32 So. 767; *State v. Bair*, 112 Iowa, 466, 51 L.R.A. 776, 84 N. W. 532; *State v. Marble*, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Plaintiff in error does not and cannot, on the record in this case, contend that the board of medical examiners of Texas has been guilty of any unfair or unjust action toward him. His contentions are based upon fancied inequalities of the statute which arise only on his own theory of how the act would have been construed by the board had he in fact requested from it authority to practise, or the right to take an examination as provided by the act.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 509, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *State v. Miller*, 146 Iowa, 521, 124 N. W. 167; *People v. Apfelbaum*, 251 Ill. 27, 95 N. E. 995; *Meffert v. State Bd. of Medical Registration (Meffert v. Paeker)* 66 Kan. 710, 1 L.R.A. (N.S.) 811, 72 Pac. 247, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790.

While the construction of the act by the court of criminal appeals of the state of Texas may not, perhaps, be in all respects
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conclusive upon this court, that construction is one toward which this court will lean.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 101, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609; *Watson v. Maryland*, 218 U. S. 173, 175, 54 L. ed. 987, 989, 30 Sup. Ct. Rep. 644; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 385, 38 L. ed. 751, 754, 14 Sup. Ct. Rep. 894; *Baltimore Traction Co. v. Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; *McGehee, Due Process of Law*, 37, 30, 306, note 7.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to the Texas court of criminal appeals upon a judgment denying the plaintiff in error a release by habeas corpus. The plaintiff in error is held upon an information charging him with practising medicine for money by treating a named patient for hay fever by osteopathy, without having registered his authority, as required by a Texas statute of 1907, chap. 123. He denies the constitutionality of the act.

The statute establishes a board of medical examiners, and requires "all legal practitioners of medicine in this state, who, practising under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a state medical examining board of this state," to prove their diplomas, or existing license, or exemption existing under any law; whereupon they are to receive a verification license. § 6. By § 7, applicants not licensed under § 6 must pass an examination; conditioned, among other things, on their being graduates of "bona fide reputable medical schools;" schools to be considered reputable "whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each." By § 9 the examinations are to be fair to every school of medicine, are to be conducted on the scientific branches of medicine only, and are to include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and *medical jurisprudence.[295] Those who pass are to be granted licenses to practise medicine. By § 10 nothing in the act is to be construed to discriminate against any particular system, and the act is not to apply to dentists legally registered and confining themselves to dentistry, nurs-

es who practice only nursing, masseurs, or surgeons of the United States Army, Navy, etc., in the performance of their duties.

The only other material sections of the act are §§ 13 and 14, the former of which declares that "any person shall be regarded as practising medicine within the meaning of this act. . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation." By § 14 any person practising medicine in violation of the act is punished by fine and imprisonment, and is not to recover anything for the services rendered.

The facts charged against the plaintiff in error are admitted. It also is admitted that before the passage of the statute he had spent \$5,000 in fitting up his place, and was deriving a net income from his calling of at least the same sum. He held a diploma from the chartered American School of Osteopathy, Kirksville, Missouri, after a full two years' course of study there, but it does not appear that he presented this diploma to the board of medical examiners, or attempted to secure either a verification license or license in any form. The board, in passing upon qualifications, does not examine in therapeutics or materia medica, which, it will be observed, are not mentioned in the act. On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him, contrary to the 14th Amendment of the Constitution of the United States. If he has not suffered, we are not called upon to speculate upon other 296]cases, or *to decide whether the followers of Christian Science or other people might, in some event, have cause to complain.

We are far from agreeing with the plaintiff in error that the definition of practising medicine in § 13 is arbitrary or irrational, but it would be immaterial if it were, as its only object is to explain who fall within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practises what at least purports to be the healing art. The state constitutionally may prescribe conditions to such practice, considered by it to be necessary or useful to secure competence in those who follow it. We should presume, until the Texas courts say otherwise, that the reference in § 4 to the diploma of a reputable and legal college of medicine, and the confining in § 7 of examinations to

graduates of reputable medical schools, use the words "medicine" and "medical" with the same broad sense as § 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practising medicine, you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent v. West Virginia*, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231.

An osteopath professes—the plaintiff in error professes, as we understand it—to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible, therefore, that the state should require of him a scientific training. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. He, like others, *must[297 begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy,—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the state requires him to prove. The same considerations that justify including him justify excluding the lower grades from the law. *Watson v. Maryland*, 218 U. S. 173, 179, 180, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644. Again it is not an answer to say that the plaintiff in error is prosecuted for a single case. If the legislature may prohibit a general practice for money except on the condition stated, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of a general practice. A distinction between gratuitous and paid-for services was made in the Maryland statute sustained in *Watson v. Maryland*, 218 U. S. 173, 178, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644. Finally, the law is not made invalid as against the plaintiff in error by the fact that he had an established business when the law was passed. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 510, 47 L. ed. 563, 567, 23 Sup. Ct. Rep. 390.

The objections that prevailed against a writ of error like this in *Bailey v. Alabama*,

211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141, do not exist here. There, as here, it was attempted to interrupt the ordinary course of a trial by habeas corpus, and there, as here, the state allowed the attempt, and discharged the writ on the merits. But in that case it did not appear that the constitutional question relied upon had arisen or necessarily would arise, although afterwards it did. 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145. But here the facts are admitted, the question appears as plainly as it ever will, and is supposed to go to the jurisdiction of the court. Therefore we have discussed the case on the merits; perhaps more than it needed, in view of the decisions cited and others that establish the right of the state to adopt a policy 298]even upon *medical matters concerning which there is difference of opinion and dispute. *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765. See also *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865.

Judgment affirmed.

LEO MEYER, as Auditor of the State of
Oklahoma, Appt.,
v.

WELLS, FARGO, & COMPANY.

(See S. C. Reporter's ed. 298-302.)

Taxation of nonresident express company — gross receipts — property in several states — commerce.

1. A nonresident express company whose receipts are largely derived from interstate commerce and from investments in bonds and land outside the state cannot validly be subjected to the "gross revenue tax" exacted by Okla. Laws 1910, chap. 44, from public-service corporations, "which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation," equal to such proportion of a specified per-

centage of its gross receipts from every source whatsoever as the portion of its business done within the state bears to the whole of its business.

[For other cases, see *Commerce*, 227-241, 264-272; *Taxes*, 268-274, 536-548, in *Digest Sup. Ct. 1908*.]

Injunction — against illegal taxation — tender.

2. A tender of so much of the tax as would have fallen on the receipts from commerce wholly within the state is not a prerequisite to injunctive relief against the collection from a nonresident express company whose receipts are largely derived from interstate commerce and from investments outside the state of the "gross revenue tax" exacted by Okla. Laws 1910, chap. 44, from public-service corporations, "which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation" equal to such proportion of a specified percentage of its gross receipts from every source whatsoever as the portion of its business done within the state bears to the whole of its business.

[For other cases, see *Injunction*, 171-179, in *Digest Sup. Ct. 1908*.]

Statutes — invalid in part.

3. The "gross revenue tax" exacted from a nonresident express company by Okla. Laws 1910, chap. 44, "which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation" equal to such proportion of a specified percentage of its gross receipts from every source whatsoever as the portion of its business done within the state bears to the whole of its business, cannot be construed, for the purpose of saving its constitutionality, as referring only to the receipts from commerce wholly within the state.

[For other cases, see *Statutes*, I. d. 4, in *Digest Sup. Ct. 1908*.]

[No. 624.]

Argued January 16, 1912. Decided February 19, 1912.

APPEAL from the Circuit Court of the United States for the Western District of Oklahoma to review a decree enjoining the collection of a tax upon the gross receipts of a nonresident express company. Affirmed.

The facts are stated in the opinion.

NOTE.—On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L.R.A. 641.

State licenses or taxing as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.R.A. 366; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 217; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal* 56 L. ed.

Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

As to the necessity for payment of tax due where injunction is sought against illegal taxation—see note to *People's Nat. Bank v. Marye*, 48 L. ed. U. S. 180.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363, and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for appellant:

A construction in conflict with the Federal Constitution will not be adopted if any other construction is possible.

Butler v. Pennsylvania, 10 How. 415, 13 L. ed. 478; *Nashville v. Cooper*, 6 Wall. 251, 18 L. ed. 852.

A plain tax on public-service property as a condition of taking tolls from the public for the service, in lieu of other excise, franchise, or income tax, will not be held an interference with interstate commerce, though the measure be laid on all commerce done by the company.

McHenry v. Alford, 168 U. S. 652, 670, 42 L. ed. 615, 621, 18 Sup. Ct. Rep. 242; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 34 Sup. Ct. Rep. 342.

The substantial effect and intent, and whether in lieu of an excise tax, is the basis upon which all the decisions harmonize.

State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164; *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Fargo v. Michigan* (*Fargo v. Stevens*) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Ficklen v. Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *McHenry v. Alford*, 168 U. S. 670, 42 L. ed. 621, 18 Sup. Ct. Rep. 242; *Wisconsin & N. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

Does the act apply to interstate receipts? *McHenry v. Alford*, 168 U. S. 651, 670, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Injunction should be refused where taxes due are not paid.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. ed. 663, 674; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194.

Mr. S. T. Bledsoe argued the cause, and, with Messrs. J. R. Cottingham and C. W. Stockton, filed a brief for appellee:

The Oklahoma gross revenue act taxes directly the receipts from interstate commerce as such, and is void for that reason.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; *Galveston, H. & S. A. R. Co. v. Davidson*, — Tex. Civ. App. —, 93 S. W. 436; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1–24, 54 L. ed. 355–364, 30 Sup. Ct. Rep. 190; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. 232, 21 L. ed. 146; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Fargo v. Michigan* (*Fargo v. Stevens*) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

Upon the face of the act it does not purport to be either a privilege or occupation tax, nor does it have any of the earmarks of such tax. If it is in fact a privilege or occupation tax upon the right of the complainant to engage in transportation of interstate commerce in the state of Oklahoma, then it is void as a regulation of commerce.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; *Kehrer v. Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep.

190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill for an injunction against a tax alleged to be unconstitutional as a regulation of commerce among the states. Upon demurrer, three judges sitting in the circuit court granted the injunction, and the defendant appealed to this court. The statute in question is entitled, "An Act Providing for the Levy and Collection of a Gross Revenue Tax from Public-Service corporations in This State," and from persons engaged in certain mining and similar occupations. By § 2: "Every corporation hereinafter named shall pay the state a gross revenue tax . . . which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public-service corporation operate wholly within the state, and if such public-service corporation operate partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business;" with a proviso for fixing a different proportion if it "more fairly represents 300]the proportion which *the gross receipts of any such public-service corporation for any year within this state bear to its total gross receipts." By § 3 the per centum to be paid by express companies (such as the plaintiff is) is 3 per cent of the gross receipts, and, "for the purpose of determinating the amount of such tax," they are required to report under oath the gross receipts "from every source whatsoever."

The plaintiff's receipts are largely from commerce among the states, and it also receives large sums as income from investments in bonds and land all outside the state of Oklahoma. So that it is evident that if the tax is what it calls itself, it is bad on the former ground, and that whatever it is, it is bad on the latter. *Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts, increased by the special outside sources of income, and tax-

ing a proportion of this total fixed by the ratio of business within the state to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, as to show that, if one is not copied from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that.

It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session, this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is "in addition to the taxes levied and collected upon *an ad valorem basis." Even if we[301 read the words which follow without a comma, viz., "upon the property and assets of such corporation," as not qualifying those which immediately precede, but as attempting to characterize the "gross revenue tax" as a tax on such property and assets, nevertheless all the property and assets are the subject of the ad valorem taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, given in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; *Flint v. Stone Tracy Co.* 220 U. S. 107, 162-165, 55 L. ed. 389, 417-419, 31 Sup. Ct. Rep. 342, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above, on the authority of *Fargo v. Hart*, supra, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the state. We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the state.

We do not gather that the appellant has any objection to testing the validity of this tax in an equity suit, or that any such objection was made below. *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604.

Therefore we do not consider whether there are any facts to take the case out of the general rule established by the cases collected in *Boisé Artesian Hot & Cold Water Co. v. Boisé City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426. See *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286. It was ob-302]jected, however, that "the bill cannot be maintained for want of a tender of so much of the tax as would have fallen on the receipts from commerce wholly within the state. But that requirement hardly can be made in this case, which is not like one where the law simply fails to allow certain proper deductions. *People's Nat. Bank v. Marye*, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68. Whether the statute could be construed as separable, of course, would be ultimately for the state court in any event. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067. But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all (*Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127); it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the state has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent.

Decree affirmed.

303]*JOHN POWERS, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 303-316.)

Appeal — scope of review — objection not seasonably taken.

1. The objection that there was no venire

NOTE. — On constitutional protection against being forced to furnish evidence to be used against one's self in a criminal case—see note to *Levy v. Superior Ct.* 29 L.R.A. 811.

On statutory exemption from prosecution as a substitute for constitutional exemption from self-crimination—see notes to *Re Buskett*, 14 L.R.A. 407, and *United States v. James*, 26 L.R.A. 418.

facias summoning the grand jury is not available on a writ of error to review a conviction, where there is nothing in the record to show that this objection, if tenable at all, was taken before plea, or, indeed, at any time during the trial.

[For other cases, see *Appeal and Error*, VIII. j, in *Digest Sup. Ct.* 1908.]

Appeal — in criminal case — review — objections to grand jury.

2. The recital in an indictment that the grand jury was selected, impaneled, sworn, and charged, and that they on their oaths present, etc., is enough, upon proceedings in error after conviction, to show the proper swearing of the grand jury.

[For other cases, see *Appeal and Error*, VIII. a; VIII. d, in *Digest Sup. Ct.* 1908.]

Indictment — sufficiency to support conviction — one good count.

3. One good count in an indictment containing several counts will support a general conviction.

[For other cases, see *Indictment*, II. g; *Trial*, 861-867, in *Digest Sup. Ct.* 1908.]

Appeal — in criminal case — review — objection to petit jury.

4. The record sufficiently discloses, upon proceedings in error after conviction, that the petit jury was duly sworn, where it recites that they were "called and impaneled," and "being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, and upon their oaths do say," etc.

[For other cases, see *Appeal and Error*, VIII. a; VIII. d, in *Digest Sup. Ct.* 1908.]

Criminal law — self-crimination — voluntary testimony.

5. The admission in evidence at the trial of the testimony of the accused, voluntarily and understandingly given at the preliminary hearing, does not violate his privilege against self-crimination accorded by U. S. Const., 5th Amend., although he was not warned at the time that what he said might be used against him.

[For other cases, see *Criminal Law*, III. b, 2, in *Digest Sup. Ct.* 1908.]

Witnesses — cross-examination of accused.

6. An accused who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to cross-examination concerning his statement.

[For other cases, see *Witnesses*, 173-176, in *Digest Sup. Ct.* 1908.]

Witnesses — cross-examination of accused.

7. One accused of illegal conduct with reference to the distillation of spirits, who has

On incriminating evidence furnished by defendant, acting under compulsion—see note to *State v. Turner*, 32 L.R.A. (N.S.) 772.

On cross-examination of accused—see notes to *People v. Tice*, 15 L.R.A. 669, and *Harrold v. Territory*, 10 L.R.A. (N.S.) 604.

testified in chief that he was employed to beat apples near a still, with no interest in them, or in the product, or in the still, may be asked on cross-examination whether he had not previously worked with his alleged employer at a distillery and made brandy with him, as relevant to his claim that he was innocently occupied.

[For other cases, see *Witnesses*, 173-176, in *Digest Sup. Ct.* 1908.]

Witnesses — privilege — statutory.

8. Testimony of an accused, voluntarily given at the preliminary hearing, is not rendered inadmissible at the trial by U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, providing that no pleading nor any discovery or evidence obtained from a party by means of a judicial proceeding shall be used in evidence against him in a criminal proceeding.

[For other cases, see *Witnesses*, V. c. in *Digest Sup. Ct.* 1908.]

[No. 152.]

Argued January 22, 1912. Decided February 19, 1912.

IN ERROR to the District Court of the United States for the Western District of Virginia to review a conviction under an indictment charging illegal conduct with reference to the distillation of spirits. Affirmed.

The facts are stated in the opinion.

Mr. S. H. Sutherland argued the cause, and, with Mr. R. A. Ayers, filed a brief for plaintiff in error:

There can be no grand jury for a United States court unless ordered by the judge, and the only method of summoning a grand jury is by *venire facias*.

United States v. Antz, 4 Woods, 174, 16 Fed. 119; *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134.

A grand jury, to be legally organized, must be sworn.

Ridling v. State, 56 Ga. 601; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; *Roe v. State*, — Ala. —, 2 So. 459; *Re Chance*, 2 Sawy. 67, Fed. Cas. No. 18,255; *Bishop*, Crim. Proc. § 1357; *Baker v. State*, 39 Ark. 180; *Lyman v. People*, 7 Ill. App. 345; *Foster v. State*, 31 Miss. 421; *Abram v. State*, 25 Miss. 589; *Stokes v. State*, 24 Miss. 621; 4 Bl. Com. 302; 1 Chitty, Crim. Law, 178; *Cooley*, Const. Lim. 318.

A grand jury which is not inpaneled according to the statute has no power to find a valid indictment.

Stokes v. State, 24 Miss. 621; *McQuillen v. State*, 8 Smedes & M. 587.

Whatever is essential in a criminal proceeding to deprive a person of his liberty must appear of record, and nothing is taken by indictment or implication.

56 L. ed.

Ball v. United States, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *Barnes v. Com.* 92 Va. 794, 23 S. E. 784; *Jones v. Com.* 87 Va. 63, 12 S. E. 226; *Spurgeon v. Com.* 86 Va. 652, 10 S. E. 979; *Com. v. Cawood*, 2 Va. Cas. 527.

It takes both impaneling and swearing to constitute a grand jury.

Rich v. State, 1 Tex. App. 206; *Lyman v. People*, 7 Ill. App. 345; *Zapf v. State*, 35 Fla. 210, 17 So. 225; *State v. Potter*, 18 Conn. 166; *Porter v. People*, 7 How. Pr. 441.

The doctrine of waiver applies to all cases of objection to the qualification of jurors and to the mode of impaneling the jury; but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice.

United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; *Rodriguez v. United States*, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; *Watson v. Com.* 87 Va. 612, 13 S. E. 22; *Curtis v. Com.* 87 Va. 589, 13 S. E. 73.

The authority to find an indictment is found in the record as entered by the clerk, and not by the jurors themselves.

Abram v. State, 25 Miss. 589.

A jury must be selected and summoned as required by law, and it is indispensable that it should so appear.

Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; *Jones v. Com.* 87 Va. 63, 12 S. E. 226; *Jones v. Com.* 100 Va. 843, 41 S. E. 951.

The petit jury was never sworn, and this is indispensable.

1 Bishop, Crim. Procc. § 1357; *Johnson v. State*, 47 Ala. 62; *State v. Jones*, 5 Ala. 666; *State v. Rollins*, 22 N. H. 528; *Warren v. State*, 1 G. Greene, 106; *Harriman v. State*, 2 G. Greene, 270.

The testimony of Colly should have been rejected or stricken out.

Fitzpatrick v. United States, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Counselman v. Hitchcock*, 142 U. S. 562, 35 L. ed. 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *United States v. Bell*, 81 Fed. 837; *Cullen v. Com.* 24 Gratt. 624; *Cooley*, Const. Lim. 6th ed. 385; *McKelvey*, Ev. pp. 299, 303, 305; *Reg. v. Garbett*, 1 Den. C. C. 236, 2 Car. & K. 474, 2 Cox, C. C. 448; 1 Greenl. Ev. 16th ed. §§ 216, 254a, 469b.

The admission of Powers before the commissioner, Rush, was not such an admission as amounted to a judicial confession, and it is essential it be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession.

1 Greenl. Ev. § 216.

The question asked of the defendant before the commissioner was not cross-examination, and by going on the stand he only waived his constitutional privilege as to cross-examination; after that his constitutional privilege protected him.

Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. ed. 535; Miller v. Miller, 92 Va. 510, 23 S. E. 891; 1 Greenl. Ev. 445; Cooley, Const. Lim. 6th ed. 384-386; State v. Lurch, 12 Or. 99, 6 Pac. 408; State v. Bacon, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; State v. Saunders, 14 Or. 300, 12 Pac. 441; State v. Gallo, 18 Or. 423, 23 Pac. 264.

John Powers, going on the stand before the commissioner and giving testimony, did not waive the constitutional privilege as to such testimony at a later stage.

Cullen v. Com. 24 Gratt. 624.

For this evidence was clearly extorted by compulsion, through fear of imprisonment.

1 Greenl. Ev. 16th ed. §§ 254a, 469d, p. 615.

The waiver of such a privilege must always be made understandingly and willingly, and generally after being fully warned by the court.

Cullen v. Com. 24 Gratt. 624; 1 Greenl. Ev. § 451.

This confession by the defendant was made under such circumstances that it was not admissible evidence, even had it been made out of court.

Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; Rex v. Gilham, 1 Moody, C. C. 194, Car. Crim. Law, 51.

It is essential in judicial confessions that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession.

1 Greenl. Ev. § 216.

The constitutional guaranty against being forced to give incriminating testimony must have a broad and liberal construction in favor of the party and rights which it was intended to secure.

Counselman v. Hitchcock, 142 U. S. 562, 35 L. ed. 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538.

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Assistant Attorney General Denison argued the cause, and, with Mr. Loring C. Christie, filed a brief for defendant in error:

The warning as to the privilege is not essential.

Wilson v. United States, 162 U. S. 613, 623, 40 L. ed. 1090, 1096, 16 Sup. Ct. Rep. 895; Wigmore, Ev. § 2269, pp. 3134, 3135.

Unless defendant's privilege was violated at the preliminary hearing, it was not violated at all, for Colly's quotation, at the final trial, of what defendant had previously said, was no new breach of the privilege.

Wilson v. United States, 162 U. S. 613, 623, 40 L. ed. 1090, 1096, 16 Sup. Ct. Rep. 895; Hardy v. United States, 186 U. S. 224, 228, 46 L. ed. 1137, 1139, 22 Sup. Ct. Rep. 889; Moore v. Com. 2 Leigh, 701; State v. Branham, 13 S. C. 389; State v. Melton, 120 N. C. 591, 26 S. E. 933; Jackson v. State, 39 Ohio St. 37; Ortiz v. State, 30 Fla. 256, 11 So. 611; State v. Burrell, 27 Mont. 282, 70 Pac. 982; Wigmore, Ev. §§ 850, 852, 2276, pp. 971, 979, 3159, note 10.

The admissions of the defendant were not improperly obtained at the preliminary hearing before the commissioner, because they fell within his waiver of privilege.

Brown v. Walker, 161 U. S. 597, 40 L. ed. 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; State v. Wentworth, 65 Me. 243, 20 Am. Rep. 688; Guy v. State, 90 Md. 29, 44 Atl. 997; Lawrence v. State, 103 Md. 17, 63 Atl. 96; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Rex v. D'Aoust, 3 Ont. L. Rep. 653; Norfolk v. Gaylord, 28 Conn. 309; State v. Klitzke, 46 Minn. 343, 49 N. W. 54; People v. Dupounce, 133 Mich. 1, 103 Am. St. Rep. 435, 94 N. W. 388, 2 Ann. Cas. 246; Connors v. People, 50 N. Y. 240; People v. Casey, 72 N. Y. 398; People v. Tice, 131 N. Y. 655, 15 L.R.A. 669, 30 N. E. 494; People v. Webster, 139 N. Y. 84, 34 N. E. 730; People v. Rozelle, 78 Cal. 84, 20 Pac. 36; People v. Meyer, 75 Cal. 383, 17 Pac. 431; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Arnold, 116 Cal. 687, 48 Pac. 803; Smith v. State, 137 Ala. 22, 34 So. 396, 13 Am. Crim. Rep. 410; People v. Dole, — Cal. —, 51 Pac. 945; State v. Green, 35 Conn. 207; Wigmore, Ev. § 2276, pp. 3153, 3154.

The controversy whether the waiver of privilege by a defendant extends to all things relevant to the issue, as held in Guy v. State, 90 Md. 29, 44 Atl. 997; Lawrence v. State, 103 Md. 17, 63 Atl. 96; Com. v. Nichols, 114 Mass. 287, 19 Am. Rep. 346; Spies v. People, 122 Ill. 255, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; State v. Griswold, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046; Clark v. State,

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87 Ala. 71, 6 So. 368; *State v. McGee*, 55 S. C. 249, 74 Am. St. Rep. 741, 33 S. E. 353; *People v. Conroy*, 153 N. Y. 174, 47 N. E. 258; *People v. Tice*, 131 N. Y. 655, 15 L.R.A. 669, 30 N. E. 494; 8 Enc. Pl. & Pr. p. 147, note, 5, p. 151, note, 1; *Wigmore, Ev.* § 2276, pp. 3153, 3154, or is limited to the scope of proper cross-examination, as was perhaps intimated (though not decided) in *Spies v. Illinois*, 123 U. S. 131, 180, 31 L. ed. 80, 90, 8 Sup. Ct. Rep. 21, 22; *Fitzpatrick v. United States*, 178 U. S. 304, 314-316, 44 L. ed. 1078, 1083, 1084, 20 Sup. Ct. Rep. 944; *Sawyer v. United States*, 202 U. S. 150, 165-167, 50 L. ed. 972-979, 980, 26 Sup. Ct. Rep. 575, 6 Ann. Cas. 269; —is deemed immaterial here because the field of the direct examination was the whole fact of guilt or innocence, and any cross-examination that was relevant was necessarily within that field. Indeed, this is generally the case where the witness claiming the privilege is the defendant.

Wigmore, Ev. § 2276, p. 3155.

The error, if any, was harmless.

Holt v. United States, 218 U. S. 245, 45 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138; *Rea v. Missouri*, 17 Wall. 532, 21 L. ed. 707; *Wills v. Russell*, 100 U. S. 621, 625, 25 L. ed. 607, 608.

Any informalities in summoning or swearing the grand and petit juries were waived.

Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; *Melnerney v. United States*, 77 C. C. A. 411, 147 Fed. 183.

Mr. Justice Day delivered the opinion of the court:

Plaintiff in error (hereinafter called defendant) was convicted in the district court of the United States for the western district of Virginia under an indictment charging him with the violation of §§ 3258, 3279, 3281, and 3242 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 2112, 2126, 2127, 2094). He was sentenced to a fine of \$100 and to be imprisoned for a period of thirty days.

The indictment contained seven counts, charging the defendant substantially as follows: That he had in his possession a still and distilling apparatus for the production of spirituous liquors without having had such still and apparatus registered (first count); that he carried on the business of a distiller of spirituous liquors without having given bond (second count); and with the intent to defraud the United States of the tax on such liquors (third count); and also carried on the business

of a retail liquor dealer without having paid the special tax therefor (seventh count); that he worked in a distillery for the production of spirituous liquors upon which no "registered distillery" sign was displayed (fourth count); and that he delivered raw material, namely, meal, to (sixth count), and conveyed distilled spirits from (fifth count), such distillery.

The case comes to this court because of the alleged violation of a constitutional right, in compelling the defendant to be a witness against himself. This contention is developed in the bill of exceptions, which shows that at a preliminary hearing before a United States commissioner, after a witness for the government had testified that he had seen the defendant beating apples at a "still *place" near the home of [311 one Preston Powers, and about 4 miles from defendant's home, the defendant, without counsel, and not having been instructed by the commissioner, voluntarily, in his own behalf, testified that he had beaten apples about thirty steps from the still place; that Preston Powers had hired him for 75 cents a day, and had set him to work beating apples, but that he had no interest in the apples, the product from them, or the still, and no control of the still, and had merely been hired by the day at a fixed price; that thereupon M. P. Colly, deputy marshal, asked him if he had not worked at a distillery within two years of the warrant in this case, at another time and place, which question the defendant refused to answer until informed by the commissioner and by the deputy marshal that unless he did so, he would be committed to jail; and he then testified that "he had worked at a distillery and made some brandy last fall, near his house, and he paid Preston Powers to assist him;" that upon the trial of the case in the district court, that court, over the objection of the defendant, admitted the testimony of Colly, who repeated the proceedings before the commissioner, including the testimony of defendant, and that the court refused to strike out Colly's testimony, or to instruct the jury to disregard it, upon the motion of defendant's counsel, to all of which, at the time, counsel for defendant duly excepted.

The contentions of the defendant are that the judgment should be reversed for the following reasons:

1st. There was no *venire facias* summoning the grand jury which found this purported indictment.

2d. The said grand jury was not sworn, and consequently could not find an indictment.

3d. The indictment was defective, and the

demurrer should have been sustained to the fourth and sixth counts.

4th. The petit jury that tried this case was not sworn nor summoned.

312] *5th. The testimony of Colly was illegal and incompetent testimony, and should have been rejected when offered, and, if received, stricken out on counsel's motion.

As to the first, that there was no venire facias summoning the grand jury, there is nothing in the record to show that this objection, if tenable at all, was taken before plea, or, indeed, at any time during the trial. Objections of this character are waived unless seasonably taken. *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; *Rodriguez v. United States*, 198 U. S. 158, 49 L. ed. 995, 25 Sup. Ct. Rep. 617; *McInerney v. United States*, 77 C. C. A. 441, 147 Fed. 183.

The same observation applies to the second assignment of error, that the grand jury is not shown by the record to have been sworn. The indictment recites that the grand jury was selected, impaneled, sworn, and charged, and that they on their oaths present, etc. At this stage of the proceedings this is enough to show the proper swearing of the grand jury. In *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952, cited by counsel for defendant, the record was destitute of any showing that the accused was arraigned or pleaded to the indictment. See *Pointer v. United States*, 151 U. S. 396, 418, 38 L. ed. 208, 217, 14 Sup. Ct. Rep. 410.

As to the assignment of error that there were certain defective counts in the indictment, the conviction was a general one, and, even if the counts were defective, as alleged, one good count, sufficient to sustain the sentence, is all that is required to warrant the affirmation of a judgment in error proceedings. *Dunbar v. United States*, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325.

As to the objection that the petit jury was not sworn: The record discloses that they were "called and impaneled," and, "being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, and upon their oaths do say," etc. 313] We *think that this sufficiently discloses, upon proceedings in error after conviction, that the petit jury was duly sworn.

The chief objection contended for in argument concerns the admission in the district court of the testimony of the defendant be-

fore the commissioner. The admission of this testimony is claimed to have worked a violation of the defendant's constitutional rights under the 5th Amendment to the Constitution, which protects him against self-incrimination. It appears from the bill of exceptions that the defendant voluntarily took the stand and testified in his own behalf. This he might do under the Federal statute (20 Stat. at L. 30, chap. 37, U. S. Comp. Stat. 1901, p. 660), making the defendant a competent witness, "at his own request, but not otherwise." We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him. In *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895, Wilson was charged with murder. Before a United States commissioner, upon a preliminary hearing, he made a statement which was admitted at the trial. He had no counsel, was not warned or told of his right to refuse to testify, but there was testimony tending to show that the statement was voluntary. At page 623 this court said:

"And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but, on the contrary, if the confession was voluntary, it is sufficient, though it appear that he was not so warned. *Joy, Confessions*, **45, 48, and cases cited.

" . . . He [Wilson] did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. . . . He did not have the aid of counsel, *and he was not warned that the[314 statement might be used against him, or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character; but as he was not confessing guilt, but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

In the present case, it does not appear that the witness claimed his privilege, or was ignorant of it, or that, if he had known of it, would not have answered,—indeed, the record shows that his testimony was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.

As to the contention that the cross-examination before the commissioner, shown in the bill of exceptions, was improperly extorted from the witness under threat of commitment, an examination of the bill of

exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens;" and may be fully cross-examined as to the testimony voluntarily given. *Reagan v. United States*, 157 U. S. 301, 305, 39 L. ed. 709, 710, 15 Sup. Ct. Rep. 610. The rule is thus stated in *Brown v. Walker*, 161 U. S. 597, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644:

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. § 451; *Dixon v. Vale*, 1 Car. & P. 278; *East v. Chapman*, 2 *Car. & P. 570, *Moody & M.* 46; *State v. K—*, 4 N. H. 562; *Low v. Mitchell*, 18 Me. 372; *Coburn v. Odell*, 30 N. H. 540; *Norfolk v. Gaylord*, 28 Conn. 309; *Austin v. Prince*, 1 Sim. 348; *Com. v. Pratt*, 126 Mass. 462; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Lockett v. State*, 63 Ala. 5; *People v. Freshour*, 55 Cal. 375.

"So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Witham*, 72 Me. 531; *State v. Ober*, 52 N. H. 462, 13 Am. Rep. 88; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Mullen*, 97 Mass. 545; *Connors v. People*, 50 N. Y. 240; *People v. Casey*, 72 N. Y. 393."

But it is contended by the defendant that the bill of exceptions shows that the alleged cross-examination was entirely irrelevant and improper, and not a legitimate cross-examination of the defendant's testimony in his own behalf. It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits, as already stated, that he was at a place about thirty steps from the still, beating apples, as testified by the government's witness; that Preston Powers had hired him to work for him at the price of 75 cents a day, and that he put him to beating apples; that the witness had no interest in the apples or the product thereof, and no interest in the still, but was merely hired to work by the day at the price of 75 cents. Having taken the stand in his

own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. The cross-examination, in the answer elicited, tended to *show that[316 defendant had worked at a distillery the fall before with Preston Powers, the man he alleged he was working for at beating apples on the occasion when the government witness saw him near the still, and had made brandy near his house, and had paid Preston Powers to assist him. This, we think, might be regarded as having some relevancy to the defendant's claim as to the innocent character of his occupation at the time charged. It had a tendency to show that defendant knew the character of the occupation in which he was then engaged, having worked before with Preston Powers at a distillery and made brandy with him, and did not exceed the limits of a proper cross-examination of the witness. As to the suggestion that § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661) prevented the introduction of the testimony given by defendant before the commissioner, that section, providing that no pleading, nor any discovery or evidence obtained from a party by means of a judicial proceeding shall be used in evidence against him in a criminal proceeding, can have no bearing where, as in the present case, the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. See *Tucker v. United States*, 151 U. S. 164, 168, 38 L. ed. 112, 114, 14 Sup. Ct. Rep. 299.

Judgment affirmed.

*SALVATORE L. ROCCA, Plff. in[317
Err.,
v.

GEORGE F. THOMPSON.

(See S. C. Reporter's ed. 317-334.)

Diplomatic and consular officers —
right to administer estate.

The most-favored-nation clause in the Italian treaty of May 8, 1878 (20 Stat. at L. 732), does not give an Italian consul general the right to administer the estate of an Italian citizen dying intestate in one

NOTE.—On the jurisdiction and powers of consul generally—see note to *Telefsen v. Fee*, 45 L.R.A. 481.

On the jurisdiction and power of consuls to administer on estates—see note to *Re Ghio*, 37 L.R.A.(N.S.) 549.

of the United States, to the exclusion of the one authorized by the local law to administer the estate, because of the privilege conferred by the Argentine treaty of July 27, 1853 (10 Stat. at L. 1009), art. 9, upon the consular officers of the respective countries as to citizens dying intestate, "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," since this provision, if applicable, cannot be construed as intended to supersede the local law as to the administration of such estates.

[Jurisdiction and powers of consul, see Diplomatic and Consular Officers, I., in Digest Sup. Ct. 1908.]

[No. 292.]

Argued January 17 and 18, 1912. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the District Court of Appeals in the Third District in that state, affirming an order of the Superior Court of San Joaquin County, granting letters of administration upon the estate of an Italian citizen to the public administrator. Affirmed.

See same case below, 157 Cal. 552, 37 L.R.A. (N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516.

The facts are stated in the opinion.

Mr. Frederic R. Coudert argued the cause, and, with Messrs. Paul Fuller, Ambrose Gherini, Howard Thayer Kingsbury, and Charles Cheyney Hyde, filed a brief for plaintiff in error:

The treaty clauses in question, conferring the right of administration of the estates of deceased nationals upon the respective consuls, became part of the municipal law of California without further legislation, and superseded any state statute not consistent therewith.

Head Money Cases (*Edye v. Robertson*) 112 U. S. 598, 599, 28 L. ed. 803, 804, 5 Sup. Ct. Rep. 247; *United States v. 43 Gallons of Whiskey* (*United States v. Lariviere*) 93 U. S. 197, 198, 23 L. ed. 847, 848; *Ware v. Hylton*, 3 Dall. 235, 1 L. ed. 583; *Re Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; *People ex rel. Atty. Gen. v. Gerke*, 5 Cal. 383; *Forbes v. Scannell*, 13 Cal. 243.

Treaties must be construed in the most liberal fashion, and treaty rights are always paramount to state legislation.

Shanks v. Dupont, 3 Pet. 249, 7 L. ed. 669; *Geofroy v. Riggs*, 133 U. S. 267, 33 L. ed. 645, 10 Sup. Ct. Rep. 295; *Hauenstein v. Lynham*, 100 U. S. 488-490, 25 L. ed. 630, 631.

It is the general practice under the law of nations for consuls, upon the death of one of their nationals, to take part in caring for the property left by him, especially in case of intestacy, and seeing that it reaches its destination. This is one of the usual and normal functions of the consuls of all civilized nations, and as such is generally recognized by usage, by statute, and by formal executive regulations in the United States and in European countries.

1 de Clercq & de Vallat, *Guide Pratique des Consuls*, p. 522; 5 Moore, *International Law Dig.* pp. 117, 118; *United States Consular Regulations*, pp. 30, 161, 162.

The weight of authority, as far as there are precedents aside from the decision at bar, is wholly in favor of the rights of the consul here contended for.

Re Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119; *Re Tartaglio*, 12 Misc. 245, 33 N. Y. Supp. 1121; *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040; *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507; *Aspinwall v. Queen's Proctor*, 2 Curt. Eccl. Rep. 241; *Thompson's Succession*, 9 La. Ann. 96; *Carpigiani v. Hall*, — Ala. —, 55 So. 248; *Re Scutella*, 145 App. Div. 156, 129 N. Y. Supp. 21; *Devlin, Treaty Making Power*, § 202.

Whenever an apparent exception has been made to the operation of the most-favored-nation clause, it will be found to rest upon concessions which cannot be duplicated and the equivalent of which cannot be fairly measured or given. This objection does not hold in the case at bar.

Hay & Hill, Foreign Relations, 1901, pp. 278, 279; 5 Moore, *International Law Dig.* pp. 260, 262, 268-270; 14 Ops. Atty. Gen. 468-470; 11 Ops. Atty. Gen. 508; *Bartram v. Robertson*, 122 U. S. 121, 30 L. ed. 1121, 7 Sup. Ct. Rep. 1115; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. 456.

Mr. T. W. Hickey argued the cause, and, with Mr. Eustace Cullinan, filed a brief for defendant in error:

The argument of the plaintiff in error rest almost exclusively on the authority of *Re Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379, and on two decisions of the surrogate's court of Westchester county, New York, viz.: *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119; *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040.

In these cases, which appear to have been inadequately argued on the public administrator's side, and in which many of the points raised in the case at bar were not discussed by the courts in their several opinions, letters were issued to a consul in

preference to a public administrator. Flatly at variance with these authorities are the cases of *Lanfear v. Ritchie*, 9 La. Ann. 96, and *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507.

The word "intervene" has a clearly defined meaning in both the English and the civil law, which is the law of the Argentine Republic. Indeed, the word was imported from the civil into the English law. The use of "intervene" presupposes an administration in progress: that is, an administrator previously appointed.

Anderson's Law Dict. title, "Intervention;" English Law Dict. title, "Intervene;" English Law Dict.; Bouvier's Law Dict.; 8 Ops. Atty. Gen. 99.

It must be assumed that the word "intervene" was not ignorantly or carelessly used in the treaty.

The Neck, 138 Fed. 144.

The reason of the law or of the treaty, that is to say, the motive which led to the making of it, and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance whenever there is a question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone, otherwise he will be made to speak and act contrary to his intention, and in opposition to his own views.

Vattel, Nations, bk. 2, chap. 17, § 287.

The opinions of the political department are weighty authorities on the interpretation of treaties.

5 Moore, International Law Dig. p. 241, § 761; *Castro v. De Uriarte*, 16 Fed. 98.

Long practical construction of a statute (and in its aspect as the supreme law of the land, as distinct from an international contract, a treaty is a statute) will be accepted by the courts.

United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; *State v. Davis*, 62 W. Va. 500, 14 L.R.A. (N.S.) 1142, 60 S. E. 588; *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 184; *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 385; *State ex rel. Horne v. Holcomb*, 46 Neb. 88, 64 N. W. 437; *Atwell v. Parker*, 93 Minn. 462, 101 N. W. 946; *Continental Improv. Co. v. Phelps*, 47 Mich. 299, 11 N. W. 167; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

The "most-favored-nation" clause in the 56 L. ed.

treaty with Italy does not entitle the Italian consular officers to demand whatever privileges may be accorded to Argentine consular officers under the treaty with the Argentine Republic.

6 Ops. Atty. Gen. 148; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Bartram v. Robertson*, 122 U. S. 116, 30 L. ed. 1118, 7 Sup. Ct. Rep. 1115; 5 Moore, International Law Dig. pp. 257-319; *Foster v. Neilson*, 2 Pet. 314, 7 L. ed. 435; 2 Rose's Notes (U. S.) 837-841; *Taylor v. Morton*, 2 Curt. C. C. 463, Fed. Cas. No. 13,799.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of the state of California to review a judgment in which that court held that the public administrator was entitled to letters of administration upon the estate of an Italian citizen, dying and leaving an estate in California, in preference to the consul general of the Kingdom of Italy.

The facts are briefly these: Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on the 27th day of April, 1908, in San Joaquin county, California, leaving a personal estate. Ghio resided in the state of California. His widow and heirs at law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the consul general of the Kingdom of Italy for California, Nevada, Washington, and Alaska territory.

Upon the death of Ghio, Consul General Rocca made application to the superior court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator, made application for administration upon the same estate under the laws of California. The superior court held that the *public administrator was entitled to [325 administer the estate. The same view was taken in the supreme court of California. 157 Cal. 552, 37 L.R.A. (N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516. From the latter decision a writ of error was granted, which brings the case here.

The consul general bases his claim to administer the estate upon certain provisions of the treaty of May 8, 1878, between Italy and the United States. Articles 16 and 17 read as follows:

"Article 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls of consular agents of the nation to which the deceased belongs, to the

and that information may be at once transmitted to the parties interested.

"Article 17. The respective consuls general, consuls, vice consuls, and consular agents, as likewise the consular chancellors, secretaries, clerks or *attachés*, shall enjoy in both countries, all the rights, prerogatives, immunities, and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." 20 Stat. at L. p. 732.

While article 16 only requires notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, article 17 gives to consuls and similar officers of the Italian nation the rights, prerogatives, immunities, and privileges which are or may be hereafter granted to an officer of the same grade of the most favored nation. It is the contention of the plaintiff in error that this favored-nation clause in the Italian treaty gives him the right to administer estates of Italian citizens dying in this country, because of the privilege conferred upon consuls of the Argentine Republic by the treaty between that country and the United States, of July 27, 1853, art. 9 of which provides: 326] "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." 10 Stat. at L. p. 1009.

From this statement of the case it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty just quoted. The question is: Does that treaty give to consuls of the Argentine Republic the right to administer the estate of citizens of that Republic, dying in the United States, and a like privilege to consuls of the United States as to citizens of this country, dying in the Argentine Republic? The question has been the subject of considerable litigation, and has been diversely determined in the courts of this country which have had it under consideration.

The surrogate of Westchester county, New York, in two cases, *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119, and *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040, has held that the treaty of Italy of 1878, in the most-favored-nation clause, carried

the benefit of the Argentine treaty to the consuls of Italy, and that the Argentine treaty conferred the right of administration upon the consuls of that country. In *Re Wyman*, 191 Mass. 276, 77 N. E. 379, the supreme judicial court of that state, as to Russian consuls, under the most-favored-nation clause in the Russian treaty, followed the surrogate courts of Westchester county, observing that the cases were well considered and covered the entire ground. The supreme court of Alabama, in *Carpigiani v. Hall*, — Ala. —, 55 So. 248, *followed the decisions in *New*[327 *York and Massachusetts*, just referred to, and in *Re Scutella*, 129 N. Y. Supp. 20, the appellate division of the supreme court of New York pursued the same course.

A contrary view was expressed by the surrogate court of New York county in *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507, and by the supreme court of Louisiana in *Lanfear v. Ritchie*, 9 La. Ann. 96.

An examination of the cases which have held in favor of the right of a consul general to administer the estate, to the exclusion of the public administrator, makes it apparent that the *Lobrasciano* Case, which is the fullest upon the subject, is the one that has been followed without independent reasoning upon the part of the courts adopting it.

In that case the right of a consul to administer the estates of deceased citizens of his country is based not only upon the interpretation of the treaties involved, but as well upon the law of nations giving the right to consuls to administer such estates. In the opinion, some citations are made from early instructions of Secretaries of State, emphasizing the right and duty of consuls to administer upon the effects of citizens of the United States, dying in foreign lands.

But these instructions must be read in the light of the statute of the United States, § 1709, U. S. Comp. Stat. 1901, p. 1179,† which, *while it recognizes[328 the right of consuls and vice consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner, or trust-

†"Sec. 1709. It shall be the duty of consuls and vice consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United

tee, to inventory the same, and to collect debts, provides in the fifth paragraph of the section that if, at any time before the transmission to the United States Treasury of the balance of the estate, the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up, and he shall cease further proceedings, and the duties imposed are where "the laws of the country permit."

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law, or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization. Section 409 of the Consular Regulations is as follows:

"A consular officer is, by the law of nations and by statute, the provisional conservator of the property within his district, belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the 329]estate, *or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the efforts, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's estate. 7 Ops. Atty. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

In Moore's International Law Digest, vol. 5, p. 123, a letter of Mr. Hay, Secretary of State, under date of February 3, 1900, is quoted to the effect that the right of a United States consular officer to intervene by way of observing proceedings in relation to the property of deceased Americans leaving no representatives in foreign countries is not understood to involve any interference with the functions of a public administrator.

In this country the right to administer

States, or, for want of them, of any others, at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, 56 L. ed.

property left by a foreigner within the jurisdiction of a state is primarily committed to state law. It seems to be so regulated in the state of California, by giving the administration of such property to the public administrator. There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the national government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the states, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of § 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right "to intervene in the *possession, administra-[330 tion, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." It will be observed that, whether in the possession, the administration or the judicial liquidation of the estate, the sole right conferred is that of intervention, and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent, and to supersede the local laws as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Literally, to intervene means, as the derivation of the word indicates [*inter*, between, and *venire*, come], to come between. Such is the primary definition of the word given in Webster's Dictionary and in the Century Dictionary. When the term is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith;

at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if, at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings."

a stockholder may sometimes intervene in a suit brought by a corporation; the government is sometimes allowed to intervene in suits between private parties to protect a public interest; and whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

"In English ecclesiastical law.—The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 3 Chitty, Commercial Law, 633; Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep. 137, 17 Eng. Rul. Cas. 11; Donegal v. Donegal, 3 Phillim. Eccl. Rep. 586.

"In the civil law.—The act by which a third party demands to be received as a party in a suit pending between other persons.

331] *"The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Poth. Proc. Civile, pt. 1, c. 2, § 7, no. 3.

"In practice.—A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff or demanding something adversely to both of them. Logan v. Greenlaw (C. C.) 12 Fed. 16; Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303; Gale v. Frazier, 4 Dak. 196, 30 N. W. 138; Reay v. Butler, — Cal. —, 7 Pac. 671." Black's Law Dict. p. 651.

Emphasis is laid upon the right under the Argentine treaty to intervene in *possession*, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the

consul general, to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects *and purposes of [332 the states thereby contracting. Re Ross, 140 U. S. 453, 475, 35 L. ed. 581, 589, 11 Sup. Ct. Rep. 897.

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in article 33, as follows:

"Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated that, in the absence of the legal heirs or representatives, the consuls or vice consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district." [25 Stat. at L. 146.]

And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:

"In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit, and pending the appointment of an administrator, and until letters of administration have been granted, take charge of the property left by the deceased, for the benefit of his lawful heirs and *credit-[333 ors, and, moreover, have the right to be appointed as administrator of such estate."

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between Baron Fava, the then Italian Ambassador, and Mr. Uhl, Act-

ing Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States, then expressed, that, as the administration of estates in the United States was under the control of the respective states, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated. See 5 Moore's International Law Digest, p. 122.

The learned counsel for the plaintiff in error, in his supplemental brief, has referred to a statement of the law of the Argentine Confederation of 1865, English translation published in vol. 58, British and Foreign State Papers, p. 455, in which it is said that a foreigner dying intestate, without leaving a wife or lawful heirs in the Argentine Republic, or where he dies leaving a will, the heirs being foreigners, absent from the country, and the executor being also absent, the consul of the deceased foreigner's nation is given the right to intervene in the arrangement of his affairs. In articles 3 and 4 it is declared:

"3. Consular intervention shall be confined to—1st. Sealing up the goods, furniture, and papers of the deceased, after giving due notice to the local authorities, provided always that the death has taken place within the consular district. 2d. Appointing executors.

"4. The consuls shall at once communicate to the testamentary judge the appointment of such executors."

334] *It is contended that the right secured to a foreign consul to appoint an executor under this act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment it is provided is to be at once communicated to the testamentary judge.

In article 8 the same law provides that executors shall perform their charge in accordance with the laws of the country. Article 13 declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens.

Our conclusion, then, is that, if it should be conceded for this purpose that the most-favored-nation clause in the Italian treaty
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carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease.

We find no error in the judgment of the Supreme Court of the State of California, and the same is affirmed.

*UNITED STATES EXPRESS COM- [335
PANY, Plff. in Err.,

v.

STATE OF MINNESOTA.

(See S. C. Reporter's ed. 335-348.)

Taxation of nonresident express company — commerce — due process of law.

1. The earnings of a nonresident express company in carrying goods between two points within the state over a route incidentally traversing a portion of another state, so far as they are derived from the carriage within the state, may be included in the gross receipts, upon which the tax imposed by Minn. Rev. Laws 1905, chap. 11, is based, without unconstitutionally burdening interstate commerce, or denying due process of law.

[For other cases, see Commerce, 227-241, 264-272; Constitutional Law, 528-540, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — statutory construction.

2. The construction given by the supreme court of Minnesota to Minn. Rev. Laws

NOTE.—On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

State licenses or taxes as affecting commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

1905, chap. 11, taxing nonresident express companies, as including in the gross receipts upon which the tax is based the earnings from interstate shipments, where the transportation while in the hands of the companies taxed was performed wholly within the state, is binding upon the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Commerce — taxation of gross receipts of nonresident express company.

3. Including in the gross receipts of a nonresident express company, upon the basis of which a tax is imposed by Minn. Rev. Laws 1905, chap. 11, "in lieu of all taxes on its property," the earnings from interstate shipments, where the transportation while in the company's hands was performed wholly within the state, does not unconstitutionally burden interstate commerce, but is an exercise of the state's power to measure a legitimate property tax by receipts which in part come from interstate commerce, which could not in itself be taxed.

[For other cases, see Commerce, 227-241, 264-272, in Digest Sup. Ct. 1908.]

[No. 708.]

Argued January 16 and 17, 1912. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which modified, and, as modified, affirmed, a judgment of the District Court of Ramsey County, in that state, sustaining a tax upon the gross receipts of a nonresident express company. Affirmed.

See same case below, 114 Minn. 346, 37 L.R.A.(N.S.) 1127, 131 N. W. 489.

The facts are stated in the opinion.

Messrs. Robert E. Olds and Frank B. Kellogg argued the cause, and, with Mr. C. A. Severance, filed a brief for plaintiff in error:

That the earnings from interstate transfer business constitute receipts derived from interstate commerce is a proposition fully established by the decisions of this court. The circumstance that the plaintiff in error operated a line wholly within the state is immaterial, so long as the function which it performed was a part of a continuous journey from one state to another, under a single, continuous contract of carriage. Whether carried on by one or by two or more express companies, the commerce involved is itself interstate, and no part of it can be divested of its interstate character by the accidental circumstance that it may be carried on by one of the companies wholly within state lines.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep.

382, 5 Sup. Ct. Rep. 826; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 343, 344, 30 L. ed. 1200, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 119, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 194, 70 N. E. 472.

The tax upon the receipts from interstate transfer business is invalid, as an attempt by the state to impose a direct burden upon interstate commerce.

State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 1036, 28 Sup. Ct. Rep. 638; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 118, 34 L. ed. 394, 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 349, 35 L. ed. 1035, 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Maine v.

Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 163; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

The contention that the tax may be sustained as one upon property brings us to the consideration of a line of cases which runs along *pari passu* with the gross earnings cases already discussed. Throughout the debate on the taxing power of the states in the light of the commerce clause of the Constitution, this court has recognized an important reservation in favor of the state. While the right to burden interstate commerce or the receipts therefrom directly with taxation has been denied, the right to tax the instrumentalities or the property used in carrying on such commerce has been conceded. This was laid down as a general proposition, even in the earlier cases on the subject.

Delaware Railroad Tax, 18 Wall. 206, 232, 21 L. ed. 888, 896; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co. 127 U. S. 117, 123, 124, 32 L. ed. 94, 96, 97, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car. Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The power thus conceded to the states was soon found to be one of far-reaching importance. It was not long before the power came to be extended beyond the mere right to tax at its ordinary value the tangible property within the state of corporations engaged in interstate commerce. The state was not content to tax the poles and wires of a telegraph company located within its borders at their value as so many poles and wires, but claimed the right, in valuing such property, to take into account their use as part of a system of poles and wires extending far beyond the borders of the state. And this court, not without much debate in the first instance, went to the desired limit and agreed that the property of companies engaged in interstate commerce may be taxed, as Mr. Justice Holmes has expressed it, "at its value as it is in its organic relations, and not merely as a congeries of unrelated items." This involved, of course, an augmentation of value by reason of the commerce in which the property is employed.

Pullman's Palace Car Co. v. Pennsyl-
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vania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; Fargo v. Hart, 193 U. S. 490, 499, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498.

But when it appeared, as it did in Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498, that the assumption of uniform value for the entire system was false, and that the total valuation used in making the apportionment on a mileage basis was made up largely from real and personal property of an express company, not necessarily used in its express business, and permanently located in the state of its incorporation, which was different from that of the taxing sovereignty, the court did not hesitate to declare the tax void.

If upon the property-tax theory, the validity of such a tax may be worked out, the conclusion arrived at is, as a practical matter, directly in conflict with the line of gross earnings tax cases running from Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857, and Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, to Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

The principles for which we contend were laid down with great emphasis in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

Mr. Lyndon A. Smith, Attorney General of Minnesota, and Mr. William J. Stevenson, Assistant Attorney General, argued the cause, and, with Mr. George T. Simpson, filed a brief for defendant in error:

These taxes are taxes upon the property of the plaintiff in error, and are simply measured by the amount of certain gross earnings of defendant; this method of levying a tax upon the property of the defendant is pursuant not only to the Constitution and laws of the state of Minnesota, but also to a system of taxation which has been in vogue to a greater or less extent in the state throughout its entire existence, which system has been approved by the decisions of Minnesota, and as far as the taxation of railroads in this manner is concerned, recognized, at least by this court, as a legitimate method of taxation.

Stearns v. Minnesota, 179 U. S. 233, 45

L. ed. 162, 21 Sup. Ct. Rep. 73; Great Northern R. Co. v. Minnesota, 216 U. S. 206, 233, 54 L. ed. 446, 460, 30 Sup. Ct. Rep. 344; Chicago G. W. R. Co. v. Minnesota, 216 U. S. 234, 54 L. ed. 460, 30 Sup. Ct. Rep. 353; Jaggard, Tax. pp. 72, 73; Minneapolis & St. L. R. Co. v. Koerner, 85 Minn. 150, 88 N. W. 430; State v. Western U. Teleg. Co. 96 Minn. 13, 104 N. W. 567; State v. Northwestern Teleph. Exch. Co. 107 Minn. 399, 120 N. W. 534; McHenry v. Alford, 168 U. S. 651, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242.

Minnesota's system of taxing express companies is only a property tax, and is not an interference with interstate commerce within the holdings of this court.

Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 163; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192-201, 36 L. ed. 672-675, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 353, 354, 36 L. ed. 1035, 1039, 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Sanford v. Poe, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 395, 69 Fed. 546; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

Nothing in the Federal Constitution prevents a state from separating a particular class of property and subjecting it to an assessment and taxation in a mode and by a rate different from that imposed on other property, and applying the proceeds to state rather than local purposes.

Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

The fact that it might be possible for Minnesota to use this system of taxation to the extent of imposing too large a tax or too heavy a burden upon the transporta-

tion company does not especially at this time, make a Federal question.

Providence Bank v. Billings, 4 Pet. 514, 563, 7 L. ed. 939, 956; Michigan C. R. Co. v. Powers, 201 U. S. 296, 50 L. ed. 762, 26 Sup. Ct. Rep. 459.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Minnesota, bringing in review a judgment of that court sustaining a tax assessed against the United States Express Company. 114 Minn. 346, 37 L.R.A.(N.S.) 1127, 131 N. W. 489.

The express company is an unincorporated association, with its principal office in the state of New York, engaged in the express business in the United States. The business is carried on under contracts between the company and railroads for the transportation by the railroad companies of goods forwarded by the express company, upon the payment by the express company, as compensation for such service, of a certain percentage of the gross receipts of the express company, derived from the business carried over the lines of the railroads. Under such contracts the company is engaged in carrying on express business over many lines of railroads in the United States, amounting in the aggregate to some 30,000 miles of road. It carries on express business in this manner in the state of Minnesota upon the Chicago, Rock Island & Pacific Railway, Duluth & Iron Range Railroad, and, for a time, the Chicago, Milwaukee, & St. Paul Railway. The company has offices in many states, the District of Columbia and Canada, and in various European countries. It has about fifty offices in the state of Minnesota.

The law in question (Revised Laws of Minnesota 1905, chapter 11) provides for the taxation of express companies. Section 1013 of the act requires every express company doing business in the state, [339 between January 1 and February 1, to file with the state auditor, in such form as he may prescribe, a statement, duly verified, showing the entire receipts, including all sums earned or charged, whether received or not, for business done within the state, including its proportion of gross receipts for business done in the state by such company in connection with other companies. The statement must further show the amount actually paid by such express company to the railroads within the state for the transportation of its freight for the year, giving the amount paid to each railroad company; and also show the entire receipts of the company for business done within the state, including its proportion of gross re-

ceipts for business done within the state in connection with other companies, after deducting the amounts paid for transportation to railroads within the state. Section 1015 provides that the auditor shall annually, between March 1 and April 1, ascertain the gross receipts of such company by deducting the sums thus annually paid by it for the transportation of freight within the state from its entire receipts for business done in the state, including its proportion for business done within the state in connection with other companies.

Section 1019 provides that annually, on or before March 15, the auditor shall assess upon each company a tax of 6 per cent upon its gross receipts for business done in the state for the preceding calendar year, as determined by the auditor, which shall be in lieu of all taxes upon its property, and shall deliver to the state treasurer for collection a draft upon the company for such sum.

The action was brought by the state of Minnesota to recover certain items which it was claimed were omitted from the returns of the express company, and which were properly the subject of taxation under the statute. Under the stipulated facts these items, embraced in paragraph 3 of complaint, schedule No. 1, consist of:

340] *"Earnings of \$54,209.19, constituting earnings on express business for the years 1899 to 1908, inclusive, which express business was made up entirely of shipments delivered by the shipper to an express company in the state of Minnesota, consigned to an ultimate consignee at a second point in the state of Minnesota, which shipments were forwarded by express between the point of origin and point of destination over lines of railroad, which lines were partly within and partly without the state of Minnesota. That is to say, all of these shipments necessarily passed out of the state of Minnesota in transit. Said amount, namely, \$54,209.19, is based upon the total earnings on said shipments, and is not that part of said earnings apportionable to the transportation, which was performed within the state of Minnesota. In arriving at said amount, the total earnings received by the express company upon said shipments have been taken, regardless of what proportion of the through carry was performed within the state of Minnesota. About 91 per cent of the mileage under this item is within Minnesota."

Alleged omitted earnings on which back taxes were claimed under paragraph 3 of complaint, schedule No. 2, such omitted earnings amounting to \$9,702.89, on which back taxes were claimed of \$504.47, were made up as follows:

"Earnings derived by the company from the following express shipments: (a) Shipments received by an express company from a shipper at a point of origin outside of the state of Minnesota, addressed to and destined to a consignee within the state of Minnesota; or (b) shipments delivered to an express company by a shipper in the state of Minnesota and addressed to and destined to a consignee without the state of Minnesota; or (c) shipments delivered to an express company by a shipper without the state of Minnesota and addressed to and destined to a consignee without the state of Minnesota, passing through the *state of Minnesota in transit, as to all[341 of which said shipments, either in class a, class b, or class c, the defendant received said shipments at a point in the state of Minnesota and forwarded them over its lines to a second point within the state of Minnesota, the transportation while in the hands of the defendant being performed wholly within the state of Minnesota. The transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant. Each of said shipments which constituted said amount of \$9,702.89 in schedule No. 2 of paragraph 3 of complaint was made upon a through rate and a through waybill and bill of lading, showing the origin and ultimate destination thereof, and consisted of a single transportation transaction, commencing with the delivery by the shipper to an express company, and continuing until and not ending before, the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed."

Taxes are not claimed or collected upon shipments of express matter in the classes named where the same express company performs the transportation service both within and without the state of Minnesota.

A question was also made as to the constitutional validity of the tax upon money orders issued by the express company, but that objection has not been pressed in argument here.

The plaintiff in error contends that the assessment of the tax upon its earnings from shipments by a consignor in the state of Minnesota to an ultimate consignee within the state, which shipments were forwarded by express between the points of origin and destination, over railroads partly within and partly without the state of Minnesota (paragraph 3, schedule No. 1), is an unconstitutional exaction, in that it is an attempt of the state to regulate interstate commerce, and is without due process of law. *As to such shipments, the[342

supreme court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 1 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806. An examination of that case shows that it is decisive of the present one on this point, and we need not further discuss this feature of the case.

As to the transportation described in paragraph 3, schedule No. 2, from points within the state to points without the state, from points without the state to points within the state, and from points without the state to points without the state, passing through the state, the transportation outside of the state being performed by connecting companies, the supreme court of Minnesota held that it was the intention of the legislature, in the statute under consideration, to include the earnings from these classes within the state in the gross receipts upon which the tax is based. This construction of the statute is binding upon us.

The transportation was made upon a through rate and through bill of lading, and, it is stipulated, consisted of a single transportation transaction, commencing with the delivery by the shipper to the express company, and continuing until the delivery of the shipment to the consignee at the ultimate destination. This was clearly interstate commerce, and the Federal question made in this connection is: Is this tax a burden upon interstate commerce, and therefore an infraction of the exclusive power of Congress, under the Constitution, to regulate commerce among the states?

It is thoroughly well settled in this court that state laws may not burden interstate commerce. As one form of burden may exist in taxing the conduct of interstate commerce, such taxation has been uniformly condemned. Examples of cases of that character may be found in *Fargo v. Michigan* (*Fargo v. Stevens*) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Western U. Teleg. Co. v. Pennsylvania*, 128 U. S. 39, 32 L. ed.

345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

In *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807, this court sustained a tax which required every railroad operated within the state to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the state, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the state.

In *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107, a tax was sustained which made the income of the railway company within the state, including interstate earnings, the prima facie measure of the value of the property within the state for the purpose of taxation. In the course of the opinion this court said:

"In form the tax is a tax on 'the[344 property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 228, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807."

A question in principle not unlike the one here presented, came before this court in *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342. In that case it was contended that the income of the corporations sought to be taxed un-

der the Federal law included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power, and to measure a legitimate tax by income derived, in part, at least, from the use of such property. *Flint v. Stone Tracy Co.* supra, 162-165.

The right of the state to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Ficklen v. Taxing Dist.* 145 U. S. 1, 22, 36 L. ed. 601, 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, wherein the possible differences between the decisions in *Philadelphia, & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, and *Maine v. Grand Trunk R. Co.* supra, were commented upon and explained. *Mr. Justice Holmes, speaking for the court, said:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. See *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. The question is whether this is such a tax. It appears sufficiently, perhaps, from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the inter-

state business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can."

In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of 1 per cent, or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the state court and the argument on behalf of the state that another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax, or in any way helped by the words "equal to."

Upon like reasoning the statute of Oklahoma was condemned *in the case of [346 *Meyer v. Wells, F. & Co.* decided to-day. [223 U. S. 298, ante, 445, 32 Sup. Ct. Rep. 218.]

Appreciating the difficulty emphasized in the *Galveston Case* of drawing the line between taxes that burden interstate commerce and those whereby the legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The supreme court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the state, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state Constitution, and was intended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

The statute itself provides that the assessments under it "shall be in lieu of all taxes upon its property." In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within

its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, while it was not necessary to the decision of the case, is nevertheless opposite:

"When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods [347] was not in reality a tax upon *the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

The tax in the present case is not like those held invalid in the *Galveston Case* and the *Oklahoma Case*, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, supra), but, as in the *Maine Case*, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, s. c. 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, to sustain a tax upon the property of an express company, which property was considered a part of one money-earning organization extending through many states.

As this court said in *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688-696, 697, 39 L. ed. 311-315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360:

"Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use;

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and by whatever name the exaction *may be called, if it amounts to no[348] more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made. The statute embraces receipts from all the business done within the state, including much which is purely local.

Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state.

We find no error in the judgment of the Supreme Court of the State of Minnesota, and it is affirmed.

*LINCOLN GAS & ELECTRIC [349]
LIGHT COMPANY, Appt.,
v.

CITY OF LINCOLN et al.

(See S. C. Reporter's ed. 349-365.)

Appeal — remanding for insufficient findings — reference to master.

The absence of specific findings of fact by the trial court to which specific objection could be made requires that a decree dismissing the bill of a lighting company which assails as confiscatory the rates for gas fixed by municipal ordinance be reversed, with instructions to refer the case to some competent master, to report fully his findings upon all of the questions raised by either party, separately, with leave to both parties to take additional evidence within a time to be fixed by the court, which shall, upon such report, proceed as equity shall require.

[For other cases, see *Appeal and Error*, 5407, 5408, in *Digest Sup. Ct.* 1908.]

[No. 83.]

Argued December 6 and 7, 1911. Decided February 19, 1912.

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A PPEAL from the Circuit Court of the United States for the District of Nebraska to review a decree dismissing the bill of a lighting company, which assails as confiscatory the rates for gas fixed by municipal ordinance. Reversed and remanded for reference to a master.

See same case below, 182 Fed. 926.

The facts are stated in the opinion.

Mr. Halleck F. Rose argued the cause, and, with Messrs. Charles A. Frueauff, Edmund C. Strode, and John F. Stout, filed a brief for appellant:

Any deprivation of the right of a public utility company to a reasonable return upon the value of its property devoted to the public service, accomplished by legislative adoption of inadequate rates, is a deprivation of property without due process of law, and a confiscation thereof to the public use without just compensation, and a denial of the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

Appellant's case, as made by the proofs, ought not to be prejudiced by the circumstance that it sought injunctive relief in the first instance, without submitting to the confiscatory rates.

Willcox v. Consolidated Gas Co. 212 U. S. 40, 42, 53 L. ed. 394, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The inviolability of property, under the rule of the Constitution, prohibits the establishment of gas rates in Lincoln, Nebraska, at a rate so low as to deprive the capital employed in that service of a small rate of earning than 8 per cent.

Willcox v. Consolidated Gas Co. 212 U. S. 51, 53 L. ed. 399, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; State Journal Printing Co. v. Madison Gas & E. Co. 4 Wis. R. Com. pp. 644, 645; Des Moines Water Co. v. Des Moines, 192 Fed. 193; Havelock v. Lincoln Traction Co. Neb. St. R. Com. for 56 L. ed.

1911; Brymer v. Butler Water Co. 179 Pa. 251, 36 L.R.A. 260, 36 Atl. 249; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 115, 15 L.R.A. (N.S.) 108, 68 Atl. 676; Chicago Union Traction Co. v. State Bd. of Equalization, 114 Fed. 561; Louisville & N. R. Co. v. Brown, 123 Fed. 151; Central R. Co. v. Railroad Commission, 161 Fed. 925; Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 585; Southern P. Co. v. Railroad Comrs. 78 Fed. 261; People ex rel. Jamaica Water Supply Co. v. State Tax Comrs. 128 App. Div. 13, 112 N. Y. Supp. 392; Spring Valley Waterworks v. San Francisco, 124 Fed. 598.

Depreciation from use, of the properties employed in the service, is an essential part of the cost of the service.

Knoxville v. Knoxville Water Co. 212 U. S. 13, 14, 53 L. ed. 380, 29 Sup. Ct. Rep. 148.

Interest on invested capital during construction is a legitimate element of replacement value.

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 542; Shepard v. Northern P. R. Co. 184 Fed. 809.

Some substantial sum should be allowed as a capital investment for franchise rights, or "going value," or both.

Monongahela Nav. Co. v. United States, 148 U. S. 312-345, 37 L. ed. 463-474, 13 Sup. Ct. Rep. 622; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Omaha v. Omaha Water Co. 218 U. S. 202, 203, 54 L. ed. 1000, 1001, 30 Sup. Ct. Rep. 615.

Messrs. Fred C. Foster and William M. Morning argued the cause and filed a brief for appellees:

The fixing of rates to be charged by public-service corporations is a legislative act, whether the rate is fixed by direct act of the legislature, or by a subordinate body or board exercising delegated authority.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; McChord v. Louisville & N. R. Co. 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Saratoga Springs v. Saratoga Gas E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606.

The city council having acted under express legislative authority, and the act being legislative, and not judicial, the court will not concern itself with the motives back of the action, nor pause to inquire whether

an adequate investigation was made before acting, nor whether or not the council acted upon a fair and reasonable knowledge of the company's condition. Good faith and adequate information will be presumed; and this court will, we think, confine its inquiry to the sole question as to whether this record presents a clear case of confiscation. We think this a fair statement of the rule as established by the most recent decisions of this court.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362-395, 38 L. ed. 1014-1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The rate fixed by this ordinance not having been put to a practical test, but having been suspended by this injunction, the ordinance will be upheld unless the case is one leaving no just or fair doubt that the rate, if enforced, would be confiscatory.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

In an investigation of the legality of maximum rates fixed by law, to be charged by public-service corporations, two principal questions are to be considered:

1. The present reasonable value of the property or plant devoted by the corporation to the public service.

2. The net earnings of the corporation which would probably arise from the operation of its business under the new rate, after deducting necessary and reasonable charges and expenses.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. National City*, 74 Fed. 88; *Grain Shippers' Assn. v. Illinois C. R. Co.* 8 Inters. Com. Rep. 158; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 443, 47 L. ed. 892, 895, 23 Sup. Ct. Rep. 571; *Danville v. Southern R. Co.* 8 Inters. Com. Rep. 409; *Redlands L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843; *American Asphalt Assn. v. Uintah R. Co.* 13 Inters. Com. Rep. 207.

It is the duty of a public-service corporation to provide a reconstruction fund to take

care of new construction and all permanent improvements, and these should not be charged to operating expenses.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; *Wyman, Public Service Corp.* § 1163.

Where items of this character have been paid for from current receipts and charged to operating expense, they should be excluded from consideration in estimating the value of the property upon which the company is entitled to earn dividends, or excluded from the operating expenses of a single year.

San Diego Water Co. v. San Diego, 118 Cal. 574, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

No part of a depreciation fund, accumulated by a public-service corporation from its receipts, can be added to the capital upon which it is entitled to earn dividends, and where this has been done the burden is on the company to show to what extent it has been done, in order that it may be segregated in a rate investigation.

Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357.

It is to be assumed that a corporation has its own money ready before starting construction, and whether it has or not, it is to be treated as if it had.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Redlands L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843.

Capitalization affords no guide to the present value of the tangible property of a waterworks company which is objecting to the rates fixed by municipal ordinance as confiscatory, where substantially all the common and preferred stock was issued under construction contracts entered into with persons who controlled the corporate action, and was greatly in excess of the true value of the property furnished under the contracts.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

A public-service corporation, regardless of the amount of its stocks and bonds, is only entitled to a fair return on the value of the property at the time used for the convenience of the public. When this return has been received by the corporation, it becomes the property of the corporation, to be applied to interest upon bonds, and the balance distributed in dividends. If the net income is not sufficient to pay the

interest on bonds, it is the misfortune of the bondholders, and not of the public. If there is only enough of a net income to pay interest on bonds, and nothing is left for dividends, this is a misfortune of the stockholders.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Neither the fair value of stocks and bonds, the cost of construction, nor the cost of reproducing the plant, is absolutely controlling, but each should be regarded as a fact tending to show fair value.

Southern P. Co. v. Bartine, 170 Fed. 725; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

The income of the year succeeding the passage of the ordinance was proper to be considered, even though the ordinance was not put into effect.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 14, 53 L. ed. 371, 380, 29 Sup. Ct. Rep. 148.

The fact that the city may have included in the tax list for 1907 an item of \$60,000, or any other sum, as the value of the franchise, would not tend to prove the value of the franchise, or furnish any argument in favor of including such value as an item in the list of complainant's property upon which it is entitled to dividends, because whatever taxes are paid by the complainant are charged by it to operating expenses and in the last analysis, are borne by the public.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The appellant cannot be heard to complain because a segregated part of its business will not show a fair profit under a given rate. Before it can successfully attack such rates as confiscatory, it must show that the effect of its operation will so reduce the earnings from its entire business as to deprive it of a reasonable return upon the value of its entire property used in the public service.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; *Delaware State Grange v. New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554; *Wilkes-Barre v. Spring Brook Water Supply Co.* 4 Lack. Leg. News, 367; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *St. John v. Erie R. Co.* 22 Wall. 136, 22 L. ed. 56 L. ed.

743; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

The burden of proof rests upon the company to show proper apportionment.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 345, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; *State v. Adams Exp. Co.* 85 Neb. 25, — L.R.A. (N.S.) —, 122 N. W. 691.

Rates may be unreasonable and yet not confiscatory.

Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 420, 53 L. ed. 577, 580, 29 Sup. Ct. Rep. 357; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Southern P. Co. v. Bartine*, 170 Fed. 727.

This court will not concern itself with the matter of alleged discrimination between customers, nor as to whether the new rate might operate to require some customers to be carried at a loss, so long as the rate will yield a reasonable rate of return on the entire business.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Northern P. R. Co. v. North Dakota*, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; *Delaware State Grange v. New York P. & N. R. Co.* 3 Inters. Com. Rep. 554; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713

Mr. Justice Lurton delivered the opinion of the court:

This case involves the validity of an ordinance regulating the appellant's charges for gas furnished to consumers, and forbidding a charge in excess of \$1 per thousand feet. The bill assailed the rate as confiscatory, and therefore a taking of property without compensation. The ordinance rests upon legislative power to regulate the charges of such public-service companies.

*The sufficiency of the price prescribed to produce a fair profit upon the value of the property employed in the business is to be strongly presumed. The bur-

den of showing its confiscatory character rests, therefore, upon the complaining company.

The court below, upon a final hearing, held that the appellant had not made out its case, and dismissed the bill, with leave to renew the litigation if, upon actual operation under the ordinance, the returns upon its business should not prove reasonably remunerative. The ordinance was never put in force. Within a few days after it went into effect this bill was filed and an injunction, *pendente lite*, granted, which was continued in force down to the final decree, and when this appeal was allowed, was, by order of the court allowing it, continued pending the appeal, under a bond conditioned to account for all overcharges if the ordinance should be sustained.

The case was not referred to a master, as is the usual course in such cases, although there was a great mass of conflicting evidence relating to the value of the plant, cost of operation, and gross and net income. Neither did the court make specific findings of fact to which specific objection could be made. Such facts as may be said to constitute "findings of fact" appear in the way of large conclusions in the course of the opinion found in the record.

In this, as in every other legislative rate case, there are presented three questions of prime importance: First, the present reasonable value of the company's plant engaged in the regulated business; second, what will be the probable effect of the reduced rate upon the future net income from the property engaged in serving the public; and, third, in ascertaining the probable net income under the reduced rates prescribed, what deduction, if any, should be made from the gross receipts as a fund to preserve the property from future depreciation.

358] *The valuation fixed by the court is the main point of attack. That the company is entitled to a fair return upon the value of the property at the time of the inquiry is the rule. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 47 L. ed. 894, 23 Sup. Ct. Rep. 571.

The court, as one means of finding the present value of the gas-making plant, found that the present cost of replacing it would be \$566,073.59. The items which enter into this valuation, and the reason for reaching this result, as stated in the opinion, are shown by the paragraphs here set out:

"In determining for what amount the plant could be reconstructed, I have accepted in the main the testimony of complainant's witnesses as being the most sat-

isfactory, and I find that the plant could be reconstructed for the following sums:	
Coal gas apparatus	\$ 80,605.00
Water gas apparatus	29,278.00
Mains in dirt streets	90,578.00
Mains in paved streets	130,027.00
Gas services, etc.	107,106.82
Gas meters in use	36,282.90
Meter connections	6,304.00
Piping for gas ranges	16,500.00

	\$496,681.72
Engineering expenses (2½ per cent)	12,417.04
Real estate	4,000.00
Present value of buildings.....	24,643.00
Contingent expenses in construction	25,000.00
Cost of organizing company....	3,000.00
	\$565,741.76

"While the evidence as to the depreciation is somewhat vague and indefinite, I think, upon the items aggregating *said \$496,681.72, there should be deducted for depreciation 10 per cent, amounting to the sum of \$49,688.17, making the total present valuation of the plant \$516,073.59; but it is apparent that, for the successful and economical operation of the plant, a certain amount of working capital is required. This amount I find to be \$50,000, making the total value of complainant's investment, upon which it is entitled to a reasonable return, \$566,073.59.

"While it is true that the testimony shows that the complainant has not such working capital, but has purchased upon credit the supplies necessary to operate, yet I think that, in determining what is a reasonable compensation, a working capital should be considered." [182 Fed. 927.]

But the appellant does not accept the valuation thus fixed. It contends that there should be added to that the following:

Steam boiler for water gas	\$ 2,225.00
Underestimate of present value of buildings	10,000.00
Underestimate of working capital	10,000.00
Underestimate of meter connections	6,102.00
Underestimate contingent expenses of construction	37,500.00
Interest on idle capital during construction	40,000.00
Promotion of business, or going value and franchise, as elements in replacing value....	\$10,000.00

	205,852.00
Add court's valuation	566,073.59
	\$771,925.59

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The appellee, on the other hand, in sup-
360]port of the general *decree dismissing
 the bill, joins issue upon each of these items,
 and insists that if the court shall see fit
 to go into the evidence, it will find that
 the plant has been greatly overvalued. It
 particularly objects to the large item of
 \$107,000 for gas service, and to the item
 of \$50,000 added to the value of the prop-
 erty as "working capital," and says that
 the incorrectness of this is seen in the ad-
 mission that the appellant has in fact no
 such working capital engaged in the busi-
 ness. Appellee further contends that the
 "expense of operation" in 1907 includes
 reconstruction or replacement work, and
 that such items enlarge the operating ex-
 penses of that year unduly and correspond-
 ingly reduce the net income. If the ex-
 pense of operating the plant for that year
 is to be accepted as the standard by which
 the operating expenses of future years are
 to be estimated, the objection is serious if
 the facts are as claimed.

The appellant further claims that the
 sum of \$8,000 deducted from the net in-
 come, as a permanent protection against
 future depreciation in the value of the
 plant, is too small, and should be much
 larger. Upon this there was conflicting ex-
 pert testimony. Upon all of these ques-
 tions of valuation and of operating ex-
 pense there is much evidence, and much of
 it conflicting. The findings of the court,
 as before stated, are of too comprehensive
 a character to be of much help in dealing
 with the details which are embraced.

But it is urged that even upon the valua-
 tion fixed by the court, the estimated
 future net income will be little over 5 per
 cent, and, in consideration of the character
 of the property and the high average inter-
 est rate prevailing in Nebraska, this is not
 a reasonable or fair return, and demon-
 strates the confiscatory character of the
 ordinance. But if the \$8,000 first deducted
 from the receipts, and laid aside as a per-
 manent fund to meet future depreciation,
 be taken into account, the estimated future
361]*net income with the rate in force
 will exceed 6 per cent.

Nor did the circuit court hold that a
 net profit of 5 $\frac{1}{10}$ per cent would be a fair
 and reasonable return upon the value of
 the property employed. What the court
 found was, in substance, that at least an
 income of that amount was certain, aside
 from the amount reserved for a permanent
 preservation fund. What the court said
 was this:

"While complainant, I think, is entitled
 to at least 6 per cent upon the money in-
 vested, it does not appear that the reduced
 rate would not yield that sum. It is quite
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probable that the reduced rate would con-
 siderably increase the consumption of gas,
 and thus increase the complainant's net
 profits.

"The record shows that in June, 1904,
 complainant voluntarily reduced its rates
 from approximately \$1.50 per thousand to
 \$1.20, and the amount of gas consumed,
 and net profits resulting, considerably in-
 creased. The inquiry in cases of this char-
 acter is not alone what has complainant
 theretofore earned, but it is what will be
 the effect of the ordinance reducing the
 rate upon the future net earnings of the
 company; and it devolves upon complainant
 to show, not that the past rates have not
 produced a reasonable return, but that the
 rate prescribed by the ordinance will not
 in the future produce a reasonable return."

This case is full of difficult and grave
 questions. Such conclusions as to facts as
 are found in the court's opinion are not
 helpful when, as here, errors are assigned
 which open up substantially the whole case.
 The cause should have gone at the begin-
 ning to a skilled master, upon whose re-
 port specific errors could have been assigned
 and a ruling from the court obtained.

In the case of *Chicago, M. & St. P. R.
 Co. v. Tompkins*, 176 U. S. 167, 179, 44
 L. ed. 417, 422, 20 Sup. Ct. Rep. 336, this
 court was called upon to review *a**[362**
 decree upholding a state-made railroad rate
 which had been unsuccessfully attacked as
 confiscatory. In that case, as in this, the
 matter had not been referred to a master,
 but had been decided by the circuit court
 upon the whole of the evidence. It came
 to this court upon such a variety of ques-
 tions of fact and law as to practically open
 up the whole case. Impressed with the
 seriousness of the questions involved, this
 court remanded the case for a reference
 and report by a skilled master. As to this
 practice, this court said:

"The question then arises, What disposi-
 tion of the case shall this court make?
 Ought we to examine the testimony, find
 the facts, and from those facts deduce the
 proper conclusion?

"It would doubtless be within the com-
 petency of this court on an appeal in
 equity to do this, but we are constrained
 to think that it would not (particularly
 in a case like the present) be the proper
 course to pursue. This is an appellate
 court, and parties have a right to a deter-
 mination of the facts in the first instance
 by the trial court. Doubtless, if such de-
 termination is challenged on appeal, it be-
 comes our duty to examine the testimony
 and see if it sustains the findings; but if
 the facts found are not challenged by either
 party, then this court need not go beyond

its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. . . . We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that, in view of the difficulties and importance of such a case, it is imperative that the most competent and reliable master, general *or special, should be selected, for it is not a light matter to interfere with the legislation of a state in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

The question as to what sum, if any, upon the facts of this case, should be annually deducted from the net income as a permanent maintenance or replacement fund, is novel and presents a grave problem.

Conflicting expert evidence has been introduced presenting radically different theories as to the necessity, character, and amount of such a fund, and as to how it should be created, preserved, and expended. Some of this evidence puts the sum to be annually deducted and set aside as a permanent fund at 5 per cent upon the value of the plant at the time of deduction. It is obvious that if this view is sound, there will be little or nothing of the net income left for distribution among shareholders, and no basis for legislative rate reduction now, and none likely until such time as the income from the permanent fund will keep up the plant. The work of reconstructing and replacing old parts by new in a plant of this kind must, in the very nature of things, be going on constantly. Heretofore it seems to have been so well and continuously done that the value of the plant as a whole has suffered less than 1 per cent per annum if the total depreciation be distributed through the more than thirty years of operation. So far as can be now seen, reconstruction and replacement charges have, up to the present time, been borne by current revenue, with the result that the revenue remaining in the single year of 1907 showed a net surplus of \$73,851.83,—a sum large enough, if distributed to shareholders upon the basis of the value of property engaged in the business as claimed by appellant, to have paid a dividend of 10 per cent, and about 15 per cent

upon the valuation settled by the circuit court.

There is no finding as to the extent of the application *of the revenue of 1907 to [364] reconstruction or replacement, as distinguished from current repairs and operating expenses. It is, however, plainly inferable that the revenue of that year was used to the extent necessary. If, in the past, reconstruction and replacement charges have been met out of current expenses, the fact must be taken into consideration, both when we come to estimating future net income and in determining what sum shall be annually set aside to guard against future depreciation. This doubtless influenced the court below in settling upon the amount of \$8,000 as a sufficient annual appropriation of income as insurance against future depreciation. But if the constantly recurring necessity to do reconstruction or replacement work was in 1907 met out of the current income of that year, thereby diminishing the net income, the fact should be given weight in estimating future net income; otherwise there will be a double deduction on that account, first, by paying such charges as they occur, and thereafter by a contribution out of the remaining income for the same object.

The facts found are not full enough to at all justify this court in dealing with this problem of a replacement fund.

There should be a full report upon past depreciation, past expense for reconstruction or replacement, and past operating expenses, including current repairs. We should be advised as to the gross receipts for recent years, and just how these receipts have been expended. Then the amount to be set aside for future depreciation will depend upon the character and probable life of the property and the method adopted in the past to preserve the property. It can be readily seen that the amount to be annually set aside may be such as to forbid rate reductions because of the requirement of such a fund. The matter is one first for a skilled master, who should make a full report upon the value of the property, the receipts and the expenses of operation, and the sums paid out on reconstruction *and replacements, and in [365] dividends in recent years.

For the reasons indicated, we direct that the decree be reversed, and the cause remanded to the district court to refer the case to a competent and skilled master, to report fully his findings upon all of the questions raised by either party, separately, and with leave to both parties to take any additional evidence they may wish within a time to be fixed by the court, and

that that court, upon such report, proceed as equity shall require.

It is further ordered for the protection of all parties that the injunction granted in the court below continue in force until final decree there, upon condition that the appellant enter into a new bond, with sureties satisfactory to the court below, to account for all overcharges to consumers since the original restraining order, in the event the ordinance shall be sustained, and that, if such bond be not made within twenty days after the filing of the mandate, that the injunction stand dissolved.

METROPOLITAN REDWOOD LUMBER COMPANY, Claimant of the Steamer San Pedro, Appt.,

v.

CHARLES P. DOE, Owner of the American Steamer George W. Elder, et al.†

(See S. C. Reporter's ed. 365-376.)

Abatement — pendency of action — salvage — limitation of shipowners' liability.

All further proceedings on a libel instituted by salvage claimants who towed to port a vessel disabled in a collision must stop upon pleading the pendency in the same court of a separate proceeding by the owners of the vessel, claiming the benefits of the limited liability provisions of U. S. Rev. Stat. §§ 4283-4285, U. S. Comp. Stat. 1901, pp. 2943, 2944, as amended by the act of June 26, 1884 (23 Stat. at L. 57, chap. 121, U. S. Comp. Stat. 1901, p. 2945), § 18, in which, conformably to admiralty rule 54, there has been an appraisalment of the vessel and her pending freight, and a stipulation entered into for the payment of the appraised value into court, and a monition duly issued, requiring all persons to present their claims and make proof.

[For other cases, see Abatement and Revival, II. e, in Digest Sup. Ct. 1908.]

[No. 155.]

Submitted December 22, 1911. Decided February 19, 1912.

APPEAL from the District Court of the United States for the Northern District of California to review a decree for salvage, rendered after the pendency of a suit for the limitation of the shipowner's liability was pleaded. Reversed and remanded, with directions to dismiss the libel.

The facts are stated in the opinion.

†This case is reported by the Official Reporter under the title of "The San Pedro."

NOTE.—As to abatement because of another suit pending—see note to Cook v. Burnley, 20 L. ed. U. S. 29.
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Mr. William Denman submitted the cause for appellant:

The liability for salving the San Pedro is a "damage" to the Metropolitan Redwood Lumber Company arising from the collision.

The Charles C. Lister, 174 Fed. 288; The Cepheus, 24 Fed. 507; Marsden, Collisions, 6th ed. p. 110.

The liabilities of the owners of vessels arising from a collision are to be litigated in a limitation proceeding just as any other liabilities inflicted on the owner of a vessel which has suffered injury.

Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585.

As a damage from collision, to be adjudicated in the limitation proceeding, the jurisdiction of the district court of the libel filed herein ceased as soon as the stipulation for value required by rule 54 was filed in the limitation proceeding.

Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 600, 27 L. ed. 1038, 1046, 3 Sup. Ct. Rep. 379, 617; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 550, 32 L. ed. 1017, 1022, 9 Sup. Ct. Rep. 612; The H. F. Dimock, 52 Fed. 598; Re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

Mr. Charles Page also submitted the cause for appellant.

Messrs. Aldis B. Browne, Alexander Britton, and Evans Browne submitted the cause for appellees. Messrs. F. A. Cutler, F. R. Sweasey, and J. N. Gillett were on the brief:

The issuance of an injunction as an essential step in the enforcement of the provisions of the statute has been recognized in numerous cases, including:

The Lotta, 150 Fed. 219; Delaware River Ferry Co. v. Amos, 179 Fed. 756; Re Morrison, 147 U. S. 14-35, 37 L. ed. 60-68, 13 Sup. Ct. Rep. 246; Moran v. Sturges, 154 U. S. 256-270, 38 L. ed. 981-985, 14 Sup. Ct. Rep. 1019; Re Providence & N. Y. S. S. Co. 6 Ben. 124, Fed. Cas. No. 11,451; The H. F. Dimock, 52 Fed. 598; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; Re Long Island N. S. Pass & Freight Transp. Co. 5 Fed. 629.

The "damage" arising from the collision, referred to in U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943, includes solely damages to other vessels and their cargoes.

Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585.

The liability for salving the San Pedro as a "damage" to the Metropolitan Redwood Lumber Company, arising from the collision, in the sense in which such term is used in the cases cited by appellant, is of

no other or different nature or character than the liability for repairs made to such vessel as a "damage" to appellant, arising from the collision. It is, however, perfectly clear that repairs are not a "damage" within the contemplation of this section of the Revised Statutes, nor are they an element to be considered in fixing the stipulation for value.

The *Doris Eckhoff*, 30 Fed. 140.

The provisions of § 4284 are not only limited in effect to losses suffered by others than the one petitioning for limitation of liability, but deal solely with losses subject to a *pro rata* payment from the sum for which such owner may be liable.

The *Catskill*, 95 Fed. 702.

The appraisement is to be made and the owner's liability fixed as of the time of the termination of the voyage.

Gokey v. Fort, 44 Fed. 364; *The Abbie C. Stubbs*, 28 Fed. 719; *The City of Norwich* (*Place v. Norwich & N. Y. Transp. Co.*) 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; *The Pine Forest*, 64 C. C. A. 228, 129 Fed. 700; *The Giles Loring*, 48 Fed. 463; *The Rose Culkin*, 52 Fed. 328; *The Doris Eckhoff*, 30 Fed. 140; *The Great Western*, 118 U. S. 520, 30 L. ed. 156, 6 Sup. Ct. Rep. 1172.

Voyage is terminated by abandonment at sea.

Carver, Carr. §§ 307, 308; *Spencer, Marine Collisions*, § 220.

The stipulation should be in an amount equal to the value of the ship at the time her voyage was terminated, and is to be estimated by deducting from the value at the port of safety the value of the salvage services.

Pacific Coast Co. v. Reynolds, 52 C. C. A. 497, 114 Fed. 877; *The Abbie C. Stubbs*, 28 Fed. 719; *The Pine Forest*, 64 C. C. A. 228, 129 Fed. 705; *The Anna*, 47 Fed. 525; *Benedict, Admiralty*, 4th ed. § 371.

The district court having, at the institution of appellant, adopted a point of time immediately after the collision as the termination of the voyage, which fact is therefore determined for this appeal, that is the point of time at which the value of the vessel and freight pending is to be fixed, and also the point of time when the liability to be limited must be ascertained.

The City of Norwich (*Place v. Norwich & N. Y. Transp. Co.*) 118 U. S. 468, 490, 30 L. ed. 134, 142, 6 Sup. Ct. Rep. 1150; *The Great Western*, 118 U. S. 520, 30 L. ed. 156, 6 Sup. Ct. Rep. 1172; *The Doris Eckhoff*, 30 Fed. 140; *The Giles Loring*, 48 Fed. 468; *Re Meyer*, 74 Fed. 881.

As the subsequent history of the wreck can only furnish evidence of its value at that point of time, — *The City of Norwich*

(*Place v. Norwich & N. Y. Transp. Co.*) 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150,—it unquestionably follows that the claim for salvage services rendered subsequent to this point of time is entirely without the contemplation of the provisions of U. S. Rev. Stat. §§ 4283, 4285, U. S. Comp. Stat. 1901, pp. 2943, 2944.

Mr. Justice **Lurton** delivered the opinion of the court:

In an independent libel proceeding instituted in the *district court by the [371 owner of the steamer *George W. Elder*, against the *Metropolitan Lumber Company*, the claimant of the steamer *San Pedro*, the libellant recovered a decree for services rendered in towing her to port after she had been injured in a collision with the steamer *Columbia*, off the coast of California. This decree was rendered at a time when there was pending in the same court a separate proceeding for limitation of liability, brought by the *Metropolitan Lumber Company*, as owner of the *San Pedro*.

Before coming to the substantial questions, we may notice certain objections to any judgment which shall operate to set aside the decree in favor of the appellees. It is said that the appellant does not assail the decree in respect to its merits or the amount of the allowance; that nothing but further delay, expense, and inconvenience will result if appellees are required to present and again prove the claim in the liability cause; and, finally, it is said that the pendency of the other suit was not pleaded until the case was about to be heard upon immaterial objections to the commissioner's report.

Conceding all that can be said about the expense, delay, and inconvenience which will result if the salvage claimants are to be required to present their claim in the limited-liability case, yet far greater confusion must result if such objections are enough to defeat the manifest object of the fifty-fourth rule. This court, in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (*Revised Statutes*, §§ 4283-4285, U. S. Comp. Stat. 1901, pp. 2943, 2944), has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.

*The appellant, owner of the *San* [372 *Pedro*, appears to have proceeded strictly

in compliance with the fifty-fourth admiralty rule. There was a due appraisal of the San Pedro and her pending freight, and a stipulation entered into, with sureties, for the value so appraised, and monition duly issued, requiring all persons to present their claims and make proof. In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, Federal or state, to stop all further proceedings in separate suits upon claims to which the limited-liability act applied.

Nor is the issuance of an injunction necessary to stop proceedings in separate or independent suits upon such claims. Power to grant an injunction exists under § 4285, Revised Statutes, when necessary to maintain the exclusiveness of the jurisdiction; but when the procedure provided by rule 54 has been followed and a monition has issued "against all persons claiming damages . . . citing them to appear before said court and make proof of their respective claims," etc., it is the duty of every other court, when the pendency of such a liability petition is pleaded, to stop. The very nature of the proceeding and the monition has the effect of a statutory injunction. Indeed, that is the express declaration of the statute.

The view we take of the statutory injunction declared by § 4285, Revised Statutes, and of its application to cases where the vessel has been surrendered and a stipulation entered into, as provided by admiralty rule 54, as a proceeding tantamount to a "transfer" of the ship, as authorized by § 4285, Revised Statutes, is fully supported by the leading case of *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 594, 599, 600 and 601, 27 L. ed. 1038, 1044, 1046, 1047, 3 Sup. Ct. Rep. 379, 617. That was a suit in a state court against the owner of a steamship to recover for goods lost by the burning of a steamer. While the suit was pending, the owner filed his petition *in the proper district court for the benefit of the limited-liability statute. The proceedings seem to have been conducted in accordance with admiralty rule 54, but, in addition, the petitioners made application, as permitted by that rule, for an order restraining the prosecution of "all and any suits" against the owner in respect of claims subject to the provisions of the act. The owner and defendant in the suit pending in the state court thereupon, by plea, set up the limited-liability suit as a reason why the state court should proceed no further. This was overruled. Later the defendant therein pleaded the final decree in the liability suit as a bar to any decree in
56 L. ed.

the state court against him, as owner. This, too, was disregarded, and a decree rendered against the owner for the claim for damages caused by the burning of the steamer and the plaintiff's goods. This was affirmed in the supreme judicial court of Massachusetts, and brought here upon writ of error. After a consideration of the meaning and purpose of the limited-liability act of 1851 [9 Stat. at L. 635, chap. 43, U. S. Comp. Stat. 1901, pp. 2943, 2944], §§ 4283, 4284, and 4285, Revised Statutes, and of admiralty rule 54, the court said:

"We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose."

Later, the court added:

"Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-*mat-[374 ter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims."

"The operation of the act, in this behalf, cannot be regarded as confined to cases of actual 'transfer' (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested."

It was urged in that case that by virtue of § 720, Revised Statutes (U. S. Comp. Stat. 1901, p. 581), the district court had no authority to issue an injunction. But as to this, the court said:

"This view of the statutory injunction, and of its effect upon separate actions and

proceedings, renders it unnecessary to determine the question as to the legality of the writ of injunction issued by the district court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it. As the writ was issued prior to the adoption of the Revised Statutes, the power to issue it was not affected by any supposed change of the law introduced into the revision, by the 720th section of which the prohibition of the act of 1793 [1 Stat. at L. 334, chap. 22, U. S. Comp. Stat. 1901, p. 581], in regard to injunctions against proceedings in state courts, has this exception appended to it: 'Except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Under the rule of *expressio unius* this express exception may be urged as having the effect of excluding 375]*any other exception; though it is observable that the injunction clause in the act of 1851 is preserved without change in § 4285 of the Revised Statutes, and will probably be construed as having its original effect, due to its chronological relation to the act of 1793."

But after an intimation that § 720 did not apply, the court added:

"But, as before indicated, the legality of the writ of injunction is not involved in this case. In our opinion, the state court, in overruling the plea of the defendants, which set up the proceedings pending in the district court, and in ordering the cause to stand for trial, and again, on the trial, in overruling as a defense the proceedings and decree of the district court, as set up in the amended answer, disregarded the due effect, as well as the express provisions, of the act of 1851, and therein committed error. It was the duty of the court, as well when the proceedings pending in the district court were pleaded and verified by profert of the record as when the decree of said court was pleaded and proved, to have obeyed the injunction of the act of Congress, which declared that 'all claims and proceedings shall cease.'"

But it is contended that a salvage claim, such as the one here involved, is not a claim for "damages or injury by collision," within the meaning of § 4283, Revised Statutes, and therefore not one to which the limited-liability act applies; that the damages there referred to are damages by collision to other vessels and their cargo, and that the expense of being towed to port is a claim like one for repairs. It is also said that even if the vessel owners may be able to include what they must pay for such a service in the damages recoverable from the guilty vessel, it is, notwith-

standing, not a damage arising from collision, within the meaning of that section.

But we need not consider whether the claim is one against the owner of the character described either in *§ 4283 or [376 the succeeding section, 4284. Those sections have been amended by the 18th section of the act of June 26, 1884 [23 Stat. at L. 57, chap. 121, U. S. Comp. Stat. 1901, p. 2945], so as to include "any or all debts and liabilities" of the owner, incurred on account of the ship, without his privity or fault. *Richardson v. Harmon*, 222 U. S. 96, ante, 110, 32 Sup. Ct. Rep. 27.

The service was rendered to the *res*, benefiting alike owner and creditors. The claim is therefore of a highly meritorious character. But the question of preference in payment out of the fund is one to be determined in the limited-liability case. We therefore express no opinion as to whether such a claim may be preferred or must share *pro rata* with others.

The court below erred in proceeding to render a decree after the pendency of the suit for a limitation of liability was pleaded.

Decree reversed and remanded with directions to dismiss the libel.

IRENE CUEBAS Y ARREDONDO, Appt.,
v.

FELIPE CUEBAS Y ARREDONDO.†

(See S. C. Reporter's ed. 376-390.)

Courts — jurisdiction of Porto Rico district court — citizenship.

1. The jurisdiction of the district court of the United States for Porto Rico which, under the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), § 3, extends to controversies where the parties or either of them are citizens of the United States, or citizens or subjects of a foreign state, does not embrace a suit to foreclose a mortgage in which one of the three defendants is a citizen of the United States, while the other

†Death of Felipe Cuebas y Arredondo suggested January 12, 1912. and appearance of Felipe R. Cuebas y Padilla et al., constituting the succession of Felipe Cuebas y Arredondo, as the parties appellee in this cause, filed and entered.

NOTE.—As to entry of judgment *nunc pro tunc*—see note to *O'Sullivan v. People*, 20 L.R.A. 143.

As to the right to enter judgment *nunc pro tunc* as of the date of rendition, so as to affect intervening rights of third persons—see note to *Clark & L. Invest. Co. v. Rich*, 15 L.R.A.(N.S.) 682.

two are citizens of Porto Rico, as is also the claimant.

[For other cases, see Courts, III. c, in Digest Sup. Ct. 1908.]

Judgment — pro confesso — final decree.

2. An order taking *pro confesso* the bill in a foreclosure suit cannot serve as the basis of a final decree, where the bill shows on its face that the court was without jurisdiction when the *pro confesso* was taken.

[For other cases, see Judgment, 53-59, in Digest Sup. Ct. 1908.]

Judgment — pro confesso — amendment of bill — final decree.

3. The subsequent amendment of a bill to foreclose a mortgage, taken *pro confesso*, so as to create a jurisdiction which had not theretofore existed, by dismissing the bill as to all but one of the defaulting defendants, and by striking out the prayer that any and every claim, interest, or encumbrance be forever barred and cut off, will not justify a final decree against the remaining defendant as of a date before his death, based upon the order *pro confesso*, but upon such amendment the court should set aside the default and give time to defend.

[For other cases, see Judgment, 53-59, in Digest Sup. Ct. 1908.]

Judgment — nunc pro tunc.

4. A final decree *nunc pro tunc* cannot be entered in a foreclosure suit on a *pro confesso* order where there is no claim that a final decree in pursuance of the allegations of the bill had ever been directed, and, through inadvertence of court or counsel, omitted from entry.

[For other cases, see Judgment, 38-42, in Digest Sup. Ct. 1908.]

Dismissal — when proper — revivor.

5. The bill in a foreclosure suit is properly dismissed where the complainant, after her claim to a final decree *nunc pro tunc* has been rightfully denied, makes no effort to revive the cause, though the defendant has been dead for some years.

[For other cases, see Dismissal and Discontinuance, II., in Digest Sup. Ct. 1908.]

[No. 159.]

Submitted January 24, 1912. Decided February 19, 1912.

A PPEAL from the District Court of the United States for Porto Rico to review a decree dismissing a bill to foreclose a mortgage. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 120.

Statement by Mr. Justice Lurton:

The appellant, asserting herself to be a citizen of the island of Porto Rico, filed this bill to foreclose a mortgage upon a plantation on the island, called "Carmelita." The defendants to the bill were three in number, namely, Cuebas y Arredondo, alleged to be a citizen of the United States, residing in Porto Rico, Francisco Antongiorgi, described as a citizen of and residing in Porto Rico, and El Banco Territorial y Agrícola, alleged to be a corporation organized under the laws of Spain, and a citizen thereof, doing business in the island of Porto Rico, with its principal place of business in the city of San Juan.

The averments as to the title and encumbrances upon the said plantation, [378 and the interests asserted by way of lien, or mortgage, by the defendants Antongiorgi and El Blanco Territorial, etc., hereafter referred to as the bank, are complex, and for the purposes of this case, upon the question now for decision, need not be stated otherwise than to say that the bill alleged that they "have or claim some interest in said mortgaged premises, or in some part thereof, as purchasers, mortgagees, or otherwise, the exact nature and extent of which interests are unknown to your orator, if any at all they have, but the same are inferior and subsequent to the lien of the mortgage of your orator and subject thereto."

Aside from the usual prayer for a decree declaring and enforcing the lien of the mortgage asserted by a sale, etc., the bill asked that "the defendants and all persons claiming under them subsequent to the commencement of this suit, and all other persons, although not parties to this suit, who have any liens or claims thereon by or under any such subsequent judgment or decree, either as purchaser, encumbrancer, or otherwise, may be barred and foreclosed of all equity of redemption in the said premises, and that your orator may have such other and further relief as the nature of the case may require, and as to this court may seem meet and agreeable to equity and good conscience."

The bill was filed April 6, 1904, in the district court of the United States for Porto Rico. On July 11, 1904, the three named defendants, though duly summoned to appear by a rule day named, and make their defense, made default, and the bill was on that day taken for confessed under equity rule 19 et seq.

In March, 1905, the bank was permitted to file its answer, in which it denied the equities of the bill, and asserted its own superior right under mortgages, judicial sale, and by estoppel.

In October, 1906, it was permitted to withdraw its answer, and file a plea to the jurisdiction. That plea was in these words, omitting the formal parts and conclusion:

"That this court ought not to further

"That this court ought not to further

"That this court ought not to further

take cognizance of the said bill of complaint, because this defendant says that at the time of the filing of the same the complainant herein was and still is a citizen of the island of Porto Rico, and resident of the same, and this defendant was and is a corporation organized and doing business under and by virtue of the laws of said island of Porto Rico, and was and is a citizen of the same, and each and all of the other defendants herein are citizens and residents of the said island of Porto Rico, and that therefore this is a suit by and between citizens and residents of the said island of Porto Rico, of which this court has no jurisdiction.

"That, as shown by the said bill of complaint, the jurisdiction of this court over and of this suit is sought to be maintained, not by reason of any Federal question being involved herein, but solely and only by reason of the alleged diverse citizenship of the parties herein and hereto, and that, as shown by the allegation of the said bill of complaint, the defendant is alleged to be a citizen of Spain, and another of the defendants, to wit, Felipe Cuebas y Arredondo, is alleged to be a citizen of the United States of America, and another of said defendants, to wit, Francisco Antongiorgi, is alleged to be a citizen of Porto Rico, and that therefore it affirmatively appears by the allegations of the said bill, if the same are true as therein alleged, that this is a case of which this court has not jurisdiction."

After first overruling this plea, for reasons set out in an opinion (5 Porto Rico Fed. Rep. 120), a rehearing was allowed and the plea sustained upon the ground that the bank was not a corporation of Spain, but one existing under the laws of Porto Rico, and a citizen of that island for jurisdictional purposes.

Prior to this action upon the plea of the 380]bank, the date *not appearing, the complainant voluntarily dismissed her bill as to Francisco Antongiorgi, whom the bill had averred to be a citizen of Porto Rico.

The judgment on the plea of the bank, above set out, was, that for lack of the requisite diversity of citizenship the bill should stand dismissed, "unless, within five days from this date, the bill can be amended so as to give the court jurisdiction."

Thereupon complainant entered an order, entitled: "Irene Cuebas y Arredondo vs. Felipe Cuebas y Arredondo et al.," which is in these words:

"Comes now the complainant above named, by her solicitors, F. L. Cornwell and N. B. K. Pettingill, and, in pursuance of the permission granted by the court in its order of the 7th day of June, 1909,

conditionally dismissing said bill of complaint, hereby amend their said bill of complaint for the purpose of retaining jurisdiction in this court by dismissing the same as to said defendant El Banco Territorial y Agricola.

"And in order to make said bill of complaint conform to such dismissal, they hereby amend the same in the following particulars, to wit:

"1. By striking from the same the last four lines of the preliminary paragraph of said bill in which the parties thereto are stated.

"2. By striking out paragraph number 10 of said bill of complaint.

"3. By striking out the name of said El Banco Territorial y Agricola wherever the same appears in the prayer for relief and in the prayer for process contained in said bill.

"And said bill of complaint having been heretofore amended so as to dismiss one Francisco Antongiorgi as a defendant therein, and being now amended so as to dismiss the same as to said El Banco Territorial y Agricola, complainant hereby elects to proceed with the same as against the defendant Felipe Cuebas as sole defendant."

*Thereupon the complainant moved[381 the court for a final decree against the sole defendant Felipe Cuebas, "as of a date prior to the death of Felipe Cuebas, so as to avoid the necessity for reviving as against his succession," etc. This the court denied, and dismissed the bill.

From this decree an appeal has been prosecuted.

Messrs. N. B. K. Pettingill and Frederick L. Cornwell submitted the cause for appellant:

One foreigner or citizen of the United States as a party is sufficient to sustain jurisdiction.

One of the definitions of the word "either," given by Webster, is "one or another of any number;" and that definition is applied as its ordinary legal meaning in numerous decisions.

Lafey v. Campbell, 42 N. J. Eq. 34, 6 Atl. 300; Messer v. Jones, 88 Me. 349, 34 Atl. 177; Ft. Worth Street R. Co. v. Rosedale Street R. Co. 68 Tex. 169, 4 S. W. 534; Dew v. Barnes, 54 N. C. 149; Graham v. Graham, 23 W. Va. 43, 48 Am. Rep. 364; People ex rel. McKeever v. Willis, 6 App. Div. 231, 39 N. Y. Supp. 987.

The word "parties" is used in its sense of ordinary legal acceptation, analogous to its use in such phrases as "necessary parties," "indispensable parties," "parties litigant," etc. There is nothing to show that

Congress intended to use the word in any technical or restricted sense.

As the object of the amendment was to enlarge the jurisdiction, it should be liberally construed for that purpose.

Garrozi v. Dastas, 204 U. S. 73, 51 L. ed. 376, 27 Sup. Ct. Rep. 224.

A complainant after an order *pro confesso* is entitled, without the production of supporting proof, to such a decree as is warranted by the allegations of his bill.

Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 83, 90, 33 L. ed. 561, 563, 10 Sup. Ct. Rep. 235.

Upon the death of a party defendant during the progress of a cause the court may, upon request of complainant, enter its final decree *nunc pro tunc* as of a date prior to such death, so as to avoid the necessity of proceedings for revivor.

Mitchell v. Overman, 103 U. S. 62, 26 L. ed. 369; *New Orleans v. Gaines* (*New Orleans v. Whitney*) 138 U. S. 595, 612, 34 L. ed. 1102, 1108, 11 Sup. Ct. Rep. 428; *Campbell v. Mesier*, 4 Johns. Ch. 342, 8 Am. Dec. 570.

These decisions are particularly applicable here because an earlier application for a final decree against the one defendant who had defaulted was prevented by the continued contest with the other defendant, the bank.

Frow v. De La Vega, 15 Wall. 552, 21 L. ed. 60.

No brief was filed for appellee.

Messrs. F. Kingsbury Curtis and Henry A. Stickney, as *amici curiæ*, filed a brief on behalf of El Banco Territorial y Agrícola.

Mr. Justice Lurton, after stating the facts as above, delivered the opinion of the court:

The bank is not a party to this appeal. The appellant has elected to dismiss her bill, both as to it and the other Porto Rican defendant, Antongiorgi, for the express purpose of creating jurisdiction of a suit between complainant, a citizen of the island of Porto Rico, and the remaining original defendant, Felipe Cuebas, a citizen of the United States. Her bill, as amended, contains no reference to the bank, or even of its existence. It was the bill, as thus amended, which was dismissed by the court. We mention this because two of the errors assigned and argued in the brief of counsel for appellant relate to the action of the court, first, in holding that the bank was in law a citizen of Porto Rico, and, second, in holding that, that being so, the jurisdiction of the court to maintain the suit, with 56 L. ed.

citizens of Porto Rico on both sides of the case, would be defeated. The action of the court in respect to the matter first mentioned is not here for review, and the other only in so far as it may become necessary to deal with it for the purpose of determining the force and effect to be given to the decree *pro confesso* against Felipe Cuebas.

It was not error in the situation of this case to deny a final decree against the succession of Felipe Cuebas upon the foundation of the *pro confesso* order made on a rule day five years theretofore. When that *pro confesso* was *taken against Cuebas, [386 the suit was one of which the district court had no cognizance. The sole complainant was a citizen of Porto Rico, and Cuebas was a citizen of the United States, and therefore subject to be sued in that court by the complainant, if the citizenship of the other persons on the same side was such as not to defeat jurisdiction. But that was not the case. One of them, Francisco Antongiorgi, was alleged in the bill to be a citizen of the island of Porto Rico. The other defendant, the bank, was averred to be a corporation organized under the laws of Spain, and a citizen thereof. But later, as we have already stated, the bank's plea that it was a corporation under the laws of Porto Rico and a citizen of Porto Rico was sustained. The case was, then, one which, upon the face of the bill, showed that one of the defendants had a citizenship common with that of the complainant, and later it turned out that a second had a like citizenship.

It is not and cannot be claimed that the complainant's bill asserted any right, title, or claim arising under the laws or Constitution of the United States. If, therefore, the district court had jurisdiction, it must depend upon diversity of citizenship alone.

It is claimed that the fact that one of the three defendants was a citizen of the United States conferred jurisdiction, although the other two were Porto Ricans, with a citizenship identical with that of the complainant. That this would not have been so under the Foraker act of 1900 [31 Stat. at L. 77, chap. 191], is conceded. That act gave to the district court for Porto Rico the jurisdiction of the United States district courts, and added to that the jurisdiction of cases cognizable in circuit courts of the United States. The contention is that this extraordinary stretch of jurisdiction is conferred by the 3d section of the act of March 2, 1901, 31 Stat. at L. 953, chap. 812. That section reads as follows:

*"That the jurisdiction of the dis-[387 trict court of the United States for Porto Rico in civil cases shall, in addition to that

conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Shortly stated, the construction placed upon this section is, that the word "parties" is not used collectively, meaning all of the litigants on the one side or the other, but is intended as if the word "litigants" had been used, and that the words "or either of them" mean "any of them," and that the jurisdiction conferred embraces all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country.

The construction contended for is out of accord with that placed upon the act in *Vallecillo Mandry v. Bertran*, 2 Porto Rico Fed. Rep. 46,—a construction constantly adhered to by the court below since 1906. It is also a construction out of harmony with a long line of decisions of this court, construing the jurisdictional clauses in the various statutes dealing with the question of jurisdiction dependent upon diversity of citizenship. The first of the decisions referred to involved the meaning of the clause in the judiciary act of 1789 [1 Stat at L. 78, chap. 20], conferring jurisdiction over controversies "where an alien is a party, or the suit is between a citizen of a state where the suit is brought and a citizen of another state." The question arose in *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435, whether it was essential to jurisdiction that all of the parties on one side should have a citizenship different from that of all of the parties on the other. In that case the complainants were citizens of Massachusetts and some of the defendants were citizens of the same state. But one of the 388]defendants was a citizen *of Vermont and this fact was claimed to give jurisdiction. To this, the court, by Chief Justice Marshall, said:

"The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

This construction of that clause and of like words in later statutes, concerning jurisdiction dependent upon diversity of citizenship, has been followed in many cases among them being *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179, and *Smith v. Lyon*, 133 480

U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303. In the case first referred to, Mr. Justice Field stated the matter in words quite as applicable here, by saying: "If there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

In view of these decisions we should be slow to conclude that Congress intended any other rule as to the arrangement of the parties where diversity of citizenship is the basis of jurisdiction than that laid down in construing like statutes upon the same subject. The contention that from the evident intention of Congress to enlarge the jurisdiction of the court we should infer an intent to confer jurisdiction to the extent claimed is without merit. Congress, in very plain words, did extend the jurisdiction, first, by cutting down the necessary jurisdictional amount to \$1,000, and second, by dispensing with diversity of state citizenship. United States citizenship is substituted for diverse state citizenship.

We therefore conclude that the court had no jurisdiction of this cause when the *pro confesso* order was entered against Felipe Cuebas.

*The final decree following a *pro*[389 *confesso* order is only such a decree as would be authorized by the state of the pleadings when the order was entered. *Frow v. De La Vega*, 15 Wall. 552, 21 L. ed. 60; *Dan. Ch. Pl. & Pr.* 5th ed. pp. 525-528, and notes; *Simmonds v. Palles*, 2 Jones & L. 489, 8 Ir. Eq. Rep. 335; *Hardwick v. Bassett*, 25 Mich. 149; *McDonald v. Mobile L. Ins. Co.* 6 Ala. 468. If the bill was fatally defective upon its face, showing that the court had no jurisdiction, it was error to allow a *pro confesso*, and upon the court's attention being called to it, it should have vacated the order and allowed the defaulting defendant to defend. *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376; *Blythe v. Hineckley*, 84 Fed. 228, 244; *Eldred v. American Palace Car Co.* 103 Fed. 209.

That the bill was subsequently amended so as to confer jurisdiction against Cuebas as a sole defendant, by dismissing the bill against the other two defendants, and striking out the prayer of the bill that any and every claim, interest, or encumbrance be forever barred and cut off, did not justify a decree based upon the order *pro confesso* made prior thereto. Upon such amendment being made, so completely changing the character of the bill, creating a jurisdiction which had not theretofore existed, the court should have set aside the default and given time to defend.

But the allowance of a final decree *nunc*

pro tunc would have been still more inadmissible. Cuebas had been then dead for, apparently, some years. There had been no revivor. If there had been, his representatives would doubtless have moved to vacate the *pro confesso* decree upon the ground suggested, and it would have been error to have denied that motion. The motion to enter a decree as of a day before his death would, if allowed, have been fruitless, for it would bear a date antecedent to the acquirement of jurisdiction, and therefore erroneous, if of any validity.

390] *But no decree *nunc pro tunc* was admissible. Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court; or a decree in a cause which is under advisement when the death of a party occurs. *Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369. There is no claim that a final decree in pursuance of the allegations of the bill had ever been directed, and, through inadvertence of either court or counsel, omitted from entry. There was therefore no authority for a decree *nunc pro tunc* upon any known ground of equity procedure. *Gray v. Brignardello*, 1 Wall. 627, 17 L. ed. 693.

No effort to revive the cause against the succession of Cuebas was at any time made. The complainant stood upon her right to a final decree *nunc pro tunc*. When this was denied she still made no effort to revive the cause, though Cuebas had been dead a long time. It was not error in such circumstances to dismiss the bill.

Decree affirmed.

CITY OF CINCINNATI, Plff. in Err.,
v.
LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(See S. C. Reporter's ed. 390-407.)

States — admission — supersedure of ordinance of 1787.

1. The power of eminent domain possessed by the state of Ohio was not restricted in any way after its admission to the Union, by the provisions of the 2d article of the ordinance of 1787, for the government of the Northwest territory, relating to that subject.

[For other cases, see *States*, 373-379, in Digest Sup. Ct. 1908.]

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

56 L. ed.

Territories — powers — eminent domain.

2. A limitation upon the general power of eminent domain assumed to exist, and not a grant of the power itself, is what was intended by the provisions of article 2 of the ordinance of 1787 for the government of the Northwest territory, that, "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

[For other cases, see *Territories*, 26-35, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — eminent domain.

3. The obligations of a contract by which a river front strip at Cincinnati was dedicated to the public use were not impaired by the condemnation, conformably to Ohio Rev. Stat. § 3283a, of a right of way for an elevated railroad track across such strip, even assuming that there is to be read into the contract the then-existing law of eminent domain, including the provisions of article 2 of the ordinance of 1787 for the government of the Northwest territory, that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular service, full compensation shall be made for the same."

[For other cases, see *Constitutional Law*, 1309-1313, in Digest Sup. Ct. 1908.]

[No. 385.]

Submitted January 9, 1912. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Circuit Court of Hamilton County, in that state, affirming a decree of the Court of Common Pleas of that county, dismissing a suit to enjoin proceedings to condemn an easement across a public landing. Affirmed.

See same case below, 82 Ohio St. 466, 92 N. E. 1111.

The facts are stated in the opinion.

Messrs. **Edward M. Ballard** and **Albert Bettinger** submitted the cause for plaintiff in error:

The dedication of the public landing is a contract.

The law of eminent domain only as it existed at the time of the dedication, like all other laws then existing, was read into the contract of dedication.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; *Richmond, F. & P. R. Co. v. Louisa R. Co.* 13 How. 71, 82, 14 L. ed. 55, 60; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep.

718; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Smith v. Parsons*, 1 Ohio, 240, 13 Am. Dec. 608; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547.

Constitutional provisions, equally with legislative enactments, come within the inhibition against the impairment of contractual obligations.

Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 515, 19 L. ed. 997, 998; *Shreveport v. Cole*, 129 U. S. 36, 42, 32 L. ed. 589, 591, 9 Sup. Ct. Rep. 210; *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. ed. 212, 215; *Fisk v. Jefferson*, 116 U. S. 131, 135, 29 L. ed. 587, 588, 6 Sup. Ct. Rep. 329; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. ed. 856; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Matheny v. Golden*, 5 Ohio St. 369.

The inhibition against the impairment of contractual obligations is found in all the fundamental laws of the country from the beginning, and is absolute.

Bank of Toledo v. Toledo, 1 Ohio St. 687.

Ohio, in order to be admitted on an equal footing with the original states, need not be possessed of the same power of eminent domain as each of those states.

Matheny v. Golden, 5 Ohio St. 369; *Case v. Loftus*, 5 L.R.A. 684, 14 Sawy. 213, 39 Fed. 732; *State v. Boone*, 84 Ohio St. 359, — L.R.A.(N.S.) —, 95 N. E. 924; *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245.

The state might alter or abridge the power of eminent domain by a change in the Constitution.

Bank of Toledo v. Toledo, 1 Ohio St. 623.

Any subsequent enlargement would be within the constitutional inhibition.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; *Graham v. Folsom*, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245.

The only power of eminent domain in the Northwest territory under the ordinance of 1787 was where the public exigencies made it necessary for the common preservation.

Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Van Brocklin v. Tennessee (Van Brocklin v. Anderson)* 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

The power of eminent domain was not conferred by the provision that "no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land."

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 276, 15 L. ed. 372, 374; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Hurtado v. California*, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292; *Dartmouth College v. Woodward*, 4 Wheat. 518, 581, 4 L. ed. 629, 645; *Newcomb v. Smith*, 1 Chand. (Wis.) 71.

The Federal government did not acquire the power of eminent domain by virtue of the 5th Amendment to the Federal Constitution.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346.

Messrs. J. B. Foraker and Ellis G. Kinkead submitted the cause for defendant in error:

Under the ordinance of 1787 there was conferred upon the territorial legislature the power of eminent domain.

Giesy v. Cincinnati, W. & Z. R. Co. 4 Ohio St. 308; *Willyard v. Hamilton*, 7 Ohio pt. 2, p. 116, 30 Am. Dec. 195.

Whatever limitations the ordinance contained upon the exercise by the territorial legislature of the power of eminent domain, they became of no effect upon the organization and admission of the state of Ohio into the Union.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 382, 51 L. ed. 231, 238, 27 Sup. Ct. Rep. 72; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 582, 9 L. ed. 773, 838; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. ed. 487, 489, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 284, 30 L. ed. 393, 395, 7 Sup. Ct. Rep. 206; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 210, 212, 28 L. ed. 959, 961, 962, 5 Sup. Ct. Rep. 423; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; *Coyle v. Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

Mr. Justice **Lurton** delivered the opinion of the court:

Under an act of the legislature of the state of Ohio of May 9, 1908, being § 3283a, and an ordinance of the city of Cincinnati in pursuance of that act, the defendant railroad company instituted, in a court of the state of Ohio, a suit to condemn a right of way for an elevated railroad track across the public landing at Cincinnati. Pending the condemnation proceeding the city of Cincinnati filed a bill in one of the common pleas courts to enjoin the railroad company from constructing its railway across said public landing, in pursuance of its agreement and contract with the city under the ordinance mentioned, and to restrain the prosecution of its pending petition for the condemnation of an easement of way across the landing. The ground upon which it was sought to stop the condemnation proceeding and prevent the company from constructing its elevated tracks across the public landing was that § 3283a, Revised Statutes of Ohio, under which alone an easement of way might be appropriated, was repugnant to article 1, § 10 of the Constitution of the United States, forbidding any state to pass any law impairing the obligation of a contract, in so far as § 3283a applied to the particular property across which an easement of way was sought to be appropriated.

That section, so far as necessary to be here stated, provides that upon compliance 399] therewith any railroad *company owning or operating a railroad wholly or partially within the state might "use and occupy for an elevated track any portion of any public ground lying within the limits of a municipality and dedicated to the public for use as a public ground, common, landing, or wharf, or for any other public purpose," excepting streets, alleys, and public roads. It is provided that before instituting a proceeding for the appropriation of the needed easement, which is to be according to a general statute referred to, such company shall submit plans for the structure, and come to an agreement with the city council of the municipality concerned, as to the terms and conditions upon which the easement shall be occupied.

The proprietors of the grant of land upon which the city of Cincinnati was originally laid out made a plan or plat of the proposed town, according to which plan a strip of ground between Front street and the Ohio river was set apart "as a common for the use and benefit of the town forever." The effect of the sale of the town lots under this plan has long since been held to constitute a dedication of the river front strip to the public use, and to have

vested in the city of Cincinnati a valid title in trust for the public use in the same manner that streets were held under the same plat or plan. *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. This dedication was made in 1789, and the property has ever since been used as a public landing or wharf.

A demurrer to the petition was sustained by the court of common pleas, and the bill dismissed. This was affirmed upon appeal to the circuit court, and again affirmed upon appeal to the supreme court of the state.

That the dedication in 1789, and acceptance by the then town of Cincinnati, constitute a contract with the dedicators, obligatory upon the town and its successor, the city of Cincinnati, may be conceded. The contention is that the Ohio act of May 9, 1908, now § 3283a, *Revised[400 Statutes of Ohio, is an impairment of the contract, forbidden by the 10th section of the first article of the Constitution of the United States. But the right of every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States, and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law; that is, a law authorizing it, and provision made for compensation. This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of contract, are, along with land and movables, within the sweep of this sovereign authority.

The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing, enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165.

17 Sup. Ct. Rep. 718; *Offield v. New York*, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72.

Every contract, whether between the state and an individual, or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. *West River Bridge Co. v. *Dix*, 6 How. 507, 12 L. ed. 535; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 691, 692, 41 L. ed. 1167, 17 Sup. Ct. Rep. 718.

These general propositions are not challenged.

But it is said that the right of appropriating private property to a public use possessed by the state of Ohio is only that which is defined and limited by the second article of the ordinance of 1787, creating a government for the Northwest territory, which embraced the territory which later became the state of Ohio. That ordinance, after providing for a territorial government, declares certain political principles to be fundamental, and that they should constitute the "basis of all laws, constitutions, and governments," thereafter organized out of that territory, and should be regarded as "articles of compact between the original states and the people and states in the said territory, and be unalterable unless by common consent." The article referred to, and claimed now to be still obligatory, is in these words:

"No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

But the ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that territory, ceased to be, in itself, obligatory upon such states from and after their admission into the Union as states, except in so far as adopted by such states and made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Permoli v. New Orleans*, 3 How. 589, 11 L. ed. 739; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185.

402] **In the Escanaba & L. M. Transp. Co. Case*, it was said:

"Whatever the limitation upon her pow-

ers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is, 'on an equal footing with the original states, in all respects whatever.' 3 Stat. at L. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird creek, and Pennsylvania over the Schuylkill river."

In *Coyle v. Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, the case of *Escanaba & L. M. Transp. Co. v. Chicago*, and the cases cited therein, were fully reviewed and held applicable to conditions imposed by Congress in the enabling act under which Oklahoma was admitted, and all limitations in that act were held inoperative after admission, in so far as they had not been subsequently adopted by the state, and were in derogation of the equality in power of that state with the other states of the Union.

It is next contended that whether the provisions of article 2 now constitute the irrevocable fundamental law of Ohio or not, that that provision was the only law of eminent domain existing in 1789, and as such is to be regarded as read into the contract of dedication, and, therefore, is the only power of eminent domain to which that contract was subordinate. Upon this hypothesis is based the contention that any subsequent law of Ohio authorizing a taking of this property for a purpose or use not within the terms of the ordinance of 1787 is a law impairing the obligation of a contract.

But the assumption that the power of eminent domain possessed by the Northwest territory in 1787 was limited as claimed is untenable. The clause referred to assumes the existence of a general power of eminent domain in the government, and provides that when exerted there must be full compensation for the property taken or the services required. That this is so is apparent not only from the language of the clause, but from a general consideration of the purpose and object of the congressional act in which the article appears. The ordinance of 1787 was a law providing

for the government of the territory of the United States northwest of the River Ohio. It provided for the appointment of a governor and secretary and for the appointment of judges and the organization of courts with common-law jurisdiction. To the governor and judges was granted legislative power to adopt and publish such laws of the original states as should seem to be adapted to the conditions, which were to be and remain in force unless disapproved by Congress. Authority to elect a legislature was conferred when there should be five thousand inhabitants.

Upon this article 2, heretofore set out, is claimed to be a contractual limitation, based upon the contract of dedication, by which this particular strip of river front is forever protected against an exercise of the power of eminent domain by the state of Ohio, except where "the public exigency makes it necessary for the common preservation." If we assume, for argument, that an affirmative limitation upon the right of appropriating property to any public purpose would so enter into any contract as to forever afterwards bind the hands of the state, no such situation is here presented. Article 2 is not a grant of power, but a limitation upon the power of eminent domain assumed to exist. It was conferred 404] upon the governor and judges *by the power to adopt and publish the laws of any original state deemed appropriate, and by the second section there was conferred upon the governor and legislature, when organized, "authority to make laws in all cases . . . not repugnant to the principles and articles in this ordinance established and declared." This legislative power, temporarily in the governor and a majority of the judges, and then in the governor and the legislature, when organized, included, by necessary implication, the general power to provide for the appropriation of private property for public purposes. If this is not the case, then the ordinance granted no power of that kind whatever, for the clause above cited is obviously a mere restriction by which compensation is required.

This right of appropriating private property to a public use is one of the powers vital to the public welfare of every self-governing community. It is a power which this court has described as an "incident to sovereignty,"—a power which "belongs to every independent government." In *United States v. Jones*, 109 U. S. 518, 27 L. ed. 1017, 3 Sup. Ct. Rep. 346, it was said:

"The provision found in the 5th Amendment to the Federal Constitution and in the Constitutions of the several states, for just 56 L. ed.

compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses, vested in the general government,—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country,—cannot be transferred to a state any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority."

That the Northwest territory was not a state, but a *mere territorial depend- [405 ency, is of no consequence. The United States was an independent sovereign, and when it created a territorial government with legislative authority subject only to the limitations of the creating act, it granted to this new dependent government this vital power unless it plainly appears that it was withheld.

The denial of such a power to this new government intended as the forerunner of a group of states west of the Ohio, or its restriction to purposes of necessary defense only, as plaintiff in error would construe the language of the article above set out, is not to be easily or lightly presumed. The power was one necessary to the work which this pioneer community was set on doing. It was a power well nigh as essential to the existence of the government as the taxing power. The language of Chief Justice Taney in the *Charles River Bridge Case*, 11 Pet. 421, 547, 9 L. ed. 774, 824, when speaking of a contention that the state of Massachusetts had surrendered the power, by granting a charter for the construction of a particular bridge, to appropriate that bridge so authorized, is apt and appropriate, when we are asked to construe the ordinance of 1787 as denying to the government of the Northwest territory a power so important to the welfare of its people. Upon this he said:

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, conven-

ience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving *it undiminished. And when a corporation alleges that a state has surrendered, for seventy years, its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies and the rule of construction must be the same."

Nor should the particular language of the article above set out be given a narrow or hypercritical meaning. The plain purpose was but to limit the general right of eminent domain by the requirement that compensation should be made. A public "exigency" exists, for the "common preservation," when the legislature declares that for a bona fide public purpose there should be a right of way for a common carrier across a particular piece of property. The uses to which § 3283a authorizes a condemnation of a right of way are undeniably public, and not private, uses. When that is the case, "the propriety or expediency of the appropriation cannot be called in question by any other authority." *United States v. Jones*, 109 U. S. 519, 27 L. ed. 1017, 3 Sup. Ct. Rep. 346.

407] *It follows, then, first, that the legislative power of the state of Ohio was not restricted in any way by the provisions of the second article of the ordinance of 1787 after its admission to the Union, and it has every power of eminent domain which pertains to other states, unless limited by its own Constitution; and, second, that if the law of eminent domain as it existed at the time of the dedication is to be read

into the contract, that that law, properly interpreted, was not such as to forbid an appropriation such as is here involved.

The judgment of the Supreme Court of Ohio must therefore be affirmed.

UNITED STATES, Petitioner,

v.

BERNARD CITROEN.

(See S. C. Reporter's ed. 407-424.)

Duties — on drilled pearls — similitude clause.

Loose drilled pearls, unset and unstrung, however carefully matched or desirable for a necklace, are dutiable at 10 per cent ad valorem under the tariff act of July 24, 1897 (30 Stat. at L. 151, 192, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1676), ¶436, as "pearls in their natural state, not strung or set," and are not classifiable by similitude as jewelry, including "pearls set or strung," dutiable under ¶ 434 at 60 per cent ad valorem, because at some time, or from time to time previous to importation, such pearls had been strung temporarily for purposes of display.

[For other cases, see Duties, 84-88, in Digest Sup. Ct. 1908.]

[No. 30.]

Argued November 1, 1911. Decided February 19, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of New York, reversing a decision of the board of general appraisers, which had sustained the importer's protest against classifying loose drilled pearls by similitude as pearls set or strung. Affirmed.

See same case below, 92 C. C. A. 365, 166 Fed. 693.

The facts are stated in the opinion.

Assistant to the Attorney General Fowler argued the cause and filed a brief for petitioner:

The circuit court of appeals improperly adopted as the facts the findings of the board of general appraisers.

Apgar v. United States, 24 C. C. A. 113, 46 U. S. App. 625, 78 Fed. 332.

The decision of the circuit court of appeals conflicts with the well-recognized rule laid down in other cases for the assessment of duties upon pearls.

Tiffany v. United States, 103 Fed. 619, 105 Fed. 766; *Neresheimer v. United States*, 131 Fed. 977.

When an article is separated into its component parts, which parts are imported separately, they are assessable for duty as if the article were imported as a whole.

United States v. Schoverling, 146 U. S. 76, 36 L. ed. 893, 13 Sup. Ct. Rep. 24; United States v. Irwin, 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 799; Isaacs v. Jonas, 148 U. S. 648, 37 L. ed. 596, 13 Sup. Ct. Rep. 677; Read v. Certain Merchandise, 43 C. C. A. 178, 103 Fed. 197; MacMillan Co. v. United States, 116 Fed. 1018.

The right of an importer so to manufacture his goods as to reduce the rate of duty extends only to its manufacture, and does not permit him to change its character after manufacture in order to avoid a higher rate of duty.

Merritt v. Welsh, 104 U. S. 694, 700, 701, 705, 26 L. ed. 896, 898, 899; Seeberger v. Farwell, 139 U. S. 608, 35 L. ed. 297, 11 Sup. Ct. Rep. 650; A. A. Vantine & Co. v. United States, 155 Fed. 149; Falk v. Robertson, 137 U. S. 225, 34 L. ed. 645, 11 Sup. Ct. Rep. 41; Seeberger v. Schlesinger, 152 U. S. 581, 587, 38 L. ed. 560, 562, 14 Sup. Ct. Rep. 729.

Mr. W. Wickham Smith argued the cause, and, with Mr. John K. Maxwell, filed a brief for respondent:

The circuit court of appeals did not pursue any improper method with regard to the findings of the board of general appraisers.

Gabriel v. United States, 59 C. C. A. 352, 123 Fed. 296; White v. United States, 18 C. C. A. 541, 38 U. S. App. 239, 72 Fed. 251; Re Van Blankensteyn, 5 C. C. A. 579, 11 U. S. App. 687, 56 Fed. 474; Re Kursheedt Mfg. Co. 49 Fed. 633; Re White, 53 Fed. 787; Marine v. Lyon, 13 C. C. A. 268, 25 U. S. App. 149, 65 Fed. 992; Re Bing, 66 Fed. 727; Mexican Onyx & Trading Co. v. United States, 66 Fed. 732; Myers v. United States, 110 Fed. 940; Leeburger v. United States, 113 Fed. 976; United States v. Jackson, 113 Fed. 1000; United States v. Riebe, 1 U. S. Ct. Customs Appeals, 19; Belcher v. United States, 91 Fed. 975.

One witness's testimony could not be allowed to upset a finding of the board, made on the testimony of a number of witnesses.

Page v. United States, 113 Fed. 1006; Bromley v. United States, 154 Fed. 399.

Every importer has a right to have his goods assessed for duty at the appropriate rate as and what they are when they come into the port and before the customs officers.

Seeberger v. Farwell, 139 U. S. 608, 35 L. ed. 297; Worthington v. Robbins, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 56 L. ed.

581; Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896; United States v. Wotton, 3 C. C. A. 553, 5 U. S. App. 234, 53 Fed. 344; Johnson v. United States, 123 Fed. 997; Godwin v. United States, 66 Fed. 739; Paturel v. Robertson, 41 Fed. 329; Hunter v. United States, 143 Fed. 914; Stone & D. Co. v. United States, 147 Fed. 605; Mavtner v. United States, 84 Fed. 155; Re Blumenthal, 51 Fed. 76; United States v. Levitt, 1 N. Y. Leg. Obs. 92, Fed. Cas. No. 15,594; Re Schoverling, 45 Fed. 349, affirmed in 146 U. S. 76, 36 L. ed. 893, 13 Sup. Ct. Rep. 24.

In all cases of doubt as to the meaning of a revenue statute the decision should be in favor of the importer, who has to pay the tax, and there never was a case more strongly calling for the application of that rule than the case at bar.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; Rice v. United States, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910; Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; Matheson v. United States, 18 C. C. A. 143, 38 U. S. App. 25, 71 Fed. 394; Adams v. Bancroft, 3 Sumn. 384, Fed. Cas. No. 44; McCoy v. Hedden, 38 Fed. 89; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Hempstead v. Thomas, 122 Fed. 538; Hayes v. United States, 80 C. C. A. 17, 150 Fed. 66; United States v. Merck, 91 Fed. 639; Franklin Sugar Ref. Co. v. United States, 73 C. C. A. 476, 142 Fed. 376; Powers v. Barney, 5 Blatchf. 202, Fed. Cas. No. 11,361; United States v. Davis, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147; United States v. Michelin Tire Co. 1 Ct. Customs Appeals, 518; United States v. Hatters' Fur Exch. 1 Ct. Customs Appeals, 198; United States v. Matagrín, 1 Ct. Customs Appeals, 309, 312; Woolworth v. United States, 1 Ct. Customs Appeals, 120, 122.

*Mr. Justice Hughes delivered the [413] opinion of the court:

Bernard Citroen, on June 11, 1906, imported into the United States thirty-seven drilled pearls,—unset and unstrung,—divided into five lots, separately inclosed. The collector classified them by similitude "as pearls set or strung, or jewelry," dutiable at 60 per cent ad valorem under paragraph 434 of the tariff act of 1897. 30 Stat. at L. 151, p. 192, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1676. The board of general appraisers sustained the importer's protest, holding the pearls to be dutiable by similitude at 10 per cent under paragraph 436. The circuit court, on additional testimony, reversed this ruling and affirmed

that of the collector, and this decision was, in turn, reversed by the circuit court of appeals, which held that the board was right. 92 C. C. A. 365, 166 Fed. 693. The case comes here on certiorari.

The paragraphs of the act of 1897 (30 Stat. at L. p. 192, chap. 11, U. S. Comp. Stat. 1901, p. 1676) which are in question read as follows:

"434. Articles commonly known as jewelry, and parts thereof, finished or unfinished, not specially provided for in this act, including precious stones set, pearls set or strung, and cameos in frames, 60 per centum ad valorem."

"436. Pearls in their natural state, not strung or set, 10 per centum ad valorem."

The pearls had been purchased by the importer's brother, and had been offered for sale, collectively and in lots, in Paris, London, and Berlin; and to show that the collection was a desirable one for a necklace, they had been strung from time to time on a silk cord. It appeared that Mrs. Leeds, the present owner, had seen the pearls in Paris, both loose and on a string. As she testified, they were brought to her hotel "both on the string and off the string; it was strung up at odd times, then it was taken apart and other pearls were put 414] in and others taken out, so it was strung several times." She was permitted to wear the pearls as a necklace; and finally bought them, it being agreed that they should be delivered to her in this country. They were so delivered in the condition in which they were imported, without string or clasp, and to these the purchaser subsequently added six pearls and formed the necklace she desired.

With respect to the character of the imported collection, the board of general appraisers found: "Pearls of greater dimensions than the average are comparatively rare; hence it frequently requires several years' search in order to secure a sufficient number to form a necklace, all accurately matched in the essential features of size, color, and luster. Such a collection thus assembled would, no doubt, command a higher price than the aggregate value of the separate pearls. On the other hand, a sufficient number of pearls, although of large size, required to form a necklace, matched as to size, but not otherwise, except a mere regard for comparative color, could be assembled within a short time and at a price based upon the cost of each separate pearl. In order to dispose of thirty or more pearls to one purchaser, such a collection would usually be sold at a less price than the aggregate would amount to were each pearl sold separately. The evidence shows and we find that the pearls in

question belong to the latter, and not to the first, class." T. D. 28,246; G. A. 6617. And as to these facts there is nothing in the evidence introduced in the circuit court which requires a different conclusion.

The questions presented are (1) whether the pearls fall directly within the description of the paragraph (434) relating to jewelry, and (2), if not, whether they are brought within this paragraph, through similitude, by virtue of § 7. 30 Stat. at L. 205, chap. 11, U. S. Comp. Stat. 1901, p. 1693.

First. The rule is well established that "in order to produce uniformity in the imposition of duties, the dutiable *class[415] fication of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington v. Robbins*, 139 U. S. 337, 341, 35 L. ed. 181, 182, 11 Sup. Ct. Rep. 581; *Dwight v. Merritt*, 140 U. S. 213, 219, 35 L. ed. 450, 452, 11 Sup. Ct. Rep. 768; *United States v. Schoverling*, 146 U. S. 76, 82, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24; *United States v. Irwin* (C. C. A. 2d C.) 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 799, 802. This, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice. When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue, and cannot be permitted to succeed. *Falk v. Robertson*, 137 U. S. 225, 232, 34 L. ed. 645, 647, 11 Sup. Ct. Rep. 41. But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate. *Merritt v. Welsh*, 104 U. S. 694, 704, 26 L. ed. 896, 899; *Seeberger v. Farwell*, 139 U. S. 608, 611, 35 L. ed. 297, 298, 11 Sup. Ct. Rep. 650. "So long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Merritt v. Welsh*, supra. The inquiry must be—Does the article, as imported, fall within the description sought to be applied?

In the paragraph as to jewelry (434) Congress expressly defined what pearls were to be included. The paragraph reads, "including . . . pearls set or strung." It does not say pearls that can be strung, or that are assorted or matched so as to be suitable for a necklace, but pearls "set or strung." We are not concerned with the reason for the distinction; it is enough that

Congress made it. Had these pearls never been strung before importation, no one would be heard to argue that they fell directly within the description of paragraph 434 because they could be strung, or had been collected for the purpose of stringing 416]*or of being worn as a necklace. Loose pearls—however valuable the collection—however carefully matched or desirable for a necklace—are not “pearls set or strung.”

Nor can it be said that pearls, imported unstrung, are brought within the description of paragraph 434 because, at some time, or from time to time, previous to importation, they have been put on a string temporarily for purposes of display. The paragraph does not use a generic definition which could be deemed to define pearls previously strung though imported unstrung, but refers—in terms which shelter no ambiguity—to their condition when imported. It is not a case of parts of a described article, separately packed to avoid the specified duty on the article as a whole. *United States v. Schoverling*, 146 U. S. 76, 82, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24; *Isaacs v. Jonas*, 148 U. S. 648, 37 L. ed. 596, 13 Sup. Ct. Rep. 677; *United States v. Irwin* (C. C. A. 2d C.) 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 799, 802. For here, the imported pearls, whether regarded separately or taken as a collection, are not within the description. It is idle to comment on the relative value of a string to hold the pearls, for this is immaterial. The statute has furnished the test, and we are not at liberty to make another.

Second. Although the pearls do not fall directly within paragraph 434, the question remains whether they are brought within it by similitude. The similitude clause (§ 7) applies to articles not enumerated in the tariff act, and hence it governs the rate in this case only if it be found that the pearls are excluded from the description of paragraph 436, which enumerates “pearls in their natural state, not strung or set.” May it fairly be said that in these two classes of pearls—those “set or strung” and those “in their natural state, not strung or set”—Congress intended to describe all pearls, or is there a sort of pearls, for example, those drilled and matched so as to be suitable for a necklace, which must be said to have been left unenumerated?

In the customs act of 1816 (3 Stat. at L. 417]310, chap. 107), a duty of 7½ *per cent ad valorem was laid on “precious stones and pearls of all kinds, set or not set.” The act of 1842 (5 Stat. at L. chap. 270) made the duty 7 per cent “on gems, pearls, or precious stones.” That of 1846 (9 Stat. at L. 45, 48, chap. 74) fixed the rate at 30

per cent for “diamonds, gems, pearls, rubies, and other precious stones, and imitations of precious stones, when set in gold, silver, or other metal,” and at 10 per cent on “diamonds, gems, pearls, rubies, and other precious stones, and imitations thereof, when not set.” In 1857 (11 Stat. at L. 193, chap. 98) and in 1861 (12 Stat. at L. 190, chap. 68), the same distinction was maintained.

In the Revised Statutes (§ 2504, p. 480) we find the following: “Precious stones and jewelry.—Diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set: 10 per centum ad valorem; when set in gold, silver, or other metal, or on imitations thereof, and all other jewelry: 25 per centum ad valorem.” In 1883 (22 Stat. at L. 513, 514, chap. 121) the rate of duty was made 25 per cent for “jewelry of all kinds” and 10 per cent for “precious stones of all kinds.” In 1890 (26 Stat. at L. 600, 601, chap. 1244) the jewelry paragraph (452), which fixed the rate at 50 per cent, embraced all articles, not elsewhere specially provided for, which were composed of precious metals or imitations thereof (including those set with pearls) and known commercially as jewelry; and the following paragraph (453) read: “Pearls, 10 per centum ad valorem.” By the act of 1894 (28 Stat. at L. 534, chap. 349), the jewelry rate was reduced to 35 per cent; the paragraph as to pearls was changed so that instead of describing pearls generally it read: “Pearls, including pearls strung, but not set, 10 per centum ad valorem;” and pearls set were placed with precious stones set, with a duty of 30 per cent.

It will thus be observed that when pearls were enumerated in the tariff acts prior to that of 1897, the enumeration *was[418 evidently intended to be comprehensive, and covered all pearls not included in the provision for jewelry. The act of 1897 placed “pearls set or strung” in the jewelry paragraph, and then provided the rate of 10 per cent for “pearls in their natural state, not strung or set.”

To complete the review of the statutes, it may be added that in 1909, when new tariff legislation was under consideration, it was proposed, in the light of the decisions to which we shall presently refer, that there should be inserted in the act a clause providing that “collections of pearls selected, matched, or graded, shall be dutiable as jewelry;” and the House bill so provided. H. R. Bill No. 1438, par. 447, 61st Cong., 1st sess., Cong. Rec. vol. 44, p. 1510. Congress not only refused to make this insertion, but instead, retaining the existing rate on unstrung and unset pearls, omitted

the phrase "in their natural state," and further clarified the provision by inserting the words "drilled or undrilled," so that the clause in the act of 1909 reads: "Pearls and parts thereof, drilled or undrilled, but not set or strung, 10 per centum ad valorem." 36 Stat. at L. 68, chap. 6, U. S. Comp. Stat. Supp. 1909, p. 726.

The difficulties that beset the construction of paragraph 436 of the act of 1897 sufficiently appear in the cases which have been brought before the courts. In 1898, Tiffany & Company imported pierced pearls described in the invoices as "pearls drilled, but not strung." They were assessed for duty at 20 per cent as unenumerated articles, manufactured in whole or part, under § 6. The circuit court (*Tiffany v. United States*, 103 Fed. 619) held that the phrase "pearls in their natural state" was a new phrase wholly unknown to merchants; that the words, having no commercial meaning, must be interpreted in their plain, natural sense; and that a drilled pearl was not a pearl in the natural state. It was pointed out that the selection made by Congress in the use of these words, so interpreted, seemed an unfortunate one, as the effect [419] was to "attach a higher duty to the lower article. The conclusion was that Congress had not, as presumably it intended to do, covered all kinds of pearls in the various jewelry paragraphs, but had "left a kind of pearl to be covered by one of the catch-all paragraphs," and this the court could not correct. The assessment was sustained.

On a later importation of drilled pearls this decision was followed by the collector, and the ruling was affirmed by the circuit court. *T. D.* 22,140, *G. A.* 4692; *Tiffany v. United States* (1901) 105 Fed. 766. But, while overruling the importer's protest, the court stated that the similitude clause should operate before the general clause providing for unenumerated manufactured articles, and that the imported pearls bore a closer resemblance to strung pearls than to pearls in their natural state. This was in effect to hold that drilled pearls were dutiable under the jewelry paragraph at 60 per cent.

This decision was reversed by the circuit court of appeals. *Tiffany v. United States* (1901; 2d Cir.) 50 C. C. A. 419, 112 Fed. 672. It was ruled that the pearls were not covered by either of the paragraphs 434 and 436; that the similitude clause should be applied; and that the drilled pearls more closely resembled pearls in their natural state than strung pearls, and hence that the pearls in question were dutiable at 10 per cent. This was followed in *T. D.* 23,751, *G. A.* 5149.

The court, however, indicated that there would be an exception to this rule when the pearls had been so selected as to produce a collection "worth more than the aggregate values of the individual pearls composing it."

Meanwhile, Neresheimer & Company had imported two lots of drilled pearls, in March and November, 1901, respectively, one being forty-five and the other thirty-nine in number, the total value exceeding \$123,000. At first they were assessed at the rate of 20 per cent; but after the decision of the court of appeals in the *Tiffany Case*, [420 supra, both entries were reliquidated and the articles were assessed by the collector as "pearls strung" at 60 per cent. This was sustained by the board of general appraisers (1902) *T. D.* 23,748, *G. A.* 5146. The board found that the pearls "were imported in a morocco case, with silk lining, forming a groove running lengthwise, in which the pearls were placed and by which they were held; that they were all matched and assorted as to quality, size, color, and shape, and arranged in a graduated order, the center being the largest, and gradually decreasing in size to the last pearl at each end; that the pearls were invoiced as 'drilled pearls,' and are drilled, and when the boxes were opened gave the appearance of necklaces; that they each constituted extraordinary collections of such, and were of the finest ever imported into this country; that by reason of this matching and assortment they in each case possessed a value greatly in excess of the aggregate values of the individual pearls composing the collection."

The circuit court affirmed the action of the board. *Neresheimer v. United States* (1903) 131 Fed. 977. But, on appeal, the decision was reversed by the circuit court of appeals (1904; 2d Cir.), 68 C. C. A. 654, 136 Fed. 86. Reviewing the conflicting testimony, the court of appeals concluded that the evidence did not warrant a finding that the pearls had been assorted so as to acquire the increased value as a collection which would bring them within the exception suggested in the *Tiffany Case*. It was held that they were dutiable at 10 per cent "by similitude to paragraph 436."

In 1905, Charles E. Rushmore imported eighty-five pearls which the appraiser, in a special report, stated had "been carefully selected, matched, and assorted, and, in fact, are said to have been strung, and require only to be restrung to form a necklace. They are in the same condition as those passed upon by the board in *G. A.* 5146 (**T. D.* 23,748)." The board of [421 general appraisers, upon this report, re-

versed the ruling of the collector and decided that the duty was 10 per cent, on the authority of the Neresheimer Case, *supra*. No appeal was taken by the government from this decision; it was rendered on January 21, 1905, and was circulated by the Treasury Department for the information and guidance of officers of customs and others concerned.

It thus appears that prior to 1906, when Citroen imported the pearls now in question, unstrung pearls, though drilled and matched so that they were ready to be strung as a necklace, had been held dutiable at 10 per cent. The fact that they were reported to have been previously strung abroad had not been deemed of consequence in the Rushmore Case, and the government had acquiesced in the ruling. Further, the exception indicated by the court in the Tiffany and Neresheimer Cases was negated by the board of general appraisers, which in Citroen's case found that the pearls were not matched as to color and luster with such care as would enhance their value as a collection. T. D. 28,246, G. A. 6617. And the circuit court of appeals, reversing the circuit court, held that there was no reason to disturb these findings. "It is fair to assume," said the court of appeals, that the ruling in the Rushmore Case "actuated the appellant (Citroen) in importing and selling the pearls." And it is now asserted by his counsel at this bar that should the government succeed, Citroen would be the only person who would have paid 60 per cent duty on a collection of pearls of the sort which these have been found to be.

Later—in 1909—while the act of 1897 was still in force, Tiffany & Company imported fifty-nine pearls, divided into four packages, all loose and all drilled. It appeared from the testimony before the board of general appraisers that M. Guggenheim, 422] the ultimate purchaser, *visited the Paris establishment of Tiffany & Company for the purpose of purchasing a necklace for his wife, and finding nothing suitable in stock, he requested the salesman to get a number of pearls together to make the desired necklace. The assortment was finally completed, a sketch being made of the necklace as it would appear when finished; and an order was given for the necklace to be made by Tiffany & Company at New York from the pearls selected. While it was not shown that the pearls had been worn abroad, it was found that they may have been, "and probably were, temporarily strung in the Paris establishment one or more times to show how the string of pearls would appear as a necklace." On the authority of the decision of the cir-

cuit court of appeals in Citroen's Case, the board of general appraisers sustained the importer's protest, holding that the pearls were dutiable either directly or by similitude at 10 per cent under paragraph 436. T. D. 29,542, G. A. 6864. This was sustained by the circuit court (*United States v. Tiffany & Co.* 172 Fed. 300), and its decision was affirmed by the circuit court of appeals (2d Cir.) 101 C. C. A. 665, 178 Fed. 1006. Petition for writ of certiorari was denied by this court. 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 223.

In its opinion in the present case, the court below forcibly expressed its dissatisfaction with the effort to resolve the doubt as to the meaning of the statute by a comparison "depending not upon an examination of the articles themselves, but often upon extrinsic evidence obtained long afterwards." It was a comparison, said the court, "which cannot be uniform, which imposes 10 per cent upon one aggregation of pearls and 60 per cent upon a similar aggregation, the rate depending upon the ability to obtain evidence of prior use in foreign countries; a comparison which does not admit of a fixed, definite rule, which encourages partiality, promotes injustice, and was broken down in practical *ap-[423 plication. This is illustrated by the fact that in the cases which have come to the attention of the court, the most marked contrariety of opinion has developed as to whether the respective collection was matched for a necklace, and whether a larger price could be obtained for the pearls singly or in combination." The court of appeals also stated that it would incline to the opinion, were the question an open one in that court, "that drilled pearls are not excluded from paragraph 436."

In this view we think the court was right. As was pointed out by the board of general appraisers: "Pearls just as they come from the shell are, strictly speaking, only such as are in their natural state." But the statute deals with the pearls of commerce. It appears that over 75 per cent of all large pearls when they first come into the hands of wholesale dealers are drilled, usually in a somewhat primitive manner, by the pearl fishers. It cannot be supposed that Congress contemplated such a disregard of the facts of trade, and such a radical departure from the policy of former tariff legislation, as would be involved in a construction of paragraph 436 which would exclude drilled pearls. Moreover, the language of the paragraph is "pearls in their natural state, not strung or set." This implies that the description includes pearls that can be strung or set, and

pearls cannot be strung unless perforated. The words do not exclude, but embrace, pearls that have been pierced, provided they are unstrung and unset.

But if drilled pearls, when neither strung nor set, are included in paragraph 436, the fact that they have been matched or assorted so as to form a collection suitable for stringing, or of being worn strung, does not take them out of the paragraph. Its language makes no distinction of that sort. The selection, or matching, does not alter the character of the pearls.

We are of the opinion that, as in former 424] tariff acts to *which reference has been made, Congress intended to cover and did cover all pearls in the two paragraphs, and did not leave a class of pearls unenumerated. The words in paragraph 436 are to be taken as describing a condition in antithesis to that described in paragraph 434, under which, if strung or set, imported pearls are dutiable as jewelry. Such an interpretation provides a simple and workable test, permitting certainty and impartiality in administration which should preeminently characterize the operation of tariff laws, and fulfils, as we believe, the purpose of Congress.

We conclude that the similitude clause has no application, and that upon the facts shown, the pearls imported in this case were dutiable under paragraph 436 at 10 per cent.

Judgment affirmed.

RICHARD FERRIS, Plff. in Err.,

v.

CHARLES FROHMAN, Charles Haddon Chambers, and Stephano Gatti.

(See S. C. Reporter's ed. 424-437.)

Error to state court — Federal question — copyright.

1. A decision of a state court enforcing the exclusive common-law performing rights of the owners of an unprinted and unpublished play as against the owner of a copyrighted adaptation substantially identical with the original play, who stood upon his copyright, denies a Federal right specially

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

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set up and claimed, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Federal Supreme Court to state courts. [For other cases, see *Appeal and Error*, 1751-1795, in *Digest Sup. Ct.* 1908.]

Copyright — common-law rights — play — public performance.

2. The exclusive common-law performing rights of the owners of an unprinted and unpublished play are not lost by public presentation.

[For other cases, see *Copyright*, II. b, in *Digest Sup. Ct.* 1908.]

Copyright — common-law rights in play — public performance abroad.

3. Public performance in England of an unprinted and unpublished play by English authors does not deprive the owners of their common-law right in the United States to protection against the unauthorized performance of a copyrighted adaptation substantially identical with the original play, although in England, under 5 & 6 Vict. chap. 45, § 20, the first public performance of a play is deemed equivalent to a publication, destroying all common-law rights there.

[For other cases, see *Copyright*, II. b, in *Digest Sup. Ct.* 1908.]

[No. 44.]

Submitted November 7, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Illinois to review a decree which reversed a decree of the Appellate Court for the First District, reversing a decree of the Superior Court of Cook County, restraining the production of a piratical copy of an unprinted and unpublished play. Affirmed.

See same case below, 238 Ill. 430, — L.R.A.(N.S.) —, 128 Am. St. Rep. 135, 87 N. E. 327.

The facts are stated in the opinion.

Mr. Charles H. Aldrich submitted the cause for plaintiff in error. Messrs. Charles R. Aldrich, Charles G. McRoberts, and L. E. Chipman were on the brief:

A Federal question is involved.

Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 580, 581, 50 L. ed. 596, 604, 605, 26

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On the common-law rights of authors and others in intellectual productions—see notes to *Press Pub. Co. v. Monroe*, 51 L.R.A. 353, and *State v. State Journal Co.* 9 L.R.A. (N. S.) 174.

Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Murdock v. Memphis, 20 Wall. 635, 22 L. ed. 444; Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 68, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265.

There could have been no decision in favor of the plaintiffs below that did not in effect deny the right claimed under the copyright laws of the United States by the defendant below. In such case there is a Federal question, whether mentioned in the opinion of the court below or not.

Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 581, 50 L. ed. 596, 604, 605, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Murray v. Charleston, 96 U. S. 432, 441, 442, 24 L. ed. 760, 761, 762.

The statute 5 and 6 Viet. chap. 45, § 20, makes public performance of a dramatic work with the author's or owner's consent equivalent to the first publication of a book.

And in England it is held that performance in the United States with the owner's consent terminates the author's playwright in England and makes the performing right *publici juris*.

Boucicault v. Chatterton, L. R. 5 Ch. Div. 267, 46 L. J. Ch. N. S. 305, 35 L. T. N. S. 745, 25 Week. Rep. 287; Boucicault v. Delafield, 1 Hem. & M. 597, 33 L. J. Ch. N. S. 38, 9 Jur. N. S. 1282, 9 L. T. N. S. 709, 12 Week. Rep. 101; Drone, Copyright, 583; Jefferys v. Boosey, 4 H. L. Cas. 847, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Chappell v. Purday, 14 Mees. & W. 303, 9 Jur. 495, 14 L. J. Exch. N. S. 258; Boosey v. Purday, 4 Exch. 145, 18 L. J. Exch. N. S. 378, 13 Jur. 918.

The performing right or playwright had no existence at common law separate and apart from the manuscript of the author, but dates its origin from 3 & 4 Will. IV. chap. 15, and in this country from the act of Congress, August 18, 1856.

Boucicault v. Chatterton, L. R. 5 Ch. Div. 269, 46 L. J. Ch. N. S. 305, 35 L. T. N. S. 745, 25 Week. Rep. 287; Wall v. Taylor, L. R. 9 Q. B. Div. 730, 51 L. J. Q. B. N. S. 547, 47 L. T. N. S. 47, 30 Week. Rep. 948, 46 J. P. 679; Donaldsons v. Becket, 4 Burr. 2408; Jefferys v. Boosey, 4 H. L. Cas. 920, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615.

The English act was passed to give the right of performance, and was brought about
56 L. ed.

by the decision in Murray v. Elliston, 5 Barn. & Ald. 657, 1 Dowl. & R. 299, 24 Revised Rep. 519; Chappell v. Boosey, L. R. 21 Ch. Div. 241, 51 L. J. Ch. N. S. 625, 46 L. T. N. S. 854, 30 Week. Rep. 733.

The public performance of a drama is in all respects analogous to the right to multiply copies of a book. It is not a common-law right distinct from the manuscript.

Boucicault v. Chatterton, L. R. 5 Ch. Div. 269, 46 L. J. Ch. N. S. 305, 35 L. T. N. S. 745, 25 Week. Rep. 287; Wall v. Taylor, L. R. 9 Q. B. Div. 730, 51 L. J. Q. B. N. S. 547, 47 L. T. N. S. 47, 30 Week. Rep. 948, 46 J. P. 679; Donaldsons v. Becket, 4 Burr. 2408; Jefferys v. Bossey, 4 H. L. Cas. 920, 3 C. L. R. 615, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Banks v. Manchester, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123, 151, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710; White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 15, 52 L. ed. 655, 661, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628.

There can be but one publication, and it makes no difference where this is made if with the consent of the author or proprietor.

Mikado Case, 25 Fed. 183; Drone, Copyright, pp. 293, 295; Boucicault v. Wood, 2 Biss. 34, Fed. Cas. No. 1,693; Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54; 7 Am. & Eng. Enc. Law, 2d ed. 528; 25 Cyc. 1495.

It was not the intention of Congress to give to foreign citizens and composers advantages in this country which, according to the international copyright convention, were to be denied to citizens of this country abroad.

White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 15, 52 L. ed. 655, 661, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628.

Publication puts an end to common-law rights and all rights of the author or proprietor, unless he at the same time takes steps to initiate and secure statutory rights.

Drone, Copyright, pp. 100-104; Macgillivray, Copyright, 36-38; Jewelers' Mercantile Agency v. Jewelers Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Miffin v. R. H. White Co. 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769; Mifflin v. Dutton, Rep. 771.

The rights do not coexist in the same composition.

Drone, Copyright, pp. 100-104; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346, 347, 52 L. ed. 1086, 1091, 1092, 28 Sup. Ct. Rep. 722; Fraser v. Yack, 53 C. C. A. 563, 116 Fed. 285; Jewelers' Mercantile

Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; *Tompkins v. Halleck*, 133 Mass. 36, 43 Am. Rep. 480.

Mr. Levy Mayer submitted the cause for defendants in error:

This court has no jurisdiction of the present writ of error:

Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The public performance in England of a manuscript play, which, under the British statutes, is made a publication, and deprives the author of his common-law right of exclusive representation, does not deprive the author of such common-law right in this country, where public performance is not deemed a publication.

Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. De Witt*, 2 Sweeny, 530, 40 How. Pr. 293, affirmed in 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Drone*, Copyright, pp. 118-121; *Wandell*, Law of the Theater, 479; 25 Cyc. 1497.

At common law and before the passage of copyright statutes an author had an exclusive property right in his manuscript.

Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. Dewitt*, 2 Sweeny, 530, 40 How. Pr. 293, affirmed in 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Drone*, Copyright, pp. 102, 118-121; *Wandell*, Law of the Theater, 479; 25 Cyc. 1497.

The public performance of a manuscript drama is not in this country a publication, but the author still retains his common-law right to its exclusive representation.

Drone, Copyright, p. 119; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Palmer v. De Witt*, 2 Sweeny, 530, affirmed in 47 N. Y. 532, 7 Am. Rep. 480; *Boucicault v. Hart*, 13 Blatchf. 47, Fed. Cas. No. 1,692; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Aronson v. Fleckenstein*, 28 Fed. 78; 25 Cyc. 1497, and cases cited.

A different rule prevails in England by statute.

Boucicault v. Delafield, 1 Hem. & M. 597, 33 L. J. Ch. N. S. 38, 9 Jur. N. S. 1282, 9

L. T. N. S. 709, 12 Week. Rep. 101; *Boucicault v. Chatterton*, L. R. 5 Ch. Div. 267, 46 L. J. Ch. N. S. 305, 35 L. T. N. S. 745, 25 Week. Rep. 287; *Drone*, Copyright, pp. 119, 574, 605, 656; *Macgillivray*, Copyright, p. 126; *Scrutton*, Copyright, 3d ed. p. 72.

The provisions of the English statutes in regard to registration of dramatic compositions are permissive only.

Drone, Copyright, pp. 280, 603; *Macgillivray*, Copyright, pp. 47, 133; *Scrutton*, Copyright, 3d ed. p. 88; 8 Halsbury, Laws of England, p. 179; *Russell v. Smith*, 12 Q. B. 217, 17 L. J. Q. B. N. S. 225, 12 Jur. 723; *Clark v. Bishop*, 25 L. T. N. S. 908.

The *lex domicilii* cannot fix the status of literary property where the author seeks to enforce rights in respect thereto in a foreign country.

1 *Morgan*, Literature, p. 479; *Drone*, Copyright, p. 581; *Story*, Conf. L. § 550; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Baglin v. Cusenier Co.* 221 U. S. 580, 55 L. ed. 863, 31 Sup. Ct. Rep. 669; *Minor v. Cardwell*, 37 Mo. 350, 90 Am. Dec. 390.

Mr. Justice Hughes delivered the opinion of the court:

This is a writ of error to the supreme court of Illinois.

The suit was brought by Charles Frohman, Charles Haddon Chambers, and Stephano Gatti (defendants in error), to restrain the production of what was alleged to be a piratical copy of a play known as "The Fatal Card." Its authors were Charles Haddon Chambers and B. C. Stephenson, British subjects, resident in London, who composed *it there in 1894.[430 The firm of A. & S. Gatti, theatrical managers of London, of which the complainant Gatti is the surviving partner, became interested with the authors and on September 6, 1894, the play was first performed in London. It was registered under the British statutes on October 31, 1894, and again on November 8, 1894. Charles Frohman of New York, by agreement of June 13, 1894, obtained the right of production in this country for five years. On March 25, 1895, Frohman acquired all the interest of Stephenson in the play in and for the United States, and it was extensively represented under his supervision. It was not copyrighted here.

George E. McFarlane made an adaptation of this play, called it by the same name, and transferred it to the plaintiff in error, Richard Ferris, of Illinois, who copyrighted it in August, 1900, under the laws of the United States, and later caused it to be performed in various places in this

country. The adapted play differed from the original in various details, but not in its essential features.

The superior court of Cook county found that the complainants were the sole owners of the original play; that it had never been published or otherwise dedicated to the public in the United States or elsewhere; and that the Ferris play was substantially identical with it. Ferris was directed to account, and was perpetually restrained from producing the adaptation which he had copyrighted. The appellate court for the first district reversed the decree (131 Ill. App. 307), but on appeal to the supreme court of Illinois this decision was reversed and the decree of the superior court was affirmed. 238 Ill. 430, — L.R.A.(N.S.) —, 128 Am. St. Rep. 135, 87 N. E. 327.

The defendants in error contest the jurisdiction of this court upon the ground that the bill was based entirely upon a common-law right of property, and insist that the upholding of this right by the state court raises no Federal question. But the complainants sued not simply to maintain their common-law right in the original play, 431] but, by virtue of it, to prevent the defendant from producing the adapted play which he had copyrighted under the laws of the United States. They challenged a right which the copyright, if sustainable, secured. Rev. Stat. § 4592, U. S. Comp. Stat. 1901, p. 3406. It was necessary for them to make the challenge, for they could not succeed unless this right were denied. Ferris stood upon the copyright. That it had been obtained was alleged in the bill, was averred in the answer, and was found by the court. The fact that the court reached its conclusion in favor of the complainants by a consideration, on common-law principles, of their property in the original play, does not alter the effect of the decision. By the decree Ferris was permanently enjoined "from in any manner using, . . . selling, producing, or performing . . . the said defendant's copyrighted play hereinbefore referred to for any purpose." The decision thus denied to him a Federal right specially set up and claimed, within the meaning of § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). This court, therefore, has jurisdiction. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 580, 581, 50 L. ed. 596, 604, 605, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *McGuire v. Massachusetts*, 3 Wall. 382, 385, 18 L. ed. 164, 165; *Anderson v. Carkins*, 135 U. S. 483, 486, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; *Shively v. Bowlby*, 152 U. S. 1, 9, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548; *Northern P. R. Co. v. Colburn*, 164 U. S. 56 L. ed.

383, 385, 386, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 67, 68, 43 L. ed. 364, 368, 369, 19 Sup. Ct. Rep. 97.

The substantial identity of the two plays was not disputed in the appellate courts of Illinois, and must be deemed to be established. The contention was, and is, that after the public performance of the original play in London, in 1894, the owners had no common-law right, but only the rights conferred by the British statutes; and that Frohman's interest (save the license which expired in 1899) was subsequently acquired. Hence, it is said the play, not being copyrighted in the United States, was *publici juris* here, and the adapter was entitled to use it as common material.

*Performing right was not within [432 the provisions of 8 Anne, chap. 19, which gave to authors the sole liberty of printing their books. *Coleman v. Wathen*, 5 T. R. 245. The act of 1833, known as "Bulwer-Lytton's act," conferred statutory playwright in perpetuity throughout the British dominions, in the case of dramatic pieces not printed and published; and for a stated term, if printed and published. 3 & 4 Will. IV. chap. 15. By § 20 of the copyright act of 1842, 5 & 6 Vict. chap. 45, it was provided that the sole liberty of representing any dramatic piece should be the property of the author and his assigns for the term therein specified for the duration of copyright in books. The section continued: "And the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book." Mr. Scrutton, in his work on Copyright, 4th ed. p. 77, states that it is "probable, though there is no express decision to that effect, that the court, following *Donaldson v. Beckett*, 2 Bro. P. C. 129, would hold the common-law right destroyed by the statutory provisions after first performance in public." Compare *MacGillivray*, on Copyright, pp. 122, 127, 128. And it may be assumed, in this case, that after the play had been performed, the right of the owners to protection against its unauthorized production in England was only that given by the statutes.

Further, in the absence of a copyright convention, there is no playwright in England in the case of a play not printed and published, where the first public perform-

ance has taken place outside the British 433]dominions. This *results from § 19 of the act of 7 & 8 Vict. chap. 12, known as the international copyright act, which provides: "Neither the author of any book, nor the author or composer of any dramatic piece or musical composition, . . . which shall, after the passing of this act, be first published out of her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this act." The provision applies to British subjects as well as to foreigners, and the words "first published" include the first performance of a play. In *Boucicault v. Delafield*, 1 Hem. & M. 597, 33 L. J. Ch. N. S. 38, 9 Jur. N. S. 1282, 9 L. T. N. S. 709, 12 Week. Rep. 101, the author of the play known as "The Colleen Bawn" filed a bill to restrain a piratical production. It appeared that the play had first been represented in New York, and by reason of that fact,—there being no copyright convention with the United States,—it was held that, under the statute above quoted, there was no playright in England. To the same effect is *Boucicault v. Chatterton*, L. R. 5 Ch. Div. 267, 46 L. J. Ch. N. S. 305, 35 L. T. N. S. 745, 25 Week. Rep. 287, where the author unsuccessfully sought to restrain an unauthorized performance of "The Shaughraun," an unprinted play which had first been represented here.

The British Parliament, in thus fixing the limits and conditions of performing rights, was dealing with rights to be exercised within British territory. It is argued that the English authors in this case, by the law of their domicile, were without common-law right and in its stead secured the protection of the British statutes, which cannot avail them here. But the British statutes did not purport to curtail any right of such authors with respect to the representation of plays outside the British dominions. They disclose no intention to destroy rights for which they provided no substitute. There is no indication of a purpose to incapacitate British citizens from holding their intellectual productions secure from interference 434]in other *jurisdictions according to the principles of the common law. Their right was not gone *simpliciter*, but only in a qualified sense for the purposes of the statutes, and there was no convention under which the authors' work became public property in the United States. See *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 36, 45 L. ed. 60, 75, 21 Sup. Ct. Rep. 7; *Saxlehner v. Wagner*, 216 U. S. 375, 381, 54 L.

ed. 525, 528, 30 Sup. Ct. Rep. 298. When § 20 of the act of 5 & 6 Vict. chap. 45, provided that the first public performance of a play should be deemed equivalent, in the construction of that act, to the first publication of a book, it simply defined its meaning with respect to the rights which the statutes conferred. The deprivation of the common-law right, by force of the statute, was plainly limited to the territorial bounds within which the operation of the statute was confined.

The present case is not one in which the owner of a play has printed and published it, and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been printed and published. It is not open to dispute that the authors of "The Fatal Card" had a common-law right of property in the play until it was publicly performed. *Donaldson v. Beckett*, 2 Bro. P. C. 129; *Prince Albert v. Strange*, 1 Macn. & G. 25, 1 Hall & T. 1, 18 L. J. Ch. N. S. 120, 13 Jur. 109; *Jefferys v. Boosey*, 4 H. L. Cas. 815, 962, 978, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615. And they were entitled to protection against its unauthorized use here as well as in England. *Wheaton v. Peters*, 8 Pet. 591, 657, 8 L. ed. 1055, 1079; *Paige v. Banks*, 13 Wall. 608, 614, 20 L. ed. 709, 710; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 2 Sweeny, 530, 47 N. Y. 532, 7 Am. Rep. 480.

What effect, then, had the performance of the play in England upon the rights of the owners with respect to its use in the United States? There was no statute here by virtue of which the common-law right was lost through the performance of the unpublished play. The act of August 18, 1856 (11 Stat. at L. 138, chap. 169), related only to dramatic compositions for which copyright had been *ob-435 tained in this country; its object was to secure to the author of a copyrighted play the sole right to its performance after it had been printed. *Boucicault v. Fox*, 5 Blatchf. 87, 97, 98, Fed. Cas. No. 1,691. The same is true of the provisions of the copyright act of July 8, 1870 (16 Stat. at L. 198, 212, 214, chap. 230, Rev. Stat. §§ 4952, 4966, U. S. Comp. Stat. 1901, pp. 3406, 3415), and of those of the act of March 3, 1891 (26 Stat. at L. 1106, 1107, chap. 565, U. S. Comp. Stat. 1901, pp. 3406, 3407), which were in force when the transactions in question occurred and this suit was brought. The fact that the act of March 3, 1891, was applicable to citizens of foreign countries, permitting

to our citizens the benefit of copyright on substantially the same basis as its own citizens (§ 13), and that proclamation to this effect was made by the President with respect to Great Britain (27 Stat. at L. 981), did not make the British statutes operative within the United States. Nor did that fact add to the provisions of the act of Congress so as to make the latter destructive of the common-law rights of English subjects in relation to the representation of plays in this country, which were not copyrighted under that act, and which remained unpublished. These rights, like those of our own citizens in similar case, the act of 1891 did not disturb.

The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin v. Richardson*, 2 Ambl. 694, 7 Eng. Rul. Cas. 66; *Morris v. Kelly*, 1 Jac. & W. 481, 21 Revised Rep. 216; *Boucicault v. Fox*, 5 Blatchf. 87, 97, Fed. Cas. No. 1,691; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 2 Sweeny, 530, 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480. Story states the rule as follows: "So, where a dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theater without the [436] consent of the author *or proprietor; for his permission to act it at a public theater does not amount to an abandonment of his title to it, or to a dedication of it to the public at large." 2 Story, Eq. Jur. § 950. It has been said that the owner of a play cannot complain if the piece is reproduced from memory. *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644; *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426. But the distinction is without sound basis and has been repudiated. *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480.

And, as the British statutes did not affect the common-law right of representation in this country, it is not material that the first performance of the play in question took place in England. In *Crowe v. Aiken* (1870), 2 Biss. 208, Fed. Cas. No. 3,441, the play "Mary Warner" had been composed by a British subject. It was transferred to the plaintiff with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. It had not been printed with the consent either of the author or of the plaintiff. It was first publicly performed in London in June, 1869, and afterwards was represented here. 56 L. ed.

The court (Drummond, J.) held that the plaintiff, by virtue of his common-law right, was entitled to an injunction restraining an unauthorized production. In *Palmer v. De Witt* (1872), 2 Sweeny, 530, 47 N. Y. 532, 7 Am. Rep. 480, the suit was brought to restrain the defendant from printing an unpublished drama called "Play," composed by a British citizen resident in London. The plaintiff on February 1, 1868, had purchased the exclusive right of printing and performing the play in the United States. On February 15, 1868, it was first performed in London. It was held that the common-law right had not been destroyed by the public representation, and the plaintiff had judgment. In the case last cited, and apparently in that of *Crowe v. Aiken*, the transfer to the plaintiff antedated the public performance, but neither decision was rested on that distinction. In *Tompkins v. Halleck* (1882) supra, an unpublished play called "The World" [437] had been written in England, where, after being presented, it was assigned by the author to a purchaser in New York. It was acted in that city and then transferred to the plaintiffs with the exclusive right of representation in the New England states. The plaintiffs' common-law right was sustained and an unauthorized performance was enjoined.

Our conclusion is that the complainants were the owners of the original play and exclusively entitled to produce it. Their common-law right with respect to its representation in this country had not been lost. This being so, the play of the plaintiff in error, which was substantially identical with that of the complainants, was simply a piratical composition. It was not the purpose or effect of the copyright law to render secure the fruits of piracy, and the plaintiff in error is not entitled to the protection of the statute. In other words the claim of Federal right upon which he relies is without merit.

Judgment affirmed.

CHARLES REITLER, Plff. in Err.,
v.

WILLIAM A. HARRIS.

(See S. C. Reporter's ed. 437-442.)

Constitutional law — due process of law — impairing contract obligations — statutory presumption.
Making the entry upon the official record

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v.*

of the forfeiture of school land for default in payment of the purchase price prima facie but not conclusive evidence that all the preliminary steps essential to a valid forfeiture were properly taken, and that the forfeiture was duly declared, as is done by Kan. Laws 1907, chap. 373, does not offend against either the contract or the due-process-of-law clause of the Federal Constitution, although construed as applicable to pending causes.

[For other cases, see Constitutional Law, 774-548, 1520, 1521, in Digest Sup. Ct. 1908.]

[No. 99.]

Submitted December 13, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Edwards County, in that state, in favor of defendant in an action of ejectment. Affirmed.

See same case below, 80 Kan. 148, 102 Pac. 249.

The facts are stated in the opinion.

Mr. **F. Dumont Smith** submitted the cause for plaintiff in error:

The attempted change "in a rule of evidence" by Kan. Laws, 1907, chap. 373, would make that evidence which never was evidence before, would validate a forfeiture concededly void prior to January 25, 1907, when the act took effect, and would destroy rights vested under the statute and decisions of the state of Kansas. The legislature may not so change the rules of evidence as to destroy such vested interest. The attempt to do so comes within the prohibition of the Federal Constitution.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N. W. 691; State ex rel. Damman v. School & University Lands Comrs. 4 Wis. 414; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Edwards v. Kearzey, 96

U. S. 595, 24 L. ed. 793; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; Muhler v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Mr. **Frederick De Courcy Faust** submitted the cause for defendant in error. Messrs. A. C. Dyer and L. M. Day were on the brief:

The legislature may change a rule of evidence.

Cooley, Const. Lim. 5th ed. p. 452; 1 Elliott, Ev. § 86; State v. Beach, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; Morgan v. State, 117 Ind. 569, 19 N. E. 154; State v. Sattley, 131 Mo. 464, 33 S. W. 41; Howard v. Mott, 64 N. Y. 262; Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Wright v. Dunham, 13 Mich. 414; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777; Robertson v. People, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; Sanders v. Greenstreet, 23 Kan. 425; Harris v. Harsch, 29 Or. 562, 46 Pac. 141; Robeson v. Brown, 63 N. C. 554; Ehle v. Brown, 31 Wis. 405; Irwin v. Pierro, 44 Minn. 490, 47 N. W. 154; Northern Liberties v. St. John's Church, 13 Pa. 104; Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 615, 42 L. ed. 879, 18 Sup. Ct. Rep. 488; Fong Yue Ting v. United States, 140 U. S. 721, 37 L. ed. 916, 13 Sup. Ct. Rep. 1016; Li Sing v. United States, 180 U. S. 493, 45 L. ed. 637, 21 Sup. Ct. Rep. 449.

New rules of evidence apply to existing causes of action.

Cooley, Const. Lim. 5th ed. pp. 452, 453; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247.

This rule will also apply to actions pending when the new law takes effect.

Fish v. Chicago, St. P. & K. C. R. Co. 82 Minn. 9, 83 Am. St. Rep. 398, 84 N. W. 458; Woodvine v. Dean, 194 Mass. 40, 79 N. E. 882; Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632; Hubbard v. New York, N. H. & H. R. Co. 70 Conn. 563, 40 Atl. 533; Campbell v.

Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what laws are void as impairing obligation of contracts—see notes to Frank-

lin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 30 C. C. A. 12.

Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action in a district court of the state of Kansas to recover the possession of a quarter section of land to which the parties were asserting adverse claims under the school-land laws of the state. The plaintiff's claim originated in a contract of purchase with the state, whereby he was required annually to pay interest on the unpaid purchase price at a stipulated rate. He failed for three years to comply with that requirement, and proceedings looking to a forfeiture of his rights under the contract resulted, in 1901, in a notation of forfeiture, as hereinafter explained. The defendant claimed under a like contract, made, in 1902, upon the supposition that all rights under the prior 439]contract had been extinguished. *In 1906, while the defendant was in possession and complying with his contract, the plaintiff made payment of the purchase price and interest under his contract, and a patent was issued to him. The action was begun in 1907, when the defendant was still in possession and complying with his contract. The controversy turned upon the validity of the forfeiture proceedings. If they were valid, the plaintiff was not entitled to recover; otherwise he was.

The statute (Laws [Kan.] 1879, chap. 161, § 2) prescribing the mode of forfeiture in force since before the plaintiff's contract was made, reads as follows:

"If any purchaser of school land shall fail to pay the annual interest when the same becomes due, or the balance of the purchase money when the same becomes due, it shall be the duty of the county clerk of the county in which such land is situated, immediately to issue to the purchaser a notice in writing, notifying such purchaser of such default; and that if such purchaser fail to pay, or cause to be paid, the amount so due, together with the costs of issuing and serving such notice, within sixty days from the service thereof, the said purchaser, and all persons claiming under him, will forfeit absolutely all right and interest in and to such land under said purchase. . . . The notice above provided for shall be served by the sheriff of the county by delivering a copy thereof to such purchaser, if found in the county, also to all persons in possession of such land; and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk. . . . Said sheriff shall

serve such notice, and make due return of the time and manner of such service, within fifteen days from the time of his receipt of the same. . . . If such purchaser shall fail to pay the sum so due, and all costs incident to the issue and service of said notice, within sixty days from the time of the service or posting of such notice, as above *provided, such purchaser, 440 and all persons claiming under him, shall forfeit absolutely all rights and interest in and to such land, under and by virtue of such purchase."

Upon the trial it appeared that, while the plaintiff was in default, as before indicated, the county clerk of the county wherein the land was situate issued a notice to him in conformity with this statute; that the sheriff made a return thereon within the time prescribed, reading: "Received this notice this 13th day of July, 1901, and served the same by leaving a copy with C. C. Potter, who occupied the within premises, July 17, 1907;" that, although not so stated in his return, the sheriff duly posted the notice in the office of the county clerk; that when the notice was served the plaintiff, although not so stated in the sheriff's return, was not a resident of the state, and was absent therefrom; that he failed to pay the sum due within sixty days from the time of the service and posting of the notice; and that, upon the expiration of that period, the county clerk entered upon the school-land record of the county the notation "Land forfeited," in such connection as to refer to the plaintiff's contract. Whether or not C. C. Potter, to whom a copy of the notice was delivered, was the only person in possession of the land at the time, did not appear.

After the issuance of the patent to the plaintiff, and after the action was begun, but before it was brought to trial, the state legislature enacted a statute (Laws [Kan.] 1907, chap. 373), containing these provisions:

"Section 1. Where entries which appear upon the records of school-land sales, or of school-land-sale certificates, in the office of the county clerk of any county in this state, and purporting or shown to have been made in the usual course of the business of that office, indicate that the interest of the purchaser in the tract of land in connection with which such entries were made had been *forfeited for default in 441 the payment of money due the state on such purchase, and such land was thereafter sold to a new purchaser, such entries shall be prima facie evidence, in any action or proceeding in any court in this state, that proper notice of the purchaser's default had been issued and legal service thereof

made, and that all things necessary to be done as conditions precedent to the forfeiture of the right and interest of the purchaser, and all persons claiming under him, in and to such land, had been duly and properly done and performed, and that such forfeiture had been duly declared. Any entry upon said records of the county clerk as 'canceled,' 'forfeited,' 'reverted to state,' 'state,' and the like, with or without date shall be held to be an entry indicating that the interest of the purchaser had been forfeited."

The district court ruled that this statute was applicable to pending causes; that the notation "Land forfeited" upon the school-land record in the county clerk's office was prima facie evidence of the lawful service of the forfeiture notice and of the due declaration of the forfeiture, and that this prima facie evidence was not overcome by the other facts disclosed at the trial, and so gave judgment for the defendant. The judgment was affirmed by the supreme court of the state (80 Kan. 148, 102 Pac. 249), and the plaintiff then brought the case here upon the contention, denied by that court, that the statute of 1907 impaired the obligation of his contract, and therefore was violative of the contract clause of the Constitution of the United States.

In our opinion, the contention cannot be sustained. The plaintiff's rights arising out of his contract were in no wise impaired by the statute of 1907. It did not interpose any obstacle to their assertion by him, and neither did it leave him without a suitable remedy for their ascertainment and enforcement. If the attempted forfeiture was invalid before, it continued 442] to be so thereafter. The statute dealt only with a rule of evidence, not with any substantive right. By making the entry of forfeiture upon the official record prima facie, but not conclusive, evidence that all preliminary steps essential to a valid forfeiture were properly taken, and that the forfeiture was duly declared, it but established a rebuttable presumption, which he was at liberty to overcome by other evidence. That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution, even where the change is made applicable to pending causes, is now well settled. *Pillow v. Roberts*, 13 How. 472, 476, 14 L. ed. 228, 230; *Marx v. Hanthorn*, 148 U. S. 172, 181, 37 L. ed. 410, 413, 13 Sup. Ct. Rep. 508; *Turpin v. Lemon*, 187 U. S. 51, 59, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337; *Curtis v. Whitney*, 13 Wall.

68, 20 L. ed. 513; *Cooley*, Const. Lim. 7th ed. 409, 524-526.

It was because the plaintiff failed to assume and carry the burden of overcoming the rebuttable presumption established by the statute that he failed in his action.

Judgment affirmed.

GABRIEL DIAZ, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 442-467.)

Criminal law — twice in jeopardy — same offense — assault — homicide.

1. The prosecution for homicide of a person previously convicted of an assault and battery from which the death afterwards ensued does not place the accused twice in jeopardy for the same offense, contrary to the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), § 5, enacting a Bill of Rights for the Philippine Islands,—especially where the jurisdiction of the justice of the peace before whom the assault and battery charge was tried did not extend to homicide cases. [For other cases, see *Criminal Law*, 64-68, in *Digest Sup. Ct.* 1908.]

Evidence — documentary — putting whole record in evidence.

2. The record of the prior proceedings before a justice of the peace, when offered in evidence by the accused on trial for homicide, without qualification or restriction, must be treated as admitted generally, as applicable to any issue which it tends to prove, and as equally available to the government and the accused.

[For other cases, see *Evidence*, IV. a, in *Digest Sup. Ct.* 1908.]

NOTE.—On former jeopardy—see notes to *Com. v. Fitzpatrick*, 1 L.R.A. 451; *Altenburg v. Com.* 4 L.R.A. 543; *Re Lange*, 21 L. ed. U. S. 872; *United States v. Perez*, 6 L. ed. U. S. 165; and *Silsby v. Foote*, 14 L. ed. U. S. 394.

On homicide in the commission of an unlawful act—see note to *People v. Sullivan*, 63 L.R.A. 405.

As to the right to convict for several offenses growing out of the same facts—see note to *Hughes v. Com.* 31 L.R.A. (N.S.) 693.

As to conviction on charge of assault as bar to subsequent prosecution for homicide following death of victim—see note to *Com. v. Ramunno*, 14 L.R.A. (N.S.) 209.

On the right of the accused to be confronted by witnesses—see note to *Morris v. United States*, 80 C. C. A. 116.

As to waiver by accused of his right to be present at every stage of the trial—see notes to *Lewis v. United States*, 36 L. ed. U. S. 1011; and *State v. Way*, 14 L.R.A. (N.S.) 603.

Evidence — hearsay — admitting without objection.

3. Hearsay evidence admitted without objection is to be considered and given its natural probative effect as if it were in law admissible.

[Hearsay evidence, see Evidence, X., in Digest Sup. Ct. 1908.]

Criminal law — confronting with witnesses.

4. The right "to meet the witnesses face to face," secured to one accused of crime in the Philippine Islands by the act of July 1, 1902, § 5, was not infringed by resting a judgment of conviction for homicide in part upon the testimony produced before the justice of the peace at a previous trial for the assault and battery from which the death afterwards ensued, and at a preliminary investigation of the homicide charge, where the record of these proceedings was offered in evidence by the accused without qualification or restriction, and included some testimony favorable to him.

[For other cases, see Criminal Law, 108-111, in Digest Sup. Ct. 1908.]

Criminal law — personal presence of accused — waiver.

5. The voluntary absence of the accused at a time when his presence is not made indispensable by Philippine Comp. Stat. §§ 3271, 3280, 3296, coupled with an express consent that the trial go on in the presence of his counsel, is a waiver of his right under § 3270, to be present at every stage of the trial.

[For other cases, see Criminal Law, 103-107, in Digest Sup. Ct. 1908.]

Criminal law — personal presence of accused — waiver.

6. One accused of an offense not capital, who is not in custody, and who was present when the trial was begun, may waive his right under the act of July 1, 1902, § 5, enacting a Bill of Rights for the Philippine Islands, to be personally present at every stage of the trial.

[For other cases, see Criminal Law, 103-107, in Digest Sup. Ct. 1908.]

[No. 384.]

Argued November 16, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which, after increasing the punishment, affirmed a conviction of homicide not capital in the Court of First Instance of Occidental Negros. Affirmed.

See same case below, 15 Philippine, 123.

Statement by Justice Van Devant:

On May 30, 1906, at San Carlos, province of Occidental Negros, Philippine Islands, Gabriel Diaz, by blows and kicks, inflicted bodily injuries upon Cornelio Alcanzaren, and by reason thereof was the next day charged before the justice of the peace of San Carlos with assault and battery. At 56 L. ed.

the hearing upon that charge Diaz was found guilty of a misdemeanor and fined 50 pesetas and costs, which he paid. Subsequently, on the 26th of June, Alcanzaren died, and Diaz was then charged before the same justice of the peace with homicide, it being alleged that the death ensued from the bodily injuries. At the preliminary investigation of this charge, the justice concluded that there was reasonable cause to believe that it was well founded, and accordingly held the accused to await the action of the court of first instance. There was then filed in that court a complaint charging Diaz with the crime of homicide, not capital, upon which he subsequently was tried, found guilty, and sentenced to a term of imprisonment and other penalties.

When called upon to plead in the court of first instance, Diaz interposed a plea of former jeopardy, supported by a copy of the record of the proceedings before the justice of the peace upon the charge of assault and battery and at the preliminary investigation, but the plea was overruled. Then, during the trial, his counsel introduced in evidence the record of those proceedings. In doing this the counsel spoke only of "the proceedings in the case for a misdemeanor," but it otherwise appears that what was meant was the record of both proceedings. Both were embraced in a single document, authenticated by a single certificate, and it clearly is disclosed that counsel on both sides and the court treated the entire document as in evidence. It embraced the testimony produced before the justice at the hearing upon the assault and battery charge and at the preliminary investigation, including the personal statement of the accused and the report of an autopsy, *upon the body of the de-445 ceased, performed conformably to the Philippine law; and it was partly upon this testimony that the court of first instance rested its judgment of conviction.

On two occasions, covering the examination and cross-examination of two witnesses for the government, Diaz, who was at large on bail, voluntarily absented himself from the trial, but consented that it should proceed in his absence, but in the presence of his counsel, which it did.

Following his conviction, Diaz prosecuted an appeal to the supreme court of the Philippines, where, subject to a change made in the term of imprisonment (see *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773; *Flemister v. United States*, 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129), the conviction was sustained (15 Philippine, 123) and the case was then brought here.

Mr. Frederic R. Coudert argued the cause, and, with Mr. Howard Thayer Kingsbury, filed a brief for plaintiff in error:

This court has jurisdiction of the cause, and power to review all questions involved therein.

Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *Giles v. Harris*, 189 U. S. 475, 486, 47 L. ed. 909, 912, 23 Sup. Ct. Rep. 639; *Hornner v. United States*, 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; *Burton v. United States*, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243.

Defendant cannot legally consent that the trial proceed in his absence.

Thompson v. Utah, 170 U. S. 343, 354, 42 L. ed. 1061, 1068, 18 Sup. Ct. Rep. 620; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

There is no provision in the Philippine statutes permitting a criminal trial to proceed in the absence of the defendant, or dispensing with the confrontation rule, such as was considered by this court in *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650.

There is no suggestion that any of the witnesses on the assault trial or the preliminary hearing were kept away by the defendant. The use of such evidence against the defendant in the homicide trial was, therefore, in itself, reversible error.

Motes v. United States, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

The introduction of the record of the assault case upon the homicide trial was merely in support of the defendant's plea of former jeopardy, and was so recognized by the court below. Such record was merely evidence of the jeopardy. It was not, and could not be, evidence of the facts which were in issue in the former trial.

Kirby v. United States, 174 U. S. 47, 55, 43 L. ed. 890, 893, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330.

The defendant's plea of former jeopardy was good and should have been sustained.

Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773; *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421; 4 *Hammond's Blackstone*, 431; *Burton v. United States*, 202 U. S. 344, 380, 50 L. ed. 1057, 1070, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; *Carter v. McClaughry*, 183 U. S. 365, 395, 46 L. ed. 236, 251, 22 Sup. Ct. Rep. 181; *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Reg. v. Elrington*, 1 Best & S. 688, 31 L. J. Mag. Cas. N. S. 14, 8 Jur. N. S. 97, 5 L. T. N. S.

284, 10 Week. Rep. 13, 9 Cox, C. C. 86; *Reg. v. Miles*, 17 Cox, C. C. 9, 59 L. J. Mag. Cas. N. S. 56, L. R. 24 Q. B. Div. 423, 62 L. T. N. S. 572, 38 Week. Rep. 334, 54 J. P. 549; *Reg. v. Stanton*, 5 Cox, C. C. 324; *Wemyss v. Hopkins*, L. R. 10 Q. B. 378; *Reg. v. King*, 18 Cox. C. C. 447, 66 L. J. Q. B. N. S. 87, [1897] 1 Q. B. 214, 75 L. T. N. S. 392, 61 J. P. 329; *Blair v. State*, 81 Ga. 629, 7 S. E. 855.

Even in reviewing a judgment based on the verdict of a jury, the court can always consider whether there was any evidence to sustain the conclusion reached.

Halsell v. Renfrow, 202 U. S. 287, 292, 50 L. ed. 1032, 1035, 26 Sup. Ct. Rep. 610, 6 Ann. Cas. 189; *Lancaster v. Collins*, 115 U. S. 222, 225, 29 L. ed. 373, 374, 6 Sup. Ct. Rep. 33.

The presumption of innocence on the part of the defendant was wholly disregarded.

Kirby v. United States, 174 U. S. 47, 55, 43 L. ed. 890, 893, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; *Coffin v. United States*, 156 U. S. 432, 458, 39 L. ed. 481, 492, 15 Sup. Ct. Rep. 394.

Solicitor General *Lehmann* argued the cause and filed a brief for defendant in error:

The jurisdiction of this court under the writ of error is restricted to the question whether any rights of the defendant secured by the Constitution or statutes of the United States have been violated.

Ong Chang Wing v. United States, 218 U. S. 272, 54 L. ed. 1040, 31 Sup. Ct. Rep. 15; *Dowdell v. United States*, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590.

The conviction upon the prosecution for assault and battery was not a bar to the prosecution for the homicide resulting from the assault.

Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; *Com. v. Roby*, 12 Pick. 496; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Johnson v. State*, 19 Tex. App. 453, 53 Am. Rep. 385; 1 *Bishop*, New Crim. Law, 1059.

The right of the defendant to be confronted by the witnesses against him was not violated, for the record of the preliminary investigation was in evidence by his act and with his consent, for every purpose to which it was relevant.

Hancock v. State, 14 Tex. App. 392; *Rosenbaum v. State*, 33 Ala. 354; *State v. Fooks*, 65 Iowa, 452, 21 N. W. 773; *Williams v. State*, 61 Wis. 281, 21 N. W. 56; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *West v. Louisiana*, 194 U. S. 258, 48 L. ed.

965, 24 Sup. Ct. Rep. 650; *Paraiso v. United States*, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127; *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; *Dowdell v. United States*, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590.

Mr. Justice **Van Devanter**, after stating the case as above, delivered the opinion of the court:

The provision against double jeopardy, in the Philippine civil government act (32 Stat. at L. 691, chap. 1369, § 5), is in terms restricted to instances where the second jeopardy is "for the same offense" as was the first. *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421. That was not the case here. The homicide charged against the accused in the court of first instance and the assault and battery for which he was tried before [449] the justice of the peace, although *identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. *Com. v. Roby*, 12 Pick. 496; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Johnson v. State*, 19 Tex. App. 453, 53 Am. Rep. 385. Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction. All that could be claimed for that jeopardy was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done under Philippine Comp. Stat. § 3284. *State v. Littlefield*, supra. It follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide.

It is objected that the accused was deprived of the right, secured to him by § 5 of the Philippine civil government act, supra, "to meet the witnesses face to face," in that the judgment of conviction for homicide was rested in part upon the testimony produced before the justice of the peace at the trial for assault and battery and at the preliminary investigation. But this objection overlooks the circumstances

in which the record wherein that testimony was set forth was received in evidence. It was not offered by the government, but by the accused, and was offered without qualification or restriction. And it is otherwise manifest that the offer included the testimony embodied in the record as well as the recitals of what *was done by the jus-[450] tice. It was all received just as it was offered, no objection being interposed by the government. In some respects the testimony was favorable to the accused and in others favorable to the government. It included a statement by the accused, who refrained from testifying in the court of first instance, and also the report of an autopsy which was favorable to him. In these circumstances the testimony was rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as equally available to the government and the accused. *Scars v. Starbird*, 78 Cal. 225, 230, 20 Pac. 547; *Diversy v. Kellogg*, 44 Ill. 114, 121, 92 Am. Dec. 154. True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible. *Damon v. Carrol*, 163 Mass. 404, 408, 40 N. E. 185; *Sherwood v. Sissa*, 5 Nev. 349, 355; *United States v. McCoy*, 193 U. S. 593, 598, 48 L. ed. 805, 807, 24 Sup. Ct. Rep. 528; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 9, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; *Neal v. Delaware*, 103 U. S. 370, 396, 26 L. ed. 567, 573; *Foster v. United States*, 101 C. C. A. 485, 178 Fed. 165, 176. And of the fact that it came from witnesses who were not present at the trial, it is to be observed that the right of confrontation secured by the Philippine civil government act is in the nature of a privilege extended to the accused, rather than a restriction upon him (*State v. McNeil*, 33 La. Ann. 1332, 1335), and that he is free to assert it or to waive it, as to him may seem advantageous. That this is so is a necessary conclusion from the adjudged cases relating to the like right secured by the Constitutions of the several states and the Constitution of the United States. Thus, it is [451] held that the right is waived where, by the consent of the accused, the prosecution is permitted to read in evidence the testi-

mony of an absent witness, given in some prior proceeding (*Hancock v. State*, 14 Tex. App. 392; *Rosenbaum v. State*, 33 Ala. 354; *Williams v. State*, 61 Wis. 281, 21 N. W. 56; *State v. Polson*, 29 Iowa, 133); or a statement of what such a witness would testify, if present, as embodied in an agreement made to avoid a continuance or to dispense with the presence of the witness (*State v. Wagner*, 78 Mo. 644, 648, 47 Am. Rep. 131; *State v. Fooks*, 65 Iowa, 452, 21 N. W. 773; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *State v. Lewis*, 31 Wash. 75, 88, 71 Pac. 778); or the deposition of such a witness, taken within or without the jurisdiction (*Butler v. State*, 97 Ind. 378; *State v. Vanella*, 40 Mont. 326, 106 Pac. 364, 20 A. & E. Ann. Cas. 398; *Wightman v. People*, 67 Barb. 44; *People v. Guidici*, 100 N. Y. 503, 508, 3 N. E. 493, 5 Am. Crim. Rep. 455; *People v. Murray*, 52 Mich. 288, 17 N. W. 843). In the last case, which involved a conviction for murder in the second degree, the question presented and the ruling thereon were stated by Judge Cooley as follows:

"A chief ground of error relied upon is that the prosecution was allowed to put in evidence certain depositions taken out of court of witnesses not present at the trial. The facts seem to be that the attorneys for the respective parties stipulated to put in certain depositions on both sides, and they were put in accordingly. This, it is said, was in violation of the respondent's constitutional right to be confronted with his witnesses. But the court made no ruling in the matter; what was done was voluntarily done by the parties; the defendant had the benefit of the stipulation, and, for aught we can know, it may have been made chiefly in his interest. . . . The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court 452] to have interfered and precluded *this stipulation being acted upon. But it would have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court not at the time complained of, but in respect to something where any other course would have been plain error. Under the view taken by the respondent it would seem that when the evidence had been obtained under his stipulation, the court was put in position where it was impossible to avoid error; for if the evidence was received, he might complain, as he does now, that his constitutional right was violated:

and if the court refused to receive it when he was consenting, the respondent would be entitled to have the conviction set aside for that error."

The view that this right may be waived also was recognized by this court in *Reynolds v. United States*, 98 U. S. 145, 158, 25 L. ed. 244, 247, where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused. In that case it was said:

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, *and[453] thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony, and cannot now complain of its consideration.

It also is objected that the accused was wrongly convicted in that the trial proceeded in part in his absence. The facts in this connection are these: The accused was represented and heard by counsel at every stage of the proceedings. He also was present in person at all the proceedings preliminary to the trial and at the time it was begun and during the major part of it. But on two occasions, in the latter part of the trial, he voluntarily absented himself, and sent to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the supreme court of the Philippines; and the objection now made is not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence.

The Philippine laws, Comp. Stat. 1907,

contain the following provisions, bearing upon the presence of the accused at the proceedings upon a charge for felony:

"Sec. 3270. In all criminal prosecutions the defendant *shall be entitled* (a) to appear and defend in person and by counsel at every stage of the proceedings. . . .

"Sec. 3271. . . . If the charge is for felony (*delito*), the defendant *must* be personally present at the arraignment; . . .

"Sec. 3280. A plea of guilty can be put in *only* by the defendant himself in open court. . . .

"Sec. 3296. The defendant *must* be personally present at the time of pronouncing judgment, if the conviction is for a felony;

454] *Not only is there such a difference in the terms of these sections as naturally implies a difference in meaning, but it is evident that unless the first means something less than that the accused must be present at every stage of the proceedings, there was no occasion for the provisions quoted from the others, and also that if the terms used in the others were deemed essential to express the thought that the accused must be present at particular stages of the proceedings, like terms would have been employed in the first had it been intended to make his presence equally requisite at other stages. It therefore is evident that the effect of these sections, when their differing terms are considered, is to make the presence of the accused indispensable at the arraignment, at the time the plea is taken, if it be one of guilt, and when judgment is pronounced, and to entitle him to be present at all other stages of the proceedings, but not to make his presence thereat indispensable. As here it does not appear, and is not claimed, that the accused was absent at any of the times when his presence was thus made indispensable, and as his absence during the latter part of the trial was not only voluntary, but coupled with an express consent that it should proceed in the presence of his counsel, as was done, it is plain that there was no infraction of the Philippine laws in that regard.

We are thus brought to the question whether the provision in § 5 of the Philippine civil government act, securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert, but which he also may waive by his voluntary act. Of course, if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. An identical or similar provision is

found in the Constitutions of the *sev-[455
eral states, and its substantial equivalent is embodied in the 6th Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there. *Kepner v. United States*, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655.

As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control; and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. *Fight v. State*, 7 Ohio, pt. 1, p. 181, 28 Am. Dec. 626; *Wilson v. State*, 2 Ohio St. 319; *McCorkle v. State*, 14 Ind. 39, 44; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *Stoddard v. State*, 132 Wis. 520, 112 N. W. 453, 13 A. & E. Ann. Cas. 1211; *Sahlinger v. People*, 102 Ill. 241; *Gallagher v. People*, 211 *Ill. 158, 71 N. E. 842; [456
Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Gales v. State*, 64 Miss. 105, 8 So. 167; *State v. Ricks*, 32 La. Ann. 1098; *State v. Perkins*, 40 La. Ann. 210, 3 So. 347; *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185; *Lynch v. Com.* 88 Pa. 189, 32 Am. Rep. 445; *Gore v. State*, 52 Ark. 285, 5 L.R.A. 832, 12 S. W. 564; *State v. Hope*, 100 Mo. 347, 8 L.R.A. 608,

13 S. W. 490; *Frey v. Calhoun* Circuit Judge, 107 Mich. 130, 64 N. W. 1047; *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *State v. Way*, 76 Kan. 928, 14 L.R.A.(N.S.) 603, 93 Pac. 159; *Com. v. McCarthy*, 163 Mass. 458, 40 N. E. 766; *United States v. Davis*, 6 Blatchf. 464, Fed. Cas. No. 14,923; *United States v. Loughery*, 13 Blatchf. 267, Fed. Cas. No. 15,631; *Falk v. United States*, 15 App. D. C. 446, 454, s. c. 180 U. S. 636, 45 L. ed. 709, 21 Sup. Ct. Rep. 923.

The reasoning upon which this rule of decision rests is clearly indicated in *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743, where it is said by the supreme court of Georgia:

"It is the right of the defendant in cases of felony . . . to be present at all stages of the trial,—especially at the rendition of the verdict; and if he be in such custody and confinement . . . as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. . . . The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order.

"But the case is quite different when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room, where he and his bail obligated themselves that he should be. . . . And the absolute necessity of the distinction, or the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered."

457] *True, in that case the defendant was absent only at the reception of the verdict, but the decisions, as also the reasoning upon which they proceed, embrace absences at other stages of the trial. In *Falk v. United States*, 15 App. D. C. 446, 454, s. c. 180 U. S. 636, 45 L. ed. 709, 21 Sup. Ct. Rep. 923, the accused, who was at large on bail, was present when the trial was begun and during the taking of a portion of the evidence for the government, and then fled the jurisdiction. He was called and defaulted, and the trial proceeded in his absence, the remaining evidence being taken and a verdict of guilt returned. Subsequently he was apprehended, and sentence was then imposed, notwithstanding his objection that the trial had proceeded in his absence. In affirming the judgment,

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the court of appeals, speaking through Mr. Justice Morris, said:

(p. 454) "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (U. S. Rev. Stat. § 1015, U. S. Comp. Stat. 1901, p. 718) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and therefore, in all such cases, he may, by absconding, prevent a trial. This would be a travesty of justice, which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. And this the counsel for the appellant appear candidly to admit. But we do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration *of justice as to [458 the true interests of civil liberty. . . .

(p. 460) "The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."

But it is said that the question has been ruled otherwise by this court in *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Lewis v. United States*, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; *Schwab v. Berggren*, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525; and *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep.

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620. We think this is not the import of those cases. In each the accused was in custody, charged with a capital offense, and was sentenced to death. In the first, a part of the trial was had in his absence notwithstanding the territorial statute declared that he "*must be personally present.*" He did not object at the time, and it subsequently was claimed that, by his silence, he had consented to what was done. But this court held otherwise, saying: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." In the second case, "the prisoner was not brought face to face with the jury until after the challenges had been made and the selected jurors were brought into the box to be sworn," and he excepted at the 459]*time to the mode in which the challenges were required to be made. The ruling in this court was that the making of the challenges was an essential part of the trial, and that it was the right of the accused to be brought face to face with the jurors when the challenges were made. The other two cases are even less in point. In one the question was whether the presence of the accused was essential in proceedings on error in an appellate court, and it was held that it was not essential. And in the other the question was whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held that he could not.

We conclude that the Philippine laws before quoted accord to one charged with a felony the full right expressed in the congressional enactment, as that right was recognized and understood in this country at the time it was carried to the Philippines, and that in what was done in the present case there was no infringement of it.

Lastly, it is insisted that the evidence was inadequate to warrant the conviction. The trial was to the court without a jury, as is permitted in the Philippines, and both the trial court and the supreme court of the Islands concurred in finding the accused guilty under the evidence. Of course, these concurring findings are entitled to great respect. Nevertheless, following the rule recognized in *Wiborg v. United States*, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197, and *Clyatt v. United States*, 197 U. S. 207, 222, 49 L. ed. 56 L. ed.

726, 731, 25 Sup. Ct. Rep. 429, we have attentively examined the evidence as set forth in the record and discussed in the opinions of the Philippine courts, and are clearly of opinion that the conviction was warranted by it.

Judgment affirmed.

*Mr. Justice Lamar, dissenting: [460

I dissent, because the trial was conducted in accordance with the rules of procedure of the Spanish law, and in disregard of the fundamental changes made by the Bill of Rights of the Philippine Islands. The defendant was not given a speedy trial, but was kept in jeopardy during repeated and lengthy suspensions.

He was not confronted with the witnesses, but the court accepted his telegraphic waiver, and the trial thereafter proceeded without the defendant being present. Witnesses were examined, argument of counsel made, and three months later sentence was pronounced, all in his absence.

On appeal the judgment was reversed by the supreme court of the Philippines, not for the purpose of setting the judgment aside, but to inflict a penalty of more than twofold severity, and to raise the term of imprisonment from six to fourteen years in the penitentiary.

The act of July 1, 1902 [32 Stat. at L. 691, chap. 1369], regulating the government of the Philippine Islands, does not provide for trial by jury, nor does it destroy the power of the appellate court to change the sentence in a criminal case. But the absence of the right to trial by jury, and the presence of the danger of appeal make it all the more important to enforce those safeguards copied from the Constitution of the United States and granted the people of those islands.

Barring the right to indictment and trial by jury the defendant charged with a felony before a Philippine court has substantially the same rights as though he were on trial in a United States court. And if this conviction can stand, it must be because the same things would be proper in this country, where the language of the Constitution is, in this respect, substantially the same as that of Philippine Bill of Rights.

Sec. 5. "That in all criminal prosecutions the accused *shall enjoy the right to [461 be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same of-

fense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself."

Not only the fact that the defendant's liberty is involved, but the further fact that the decision will be a precedent in other cases, justifies a brief statement of the facts and reasons on which this dissent is based.

The opinion proceeds upon the theory that while a defendant has the right to be confronted with the witnesses, he may waive that privilege in all except capital cases. In support of that proposition many authorities are cited.

In some of these cases the defendant was voluntarily absent from the court room, for a short time, without the attention of the court being called to the fact. In others the defendant escaped while the trial was in progress. In others, having given bail, he failed to return in time to hear the verdict read. In all of them the court's decision was expressly, or by necessary implication, placed upon the ground that the defendant could not take advantage of his own wrong, and render a trial nugatory by escape or making an improper use of his bail.

These cases undoubtedly announce a correct rule. For, when the trial of a felony begins, it ought to proceed in due and orderly course to verdict. The defendant has no right to force the court to order a mistrial. If he escapes or takes advantage of his bail to remain away during the trial, the court proceeds, not because it is willing that he should be absent, but because it is obliged to go on without him. But because the court is compelled so to act under 462]*such facts, it does not follow that it could or would consent for him to be absent during the trial; or that it would accept a formal waiver from him of the right to be confronted by the witnesses, or to be present when sentence was pronounced. As said in *Hopt's Case*, 110 U. S. 579, 28 L. ed. 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417:

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty. . . . This is a mistaken view. . . . The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. . . . If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

It is true, as pointed out in the opinion of the court here, that this was said in

a case where the defendant was on trial for his life. But the principle was announced in language which, repeatedly and expressly, made it applicable to felonies, and wherever the defendant might be deprived of his life or liberty. The defendant, in such cases, cannot waive his right to be present when his liberty is involved, any more than when his life is at stake. And it is a misnomer to say that when he escapes or refuses to be present, that he has waived the right. He has made it impossible for the court to give him his rights.

But, even if the doctrine of waiver could be extended beyond these cases of necessity, arising from flight and voluntary absence after the trial began, it would not apply in the present instance. The case was conducted from beginning to end as though it were civil litigation, with several suspensions of the trial,—once for fourteen days, once for thirty days,—and with three months between the argument and the rendition of the judgment. There was in this case, therefore, no compelling necessity, as in those cited in the opinion of the majority. The court accepted the defendant's waiver, as though he alone had an interest *in the method of trial,—[463 ignoring the fact that, as said in the *Hopt Case*, "the public had an interest in his life and liberty."

In order to make this want of necessity clear it will be necessary to state some of the facts as they appear in this record.

The defendant lived in the town of San Carlos, in the province of Occidental Negros. He was charged with having killed Alcanzaren in that municipality. After a preliminary trial, he was bound over to answer for the charge of homicide,—equivalent to manslaughter, and not punishable by death. He gave bond, and was subsequently brought to trial before the court of first instance, sitting at Bacolod, which, according to the maps, is about 30 miles from San Carlos, and on the other side of the Island. The distance between the two places by water is about 100 miles.

Diaz was arraigned and pleaded "not guilty" September 26, 1906. The case was several times continued, the defendant once or twice consenting. But on August 15, 1907, eleven months after arraignment, the trial began,—the defendant and his counsel being present.

Two witnesses for the prosecution were examined. "At the request of the fiscal, the hearing was suspended and an order was issued for the arrest of" three absent witnesses. The record does not show to what date the court adjourned. But fourteen days later it reconvened, the defendant and his counsel again being present.

The trial was resumed August 29, 1907, and two witnesses for the prosecution were examined.

The record does not show why the proceedings were again suspended, nor the date to which the court adjourned. But it does appear that after a delay of thirty days the court again reconvened, and that the judge had received a telegram from Diaz. It is copied into the record, and reads as follows:

464] *San Carlos, Sept. 20, '07.
Judge Jocson, Bacolod:—

I waive right to be present during examination of government witnesses.

Gabriel Diaz.

Other entries of the same date show that "on September 20, 1907, in open court, the Honorable Vincent Jocson, of the 10th district, presiding, the provincial fiscal and the counsel for defendant being present, the accused himself having waived his right to be present at the trial, according to a telegram just received from him, the trial of this case was resumed and Pelagio Carbajosa, a witness for the prosecution, was examined. The prosecution then rested. The counsel for defendant only introduced in evidence a certified copy of the proceedings before the justice court. . . . The trial was then adjourned for the purpose of allowing the fiscal to introduce evidence in rebuttal."

The next day the court again met, the judge, provincial fiscal, and attorney for the defendant being present, "The trial of this case was resumed and a witness for the prosecution was examined in rebuttal. The fiscal then rested his case, and counsel for the accused waived his right to introduce further evidence. Both parties having rested, the fiscal and counsel for the defendant, respectively, made their oral arguments, and the court declared the trial closed, and took the case under advisement."

The court, however, did not adjourn to a given date, nor was there even a provision that the defendant and his counsel should be notified of the time and place when judgment would be entered and sentence pronounced.

The court waited ninety days. It then delivered an opinion, entitled in the case, and dated, "Bacolod, Dec. 24, 1907," in which he discussed the evidence, and concluded by finding the defendant guilty, and 465] sentencing him to *confinement in the penitentiary for six years and one day.

Notice of this sentence was evidently received by the defendant, because on January 17, 1908, he entered an appeal to the

supreme court of the Philippines. One of the judges of that court held that "there was no competent evidence to sustain a conviction," but the majority, "notwithstanding the deficiencies and irregularities that are observable in the prosecution of this case," reversed the case, not for the purpose of setting aside the conviction, but solely for the purpose of increasing the penalty. It thereupon sentenced him to a penalty of fourteen years of *reclusion temporal*, with the accessory penalties of article 59 of the Penal Code.

From these facts it will be seen that the Philippine court of first instance was not in the situation of an American court with a jury impaneled and under the necessity either of proceeding to verdict in the defendant's absence, or of discharging the jury, and rendering the trial nugatory. It assumed that if Diaz was willing to be absent, the court could accept his waiver. The procedure adopted was evidently in accordance with the judge's view of the Spanish law, but in disregard of the fact that, under the Bill of Rights, when the trial began, the defendant stood upon his deliverance. There could thereafter be the customary adjournments from day to day, but no suspensions of the trial except "in case of urgent necessity," "and for very plain and obvious causes." *United States v. Perez*, 9 Wheat. 580, 6 L. ed. 165; *Thompson v. United States*, 155 U. S. 274, 39 L. ed. 149, 15 Sup. Ct. Rep. 73, 9 Am. Crim. Rep. 209.

At common law the trial of felonies was required to be completed at one sitting. Of necessity this rule had to be modified, and adjournments from day to day were finally allowed. There are a few instances in which the case was suspended for a reasonable time, in order to permit the attendance of witnesses who had been unavoidably delayed, *or for other proper[466] cause, in the discretion of the judge conducting the trial. But without regard to the delay of eleven months between arraignment and trial, the extremest extension heretofore allowed is insignificant by comparison with those here, first for two weeks and then for thirty days. In both these instances the record fails to show that the defendant objected, and it may be that if he can waive the right to be confronted by the witnesses he may waive the guaranty against multiplied jeopardy. For that right is not greater than the right to be present at every stage of the trial.

The court being of the opinion that the defendant need not be present at the trial, it is not surprising that he thought the defendant might also be absent when judgment was rendered and sentence pronounced.

It is true that the Philippine Code expressly declares that the defendant "must be personally present at the time of pronouncing judgment if the conviction is for a felony." But that could no more add to the Bill of Rights than a statute could repeal the requirement that the defendant should be confronted with the witnesses, and be present at every stage of the trial. That the defendant was not personally present is both the legal inference and the natural conclusion from what appears in the record. When the court took the case under advisement on September 21, 1907, it passed no order indicating when the decision would be delivered, even if it had the right to hold the defendant in suspense for days and weeks and months. There was therefore no reason for the defendant to be present at Bacolod on December 24, in anticipation that judgment would be entered on that date.

There are cases which hold that where the record shows that the defendant was present when the trial began, there is a presumption that he remains in attendance, and it is not necessary to repeat the statement in the record, from day to day, 467]so as to affirmatively show that *he was present. In the present case the presumption would be the other way, because, having been absent during the last two days of the trial, there is no reason to assume that he was present when, after an indeterminate suspension, the court reconvened. At any rate, there is peculiar room for the application of the rule in Federal courts announced in *Lewis v. United States*, 146 U. S. 372, 36 L. ed. 1012, 13 Sup. Ct. Rep. 136, that "where the personal presence is necessary in point of law, the record must show the fact."

In my opinion the conviction was not only erroneous because the defendant was not present when the witnesses were examined and argument made, but, having been unlawfully put in double jeopardy, and judgment equivalent to verdict having been pronounced in his absence, he is entitled to his discharge. *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532.

It may be that such views would work a radical change in criminal procedure in the Philippines. But when Congress incorporated the language of the 6th Amendment into the act of July 1, 1902, it must have intended to make just such changes, and to require the trial to be conducted in the American manner, and, among other things, also to prohibit suspensions and undue prolongation of the hearing, so as thereby to prevent the pain and anxiety which must inevitably be suffered by a prisoner who is thus kept on a mental rack.

These considerations compel me to dissent, and to add, that if the effort to review this judgment can lawfully result in having the sentence more than doubled, it imposes a penalty on the exercise of the right, and makes it worse to appeal than to submit to conviction on record which the supreme court of the Philippines admitted presented "irregularities and deficiencies."

*GAAR, SCOTT, & COMPANY, Plff.[468
in Err.,

v.

O. K. SHANNON.

(See S. C. Reporter's ed. 468-473.)

Error to state court—Federal question—decision on non-Federal ground.

1. A decision of a state court dismissing a suit by a foreign corporation to recover back a franchise tax imposed under a state statute which is alleged to contravene the Federal Constitution, which decision rests in part on the ground that the tax was voluntarily paid, cannot be reviewed in the Federal Supreme Court if the question as to voluntary payment fairly arises on the record, although the Federal questions may have been actually considered and determined by the state court.

[For other cases, see *Appeal and Error*, 1455-1528, in *Digest Sup. Ct.* 1908.]

Taxes—payment under protest—recovery back.

2. The payment by a foreign corporation of the franchise tax imposed by Tex. Laws 1905, chap. 19, to escape the consequences of the self-executing provisions of the statute, under which a corporation failing to pay the tax incurs a penalty and forfeits its right to do business in the state, and its right to sue, is not voluntary, so as to defeat the right to recover back the tax as paid under protest.

[For other cases, see *Taxes*, 608-612, in *Digest Sup. Ct.* 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

As to when taxes illegally assessed may be recovered back—see note to *Erskine v. Van Arsdale*, 21 L. ed. U. S. 63.

Taxes — payment under protest— recovery back.

3. A foreign corporation doing only an interstate business, and therefore not liable to the franchise tax imposed by Tex. Laws 1905, chap. 19, cannot recover back the amount of such tax, as paid under the duress of the self-executing provisions of the statute, under which a corporation failing to pay the tax incurs a penalty and forfeits its right to do business in the state, and its right to sue.

[For other cases, see Taxes, 608-612, in Digest Sup. Ct. 1908.]

[No. 88.]

Argued December 11, 1911. Decided February 19, 1912.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, to review a judgment which affirmed a judgment of the District Court of Travis County, in that state, sustaining the demurrer to the complaint in an action by a foreign corporation to recover back a franchise tax. Affirmed.

See same case below, 52 Tex. Civ. App. 634, 115 S. W. 361.

Statement by Mr. Justice Lamar:

In this suit against Shannon, secretary of state for Texas, for the recovery of taxes paid under protest, the plaintiff, Gaar, Scott, & Company, alleged that it is a corporation chartered by the laws of Indiana, in which state it has its principal place of business, and where it manufactures 469]*machinery; that in 1901 it paid the amount of franchise tax required of foreign corporations, and obtained from the state of Texas a permit to do business for ten years. This permit, it alleges, was a contract which could not be impaired, but, notwithstanding that fact, the legislature, in 1905, passed an act requiring foreign companies doing business in Texas to pay a still higher franchise tax, measured by their capital and surplus, and provided that if the same was not paid by May 1st, a penalty of 25 per cent should be added, and if not paid by July 1st, the permit to do business in the state should be forfeited "without judicial ascertainment," and the company deprived of the right to sue in the courts. It alleged that the secretary of state had mailed to the company a circular calling attention to the provisions of the act, and thereupon, and before May 1, 1905, and again before May 1, 1906, under the duress of this statute, the company had paid the tax demanded, under protest, and with written notice that it reserved the right to sue for the recovery of the

amount exacted by an unconstitutional law.

The petition alleges that plaintiff "*only transacts an interstate business in the state of Texas in the sale of its manufactured products*. That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, and that this applies to all goods sold by your petitioner in the state of Texas, and your petitioner further alleges that it was, at the time this permit was granted to do business in the state of Texas, and that it now is, and has been ever since said permit was granted to it, engaged in an interstate commerce business."

The only prayer was for the recovery of the taxes paid for the years 1905 and 1906. The defendant's general demurrer was sustained. 52 Tex. Civ. App. 634, 115 S. W. 361.

Mr. C. E. More argued the cause, and, with Messrs. Almon W. Bulkley and J. L. Patterson, filed a brief for plaintiff in error:

These taxes were not voluntarily paid.

Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; State ex rel. McCurdy v. Nelson, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548; Marshall v. Snediker, 25 Tex. 460, 78 Am. Dec. 534; Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 666; Denver v. Evans, 35 Colo. 490, 84 Pac. 65; Rumford Chemical Works v. Ray, 19 R. I. 302, 456, 33 Atl. 443, 34 Atl. 814; Boston & S. Glass Co. v. Boston, 4 Met. 181; Dunnell Mfg. Co. v. Newell, 15 R. I. 233, 2 Atl. 766; Creamer v. Bremen, 91 Me. 508, 40 Atl. 555; Woodmere Cemetery Asso. v. Springwells Twp. 130 Mich. 466, 90 N. W. 277; Gaar, S. & Co. v. Sorum, 11 N. D. 164, 90 N. W. 801; La Salle County v. Simmons, 10 Ill. 513; Harvey v. Olney, 42 Ill. 336; Prickett v. Madison County, 14 Ill. App. 454; Chicago v. Sperbeck, 69 Ill. 562; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Chicago v. Klinkert, 94 Ill. App. 524; Chicago v. Waukesha Imperial Spring Brewing Co. 97 Ill. App. 585; Henry v. Chester, 15 Vt. 460; Chicago & A. R. Co. v. Chicago, V. & W. Coal Co. 79 Ill. 121, 2 Mor. Min. Rep. 634; German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94; Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Baker v. Panola County, 30 Tex. 86; Wood v. Stirman, 37 Tex. 585; Galveston v. Sydnor, 39 Tex. 236; Galveston Gas Co. v. Galveston County, 54 Tex. 287; Galveston

County v. Gorham, 49 Tex. 279; Galveston County v. Galveston Gas Co. 72 Tex. 509, 10 S. W. 583.

Mr. James D. Walthall, Assistant Attorney General of Texas, argued the cause, and, with Mr. Jewell P. Lightfoot, Attorney General, filed a brief for defendant in error:

If plaintiff in error was doing only an interstate business, as pleaded and contended by it, then a forfeiture of its permit could in no wise affect it, because its right to do an interstate business without first obtaining a permit is unquestioned.

Allen v. Tyson-Jones Buggy Co. 91 Tex. 22, 40 S. W. 393, 714; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Lasater v. Purcell Mill & Elevator Co. 22 Tex. Civ. App. 33, 54 S. W. 425.

The taxes sought to be recovered in this case were therefore voluntarily paid, and cannot be recovered back, even though improperly collected.

2 Dill. Mun. Corp. 947; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Union P. R. Co. v. Dodge County, 98 U. S. 542, 25 L. ed. 196; Little v. Bowers, 134 U. S. 554, 33 L. ed. 1019, 10 Sup. Ct. Rep. 620.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

On writ of error to a judgment sustaining defendant's demurrer to the complaint for the recovery of taxes paid under protest, the court of appeals of Texas considered all the assignments of error. It held that the permit of 1901, to do business for ten years, was not a contract, and that therefore the state, during that period, might demand an increased or additional franchise tax. It ruled that foreign corporations might be altogether excluded, or required to pay a discriminatory tax as the condition of the right to do business in Texas. It further held that even if there had been merit in plaintiff's contention, it was not entitled to recover the taxes for 1905 and 1906, because they had been voluntarily paid.

1. If the record affords a basis for sustaining the last proposition, this court cannot consider whether the act violates the 14th Amendment, or the commerce and contract clauses of the Constitution. For, as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. Hale v. Akers, 132 U. S. 554,

564, 33 L. ed. 442, 446, 10 Sup. Ct. Rep. 171. The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res judicata*, laches, statute of limitations, and others *similar in kind to[471 that involving the effect of a voluntary payment. Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; Pierce v. Somerset, 171 U. S. 648, 43 L. ed. 319, 19 Sup. Ct. Rep. 64; Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733.

It is, however, equally well settled that if the Federal question is properly presented and necessarily controls the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. West Chicago Street R. Co. v. Chicago, 201 U. S. 506, 520, 50 L. ed. 845, 850, 26 Sup. Ct. Rep. 518. And the plaintiff in error insists that, under this rule, the constitutionality of the statute must be decided, because the facts stated in the complaint, and admitted by the demurrer, do not afford any basis for holding that the money was voluntarily paid.

2. Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be duress of goods. Or, if there is, the citizen, to avoid the consequences of the duress, may pay the money, regain the use of his property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date, a penalty of 25 per cent shall be incurred, the license of the company shall be canceled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. Swift & C. & B. Co. v. United States, 111 U. S. 29, 28 L. ed. 343, 4 Sup. Ct. Rep. 244; Robertson v. Frank Bros. Co. 132 U. S. 23, 33 L. ed. 238, 10 Sup. Ct. Rep. 5; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 329, 53 L. ed. 1018, 29 Sup. Ct. Rep. 671; Atchison, T. & S. F. R. Co. v. *O'Connor, decided this day.[472 [223 U. S. 280, ante, 436, 32 Sup. Ct. Rep. 216.] Otherwise plaintiff might be without

any remedy whatever. For in *Arkansas Bldg. & L. Asso. v. Madden*, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119, it was held that a taxpayer was not entitled to an injunction against the enforcement of a similar statute of the state of Texas, unless he could show that there was no adequate remedy at law. And, as payment under such an act was treated as compulsory, for which suit might be maintained, and as there was nothing to indicate inability of complainant to pay, or of the defendant to respond to a judgment, the bill was dismissed without prejudice. That necessarily recognized that the plaintiff had the right to pay under protest, sue the officer for the amount exacted, and recover it back in case it should be made to appear that the statute was void.

3. If, therefore, the plaintiff had been included in the class to which this statute applied, and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional, and to a review of the judgment if it had been adverse to the company's contention. But the company did not, in any sense, come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the supreme court of Texas in *Allen v. Tyson-Jones Buggy Co.* 91 Tex. 22, 40 S. W. 393, 714, and *L. Miller & Co. v. Goodman*, 91 Tex. 41, 40 S. W. 718, had held that the franchise tax act had no application to corporations doing an interstate business. The duress of its provisions, therefore, operated only on those doing intrastate business; and if the plaintiff, on a mere demand, paid the tax imposed by a statute applicable only to other corporations, it had no more right to recover than would a drygoods merchant 473] who voluntarily *paid a tax illegally imposed on those engaged in the selling of liquor.

To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule that "one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive 56 L. ed.

him of rights protected by the Federal Constitution." *Southern R. Co. v. King*, 217 U. S. 534, 54 L. ed. 872, 30 Sup. Ct. Rep. 594.

What we have said shows that the question as to voluntary payment fairly arose out of the record, and was not arbitrarily injected into the case. *Leathe v. Thomas*, 207 U. S. 99, 52 L. ed. 120, 28 Sup. Ct. Rep. 30. A decision on that non-Federal point could properly dispose of the plaintiff's suit to recover back what it had paid. The judgment of the Civil Court of Appeals must therefore be affirmed.

NEW MARSHALL ENGINE COMPANY
and Frank J. Marshall, Pliffs. in Err.,

v.

MARSHALL ENGINE COMPANY, by Andrew Van Blarcom, Its Receiver.

(See S. C. Reporter's ed. 473-480.)

Courts — concurrent jurisdiction — patent cases — specific performance.

A suit by the assignee of a patent, to compel the assignor and his assignee of a later patent, which, on the face of the application and letters patent, appears to be for an improvement, to assign the patent for such improvement to complainant, in compliance with a covenant for further assurance, is within the jurisdiction of a state court, although the bill also asks for an injunction against the sale or manufacture of machines covered by such later patent, where such injunction was only prayed as an incident of a finding that the title was vested in the complainant.

[For other cases, see *Courts*, 1416-1421, in *Digest Sup. Ct.* 1908.]

[No. 107]

Submitted December 15, 1911. Decided February 19, 1912.

IN ERROR to the Superior Court of the State of Massachusetts for the County of Franklin, to review a decree affirmed by the Supreme Judicial Court of that state, for the specific performance of a covenant for further assurance in the assignment of a patent. Affirmed.

See same case below in *Supreme Judicial Court*, 199 Mass. 546, 85 N. E. 741.

Statement by Mr. Justice Lamar:

On June 1, 1886, Letters Patent 342,802, were issued to Frank J. Marshall for an improvement in pulp-beating engines.

NOTE.—On concurrent jurisdiction of Federal and state courts—see notes to *Copp v. Louisville & N. R. Co.* 12 L.R.A. 725, and *Smith v. M'Iver*, 6 L. ed. U. S. 152.

Shortly before the patent expired he organized the Marshall Engine Company, and on September 15, 1902, assigned to it the patent and "all improvements thereon and renewals of the same." Marshall was elected president of the company, but neglected to have the assignment recorded within the time required by law. It contained, however, a provision for further assurance, and on October 8, 1904, after the patent had expired, Marshall executed an additional instrument whereby, after reciting the former assignment, he transferred the patent and "all further improvements thereon and renewals thereof."

In September, 1903, at the time the first assignment was made, Marshall had on file an application for a patent on "an improvement on patent 411,251, granted to E. R. Marshall, and embodies features shown in patent 342,802, granted in 1886 to myself." There is no further reference in the record to patent 411,251. Marshall's application was granted, and on April 14, 1903, Letters Patent 725,349 were granted to him.

No formal assignment was made, but it is found as a fact that, between September 15, 1903, and the receivership, the complainant manufactured nine or ten engines embodying the improvement covered by patent 725,349.

475] *On June 13, 1905, a receiver was appointed for the Marshall Engine Company. Immediately thereafter, Marshall organized under the laws of Massachusetts a new company bearing his name, and assigned to it this patent 725,349. The New Marshall Engine Company took with notice of the complainant's right.

The Marshall Engine Company, of New Jersey, claimed title to this patent 725,349 as an "improvement" on patent 342,802, which passed by virtue of the assignment of September 15, 1902. It thereupon filed, through its receiver, a bill in the superior court of Franklin County, Massachusetts, asserting this title, and praying that the defendants, Marshall and the New Marshall Engine Company, should be required to execute and deliver to it an assignment in due form to patent 725,349, so as to entitle it to be recorded in the Patent Office, and also that the defendants, their successors and assigns, should be enjoined from manufacturing or selling machines covered by patent 725,349.

The defendants answered, admitting or denying the several allegations of the bill, but setting up no affirmative defense. The case was referred to a master, who found in favor of the complainant. Thereupon the defendants moved to dismiss the bill because "it presents questions involving an

inquiry as to the construction and scope of the patents therein mentioned, of which questions the Federal courts have exclusive jurisdiction." The motion was overruled, and a final decree was entered in favor of the complainants. The decision was affirmed by the supreme judicial court of Massachusetts, and the case was brought here by writ of error.

Mr. Edmund A. Whitman submitted the cause for plaintiffs in error. Messrs. Lyman W. Griswold and Frank J. Lawler were on the brief:

One question here presented is as to the construction to be given to the law governing the assignment under which the plaintiff claims title, which clearly makes it a case for the United States courts.

Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; *Aberthaw Constr. Co. v. Ransome*, 192 Mass. 439, 78 N. E. 485.

If the assignee of a patent sets up his patent, he thereby puts the title in issue; and even if it is denied by the defendant, this does not make it a suit upon the contract, but it still remains a suit for infringement of a patent.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 291, 46 L. ed. 915, 22 Sup. Ct. Rep. 681.

If the patent is involved it carries with it the whole case.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 292, 46 L. ed. 910, 915, 22 Sup. Ct. Rep. 681.

The character of a case is determined by the question involved. If it appears that some right will be defeated by one construction of a United States law, or sustained by an opposite construction of such law, a case thereby arises of which the United States courts alone have jurisdiction.

Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282-286, 46 L. ed. 910-913, 22 Sup. Ct. Rep. 681; *Starin v. New York*, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28.

This case involves the construction of patents, and the United States courts alone have jurisdiction.

Aberthaw Constr. Co. v. Ransome, 192 Mass. 439, 78 N. E. 485; *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577.

Assignees may sue in the United States courts for infringements.

Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577.

An injunction against future infringements is prayed for in this case, and thereby arises a case under the patent laws.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

Even if the complaint, standing by itself, makes out a case of state jurisdiction, it will be taken away if the answer sets up a case of a right under the patent laws.

Robinson v. Anderson, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

A suit in which the relief sought is an injunction against infringing on a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent.

Atherton Mach. Co. v. Atwood-Morrison Co. 43 C. C. A. 72, 102 Fed. 949; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 294, 46 L. ed. 910, 916, 22 Sup. Ct. Rep. 681.

The remedy sought involves the right of the defendant to use the patent; in other words, it is a suit for infringement, of which the Federal courts alone have jurisdiction.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.

Tennessee v. Davis, 100 U. S. 257, 264, 25 L. ed. 648, 650; Story, Const. § 1647; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Puetz v. Bransford, 32 Fed. 318; White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768; Adriance, P. & Co. v. McCormick Harvesting Mach. Co. 55 Fed. 288; Water A. Wood Harvester Co. v. Minneapolis-Easterly Harvester Co. 61 Fed. 256; Young Reversible Lock-Nut Co. v. Young Lock-Nut Co. 72 Fed. 62.

Mr. Walter H. Bond submitted the cause for defendant in error:

The state courts had jurisdiction of the case at bar, inasmuch as it was merely an attempt to enforce rights arising *ex contractu*.

Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

If the validity of a patent is incidentally drawn in question in a cause properly cognizable in a state court, the jurisdiction of that court is not thereby ousted.

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Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62.

Actions to compel the specific performance of contracts where the question was whether the improvement for which letters patent were issued is an improvement on a former improvement have been somewhat common in the state courts, and no question seems to have been raised as to the jurisdiction of those courts.

McFarland v. Stanton Mfg. Co. 53 N. J. Eq. 649, 51 Am. St. Rep. 647, 33 Atl. 962; Birkery Mfg. Co. v. Jones, 71 Conn. 113, 40 Atl. 917; Harris v. Wallace Mfg. Co. 84 Ohio St. 104, 95 N. E. 559; Bates Mach. Co. v. Bates, 192 Ill. 138, 61 N. E. 518.

Inasmuch as the equitable title to letters patent No. 725,349 passed by the agreement of September 15th, 1902, irrespective of the question as to whether letters patent No. 725,349 are an improvement on letters patent No. 342,802, it is not necessary to find that letters patent No. 725,349 are an improvement on letters patent, No. 342,802, in order to affirm the judgment of the supreme court of Massachusetts; and the state courts had unquestionable jurisdiction of the suit to enforce the specific performance of the said agreement.

Birkery Mfg. Co. v. Jones, 71 Conn. 113, 40 Atl. 917; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a state may try questions of title, and may construe and enforce contracts relating to patents. Wade v. Lawder, 165 U. S. 627, 41 L. ed. 852, 17 Sup. Ct. Rep. 425. The present litigation belongs to this class. The controlling fact for determination here is whether patent 725,349 belongs to the *Mar-[479 shall Engine Company, of New Jersey, or to the New Marshall Engine Company, of Massachusetts. The complainant did not, by its bill in the state court, raise any question as to the validity or construction of the patent, nor did it make any claim for damages for infringement. The suit was an ordinary bill for specific performance to compel Marshall to assign to complainant the improvement on patent 342,802, in compliance with his covenant for further assurance. If patent 725,349 was

an improvement thereon, as on the face of the application and letters patent it appeared to be, then the complainant was entitled to a decree requiring Marshall to make a conveyance which could be properly recorded for the protection of the true owner.

Marshall had, however, in violation of his contract, previously assigned patent 725,349 to the New Marshall Engine Company, which took with notice of the prior transfer. This company, therefore, held the legal title as trustee for the complainant. Under the circumstances the state court had jurisdiction to pass on the question of ownership, and to enter a decree requiring Marshall, as patentee, and the New Marshall Engine Company, as trustee, to make an assignment in due form to the complainant. This jurisdiction was based on general principles of equity jurisprudence, and did not present a case arising under the patent law.

It is, however, urged that the state court was ousted of the jurisdiction to enter a decree for specific performance, because the bill went farther, and prayed that the defendants, and each of them, should be enjoined from manufacturing or selling the machines covered by patent 725,349. It is claimed that this was, in effect, an application and decree for injunction against infringement, and could only be granted by a Federal court.

But the allegations of the complainant's bill do not involve any construction of the meaning or effect of patent 725,349, 480] nor does it charge that the manufacture or sale of engines by the defendants would be an infringement of the patent, or of any right of the complainant, if in fact, patent 725,349 belonged to the New Marshall Engine Company. The injunction was asked for only as an incident of a finding that the title was vested in the complainant. "The bill . . . must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to and not as one to protect the complainants in the exclusive enjoyment of a patent right. . . . It is to prevent the fraudulent violation of these contracts, therefore, that the complainant seeks the aid of the court and asks for an injunction." *Brown v. Shannon*, 20 How. 56, 57, 15 L. ed. 827, 828. As said in *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344, "the injunction is to be the consequence of a decree sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside." Here the injunction asked for is to be the consequence of the decree sustaining the complainant's title.

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It alleges no ground for injunction unless that title is established.

The state court had jurisdiction of the subject-matter of the controversy. The relief granted was appropriate to the cause of action stated in the bill. The decree must therefore be affirmed.

*GALVESTON, HARRISBURG, & [481
SAN ANTONIO RAILWAY COMPANY
and the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

L. V. WALLACE. (No. 108.)

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY and the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

J. D. CROW. (No. 109.)

(See S. C. Reporter's ed. 481-492.)

Courts — concurrent jurisdiction — enforcing cause of action arising under Federal statute.

1. The damage caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), is not traceable to a violation of the statute, redress for which, under § 9 of the original act, can only be

NOTE.—On concurrent jurisdiction of Federal and state courts—see notes to *Copp v. Louisville & N. R. Co.* 12 L.R.A. 725, and *Smith v. M'Iver*, 6 L. ed. U. S. 152.

On the administration of Federal laws in state courts—see note to *Loughlin v. McCaulley*, 48 L.R.A. 33.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

Connecting carriers; loss beyond own line; construction of Hepburn act (Carmack amendment).

The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce, and receiving property for transportation from a

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had in the Interstate Commerce Commission or in the Federal courts.

[For other cases, see Courts, 1361-1432, in Digest Sup. Ct. 1908.]

Conflict of laws — enforcing cause of action created by foreign statute.

2. The jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. [For other cases, see Conflict of Laws, 4-10, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — enforcing cause of action arising under Federal statute.

3. A state court may enforce the liability of an initial carrier of an interstate shipment, arising under the Carmack amendment of June 29, 1906, to the interstate commerce

act of February 4, 1887, by which such carrier is made liable for a loss beyond its own line.

[For other cases, see Courts, 1361-1432, in Digest Sup. Ct. 1908.]

Commerce — Federal power — regulating liability of connecting carrier.

4. The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere *en route*, with a right of recovery over against the carrier actually causing the loss, which is made by the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.

[For other cases, see Commerce, 328-333, in Digest Sup. Ct. 1908.]

point in one state to a point in another state, as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; *Gibson v. Little Rock & H. S. W. R. Co.* 93 Ark. 439, 124 S. W. 1033; *Blackmer & P. Pipe Co. v. Mobile & O. R. Co.* 137 Mo. App. 479, 119 S. W. 1; *Travis v. Wells, F. & Co.* 79 N. J. L. 83, 74 Atl. 444; *Earnest v. Delaware, L. & W. R. Co.* 134 N. Y. Supp. 323; *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Supp. 311; *Missouri, K. & T. R. Co. v. Stark Grain Co.* 103 Tex. 542, 131 S. W. 412, modifying — *Tex. Civ. App.* —, 120 S. W. 1146.

Congress intended by this act to adopt, as against the initial carrier in interstate shipments, the ordinary common-law liability, and to deny the common-law right to contract for special exemptions therefrom. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

A carrier receives property for transportation from a point in Kentucky to a point in Georgia, and issues a through bill of lading therefor, within the meaning of the Hepburn act, where the shipper delivers the shipment to the initial carrier at a station in Kentucky, marked for a place in Georgia, and the carrier issues a bill of lading by which it agrees to transport the shipment to the place where it shall be received by the next connecting carrier for transportation, which was to a point in Alabama, and stipulates that its liability shall cease at its terminus when the shipment is delivered to the next carrier, which is to continue the transportation. *Louisville, & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed in 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171.

A bill of lading showing the interstate character of the shipment, and containing stipulations governing the entire transportation from the initial point to destination, 56 L. ed.

undertaking to specify not only rights, duties, and limitations relating to the parties to the contract, but also those of subsequent carriers, is a through bill of lading within the meaning of the Hepburn act, and the carrier cannot therefore limit its liability to its own line. *Southern P. Co. v. Meadors*, — *Tex. Civ. App.* —, 129 S. W. 170, reversed on other grounds in — *Tex.* —, 140 S. W. 427.

A bill of lading for an interstate shipment stipulating that, as a condition precedent to the issuance of "this through bill of lading and guaranty of through rate," the initial carrier's liability is limited to its own line, is a through contract, and, as such, is governed by the Hepburn act, although the main contracting clause states the agreement as one to carry to a point on its own line within the state, and there deliver to the next succeeding carrier to continue the transportation. *Houston & T. C. R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594.

A bill of lading issued by the initial carrier for an interstate shipment to be transported by that carrier and connecting lines to final destination is for a through shipment, within the meaning of this statute, although it names the intermediate lines over which the shipment is to pass. *Kemendo v. Fruit Dispatch Co.* — *Tex. Civ. App.* —, 131 S. W. 73.

A so-called "live stock contract" possessing all the essentials of a bill of lading, by which the initial carrier agrees to transport at a reduced rate an interstate shipment of live stock destined for a point beyond its line, to the end of its line, there to be transferred to a connecting carrier for further transportation, is within the statute, and the carrier issuing it is therefore liable for the negligent acts of any connecting carrier over whose road the freight may be transported. *Texas C. R. Co. v. Hico Oil Mill*, — *Tex. Civ. App.* —, 132 S. W. 381.

The failure of the initial carrier to issue any receipt or bill of lading for an interstate shipment will not relieve it from liability under this statute, but it will be

Connecting carriers — liability for loss beyond line.

5. A carrier voluntarily receiving property for transportation to a point on another line in another state is, under the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, conclusively treated as having made a through contract of carriage, rendering it liable for the other carrier's negligent failure to deliver the shipment to the consignee. [For other cases, see Carriers, 180-206a, in Digest Sup. Ct. 1908.]

Evidence — presumption — burden of proof — negligence — excepted causes.

6. Proof of delivery of an interstate shipment to the initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise

liable to the shipper to the same extent that it would have been liable to the lawful holder of the shipping receipt or bill of lading, had it performed its statutory duty to issue such receipt or bill of lading. *International Watch Co. v. Delaware, L. & W. R. Co.* 80 N. J. L. 553, 78 Atl. 49.

The Hepburn act applies to a carrier receiving property to be transported to a point beyond the state, although its own line lies wholly within the state. *Shultz v. Skaneateles R. Co.* 66 Misc. 9, 122 N. Y. Supp. 445, affirmed in 145 App. Div. 906, 129 N. Y. Supp. 1146.

A local express company, though operating only in one county of the state, which accepts goods for transportation to be delivered in a city outside the state, is, under the Hepburn act, liable for a loss in the hands of another express company to which the first company delivered the goods to complete the transportation. *Florman v. Dodd & C. Exp. Co.* 79 N. J. L. 63, 74 Atl. 446.

A truckman engaged to cart goods from a store to the dock or depot of a carrier to be forwarded to a destination outside the state, is not within the provisions of this statute. *Hirsch v. New England Nav. Co.* 129 App. Div. 178, 113 N. Y. Supp. 395. The court said: "It cannot be that the provisions of the interstate commerce act affect a truckman in a city, and hold him responsible for goods lost anywhere in the United States, upon the theory that he was the initial carrier, when all he had to do was to cart the goods from the store to the dock or the depot as an independent employment."

The liability which this statute imposes on the initial carrier in an interstate shipment for the conduct of the connecting carrier is referable entirely to acts and omissions which rendered the latter liable as a common carrier, and hence, where the initial carrier, being under no obligation to notify a connecting carrier that the shipper desired to divert the shipment, fails to do so and in consequence the connecting carrier fails to make the diversion, the initial carrier is not liable for any resulting loss.

to the liability imposed by the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, for loss or damage caused by it or any other carrier in the chain of transportation, and casts upon it the burden of proving that the loss resulted from some cause for which such initial carrier was not responsible in law or by contract.

[For other cases, see Evidence, 369-385, in Digest Sup. Ct. 1908.]

[Nos. 108 and 109.]

Submitted December 15, 1911. Decided February 19, 1912.

TWO WRITS OF ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to

Patton v. Texas & P. R. Co. — Tex. Civ. App. —, 137 S. W. 721.

The Hepburn act does not make the initial carrier liable for a sale of the goods by the terminal carrier, to satisfy the freight charges, after the latter's liability as carrier has terminated, and the new relation of warehouseman has been forced upon it by the negligence of the consignor, since the acts of the connecting carrier for which the initial carrier is made liable are acts as carrier, and not as warehouseman. *Norfolk & W. R. Co. v. Stuart's Draft Mill Co.* 109 Va. 184, 63 S. E. 415.

Diversion of an interstate shipment by an intermediate carrier, to another connecting carrier than the one stipulated in the contract of carriage, is an act of negligence which makes the initial carrier liable under the Hepburn act, as though for a conversion of the goods, when not delivered, and for damages when delivered in a damaged condition. *Kemendo v. Fruit Dispatch Co.* — Tex. Civ. App. —, 131 S. W. 73.

The initial carrier is liable for loss, damage, or injury to the property under the Carmack amendment resulting from the action of the terminal carrier in permitting an inspection contrary to the express provisions of the bill of lading, but where no damage results it is not liable as for a conversion because of such inspection. *Earnest v. Delaware, L. & W. R. Co.* 134 N. Y. Supp. 323.

Whether the Hepburn act fixes the liability of the initial carrier for all damages for which any connecting carrier would be liable under the common-law rule was questioned, but not decided, in *Southern P. Co. v. Weatherford Cotton Mills* — Tex. Civ. App. —, 134 S. W. 778.

And where it has been held that the Carmack amendment does not apply where the damage claimed is not in reference to the property itself which is the subject of the transportation, such as a mere delay in forwarding a shipment of building materials which delays the completion of the contract to the damage of the contractor. *Gulf, C. & S. F. R. Co. v. Nelson*, — Tex. Civ. App. —, 139 S. W. 81.

review judgments which affirmed judgments of the County Court of Uvalde County, in that state, holding an initial carrier in an interstate shipment liable to the shipper for loss on a connecting line. Affirmed.

See same case below, No. 108, — Tex. Civ. App. —, 117 S. W. 169; No. 109, — Tex. Civ. App. —, 117 S. W. 170.

The facts are stated in the opinion.

Messrs. Maxwell Evarts and James L. Bishop submitted the cause for plaintiffs in error:

The statute did not impose upon the defendant the obligation of an insurer of the safe delivery of the goods at destination.

Re Release Rates, 13 Inters. Com. Rep. 550; Bernard v. Adams Exp. Co. 205 Mass.

The initial carrier cannot complain of a division of damages with the terminal carrier, when, under the Hepburn act, judgment might have been rendered against it for the full amount of the damages. St. Louis, S. F. & T. R. Co. v. Fenley, — Tex. Civ. App. —, 118 S. W. 845.

The initial carrier in an interstate shipment is jointly liable under the Hepburn act (Carmack amendment) with the terminal carrier, for damages occurring through the negligence of the latter. Otrich v. St. Louis, I. M. & S. R. Co. 154 Mo. App. 420, 134 S. W. 665.

And the right of the shipper of an interstate shipment under the Hepburn act to recover the whole damage from the initial carrier is not affected by the fact that he makes the other roads parties defendant. Missouri, K. & T. R. Co. v. Demere, — Tex. Civ. App. —, 145 S. W. 623.

Under the Hepburn act, the initial carrier may make any defense which could be made by any connecting carrier on whose line the loss occurred. Riverside Mills v. Atlantic Coast Line R. Co. 168 Fed. 927.

An initial carrier has a right of recovery over under this act against the other carriers of an interstate shipment in the event only that he is able to prove that the damage approximately resulted from the negligence of such other carriers. Missouri, K. & T. R. Co. v. Jarmon, — Tex. Civ. App. —, 141 S. W. 155.

This statute does not apply to a shipment to a foreign country. Houston, E. & W. T. R. Co. v. Inman, — Tex. Civ. App. —, 134 S. W. 275.

There is some uncertainty as to whether this act obligates carriers to undertake through carriage.

"It may require resort to construction to determine whether the language employed," said the court in Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865, speaking with reference to this statute, "is broad enough to require a carrier to receive property intended for transportation to a destination beyond its own line."

In Welch Lumber Co. v. Norfolk & W. R. Co. 137 App. Div. 248, 121 N. Y. Supp. 56 L. ed.

254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Travis v. Wells F. & Co. 79 N. J. L. 83, 74 Atl. 444; Wright v. Adams Exp. Co. 43 Pa. Super. Ct. 40; Latta v. Chicago, St. P. M. & O. R. Co. 97 C. C. A. 198, 172 Fed. 850.

Congress cannot enforce as a contractual obligation that which is merely a statutory obligation. It cannot create a contract against the will of the parties, not because it would be unconstitutional to do so, but because it is impossible to do so.

Parsons, Contr. *515.

The rule laid down in Muschamp v. Lancaster & P. R. Co. 8 Mees. & W. 421, 2 Eng. Ry. & C. Cas. 607, 5 Jur. 656, to the effect that a mere receipt of property for transportation to a point beyond the line of the

985, the court in sustaining the validity of this act, apparently assumed that it obliges the carrier to contract to carry beyond its own line.

The contention that the provisions of the act of Congress of June 29, 1906, commonly known as the "Hepburn act," when considered together, operate to compel a carrier to enter into contracts with other connecting common carriers, and then hold the former liable for such losses as occur on the line of the latter, was overruled in Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649, the court saying: "Can it be fairly said that these provisions of the act of June 29, 1906, do anything more than require of carriers engaged in interstate commerce to make through routes and joint rates, and in the event they neglect or refuse to do so, confers power on the commission to establish, after hearing, through routes and fix maximum rates, subject, of course, to be reviewed by the courts?" The court pointed out that in this case it did not appear that the commission ever established a through route or fixed any rates, and added that, even conceding the contention to be well founded, there was no compulsion in this case. The court also said that here the initial carrier, having received the property for carriage beyond its own line, having issued a through bill of lading, and having guaranteed the rates and charges to the point of destination, could not, even at common-law, have stipulated against its liability for a loss beyond its own line (see *infra*, II. f. 2a), and that the act in this respect was declaratory merely.

The Federal Supreme Court left this question undecided in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164, expressly refraining from considering the question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, or its right to refuse to make a through route or joint rate when such route and rate would involve a continuance of the transportation over independent lines.

The liability of the initial carrier in an

receiving carrier, without any qualifying agreement, justifies an inference of an agreement for through transportation, is a rule of evidence, and the inference so derived may be rebutted by proof of the actual agreement between the parties.

Hutchinson, Carr. §§ 228 et seq.

Congress did not attempt to establish such a rule of evidence by the Carmack amendment. There is nothing said as to the character of the receipt to be given, or as to its effect. The statute concerns itself only with the liability imposed upon the initial carrier, irrespective of the terms of the receipt. Much less does the statute attempt to make a receipt or bill of lading conclusive evidence of a contract for through carriage. If it had attempted to do so, it may well be doubted whether the attempt would have been legal.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Howard v. Moot, 64 N. Y. 268; Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; Wigmore, Ev. § 1354.

Another consideration, not without weight, is found in the common-law obligations of the defendant as a common carrier. The common law imposes upon the carrier the obligation to receive and carry the goods tendered to it for transportation

over its own line, even though marked for a destination beyond its own line.

United States v. Geddes, 65 C. C. A. 320, 131 Fed. 452; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Seasongood, S. K. Co. v. Tennessee & O. River Transp. Co. 21 Ky. L. Rep. 1142, 49 L.R.A. 270, 54 S. W. 193; Southern Exp. Co. v. R. M. Rose Co. 124 Ga. 581, 5 L.R.A.(N.S.) 619, 53 S. E. 185.

The common law also imposes upon the carrier the duty of delivery of the goods to the succeeding carrier, where they are received for transportation to a point beyond the initial carrier's line.

Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Tift v. Southern R. Co. 123 Fed. 789; Rawson v. Holland, 59 N. Y. 611, 18 Am. Rep. 394.

This is an obligation from which the carrier cannot release itself.

Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297.

Since the initial carrier was under the legal obligation to receive and carry the goods over its own line, although marked to a destination in another state, and was likewise under the legal obligation to deliver the goods to the succeeding carrier, no inference can be drawn from the mere receipt of the goods that the railroad company intended to contract to carry the goods to destination, because of the existence upon the statute book of the Carmack

interstate shipment for loss or damage occurring anywhere *en route*, imposed by this statute notwithstanding any attempted contract restrictions, is confined to the case of a carrier "receiving property for transportation from a point in one state to a point in another state."

There are intimations in some of the cases that the statute does not prevent the initial carrier from limiting its undertaking to one for carriage to a point on its own line within the state, and for delivery of the shipment there to the next connecting carrier in the line of transportation. Blackmer & P. Pipe Co. v. Mobile & O. R. Co. 137 Mo. App. 479, 119 S. W. 1; Houston T. C. R. Co. v. Lewis, 103 Tex. Civ. App. 452, 129 S. W. 594.

There is nothing necessarily inconsistent with this idea in the holding in St. Louis, I. M. & S. R. Co. v. Furlow, 89 Ark. 404, 117 S. W. 517, that since the passage of the Hepburn act, a carrier cannot receive an interstate shipment which is destined to pass over its road and a connecting line, and exempt itself from liability for a loss occurring on such connecting line, by contracting to carry the shipment only over its own line, and then deliver it to a connecting line. The carriage over the initial carrier's own line in this case necessitated transportation between points in different

states, which apparently brings the case within the express provisions of the statute.

But in Galveston, H. & S. A. R. Co. v. Johnson, — Tex. Civ. App. —, 133 S. W. 725, the liability of the initial carrier under the Federal statute was said to be the same whether its contract as issued read to final destination beyond its own line, or was for carriage to the end of its own line, there to be delivered to a connecting carrier for further transportation. The court thought that stipulations inserted in the bill of lading contemplating transportation beyond the carrier's line, to transport only over its own line, and deliver at its terminus to the next succeeding carrier, were the equivalent of an attempt to restrict the initial carrier's liability to its own line, which was what the statute forbids.

Since the so-called Carmack amendment to the Hepburn act, a carrier undertaking the carriage of an interstate shipment cannot limit its liability to its own line. Central R. Co. v. Sims, 169 Ala. 295, 53 So. 826; Central R. Co. v. Chicago Varnish Co. 169 Ala. 287, 53 So. 832; St. Louis Southwestern R. Co. v. Grayson, 89 Ark. 154, 115 S. W. 933; Chicago, R. I. & P. R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; Southern Exp. Co. v. Meyer, 94 Ark. 103,

amendment. Its act was not voluntary, but compulsory, and therefore there can be found no element of intention of adopting the statute as a condition of entering into the employment.

It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates.

People ex rel. Rodgers v. Coler, 166 N. Y. 19, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

Much less will an unconstitutional statute be regarded as inserted in the contract by implication.

Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 70, 65 N. E. 885; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313.

The mere failure of the last connecting carrier to deliver the goods at Lowell was not evidence of a loss of the goods caused by the initial carrier or a connecting carrier.

Ricks v. Reed, 19 Cal. 551; *Blake v. Russell*, 77 Me. 492, 1 Atl. 200; *Hale v. Missouri P. R. Co.* 36 Neb. 266, 54 N. W. 517; *Hall v. Palmer*, 54 Mich. 271, 20 N. W. 49.

The statute, as construed and enforced by the Texas courts, is unconstitutional because it deprives the defendant of its property without due process of law.

Wilkinson v. Leland, 2 Pet. 627-658, 7

125 S. W. 642; *Pittsburg, C. C. & St. L. R. Co. v. Mitchell*, — Ind. —, 91 N. E. 735; *Pittsburgh, C. C. & St. L. R. Co. v. Knox*, — Ind. —, 98 N. E. 295; *Dodge v. Chicago, St. P. M. & O. R. Co.* 111 Minn. 123, 126 N. W. 627; *Southern P. R. Co. v. Lyon*, — Miss. —, 34 L.R.A.(N.S.) 237, 54 So. 784; *Missouri, K. & T. R. Co. v. Carpenter*, — Tex. Civ. App. —, 114 S. W. 900; *International & G. N. R. Co. v. Wilbourne*, — Tex. Civ. App. —, 115 S. W. 111; *Kemendo v. Fruit Dispatch Co.* — Tex. Civ. App. —, 131 S. W. 73; *Southern P. Co. v. Weatherford Cotton Mills*, — Tex. Civ. App. —, 134 S. W. 778; *Pecos & N. T. R. Co. v. Crews*, — Tex. Civ. App. —, 139 S. W. 1049; *Old Dominion S. S. Co. v. Flanary*, 111 Va. 816, 69 S. E. 1107.

The prohibition of the Carmack amendment to the Hepburn act, against limiting liability to the carrier's own line, does not apply to a shipment to a foreign country. *Houston, E. & W. T. R. Co. v. Inman*, — Tex. Civ. App. —, 134 S. W. 275.

The language of the Hepburn act, as is pointed out by the court in *St. Louis Southwestern R. Co. v. Ray*, — Tex. Civ. App. —, 127 S. W. 281, apparently applies to intermediate as well as initial carriers.

But in *Eastern R. Co. v. Montgomery*, — Tex. Civ. App. —, 139 S. W. 885, the court said that the initial carrier of an

L. ed. 542-553; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Westervelt v. Gregg*, 12 N. Y. 212, 62 Am. Dec. 160; *Holden v. Hardy*, 169 U. S. 369-390, 42 L. ed. 781-790, 18 Sup. Ct. Rep. 383; *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The power to regulate commerce is subject to the limitations of due process of law.

Gibbons v. Odgen, 9 Wheat, 1, 196, 211, 6 L. ed. 23, 70, 73; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 356, 73 Atl. 754, 17 Ann. Cas. 324; *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. ed. 394, 408; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *Lottery Cases (Champion v. Ames)* 188 U. S. 321, 362, 47 L. ed. 492, 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 685, 43 L. ed. 859, 19 Sup. Ct. Rep. 565; *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep.

interstate shipment is the only one made liable by the Carmack amendment for the damage or loss occurring beyond its own line, and that an intermediate carrier is only liable for such loss or damage as occurred on its line.

The terminal carrier in an interstate shipment is not made liable by the Hepburn act (Carmack amendment) for a loss or injury occurring on the line of the initial carrier. *Otrich v. St. Louis, I. M. & S. R. Co.* 154 Mo. App. 420, 134 S. W. 665.

But the presumption against the terminal carrier in an interstate shipment is destroyed by the declaration in the Hepburn act (Carmack amendment) that the initial carrier in an interstate shipment is liable no matter on what line the damages have occurred. *Carlton Produce Co. v. Velasco, B. & N. R. Co.* — Tex. Civ. App. —, 131 S. W. 1187.

The liability of an initial carrier in an interstate shipment for negligence and delay beyond its own line, incurred under this act, is enforceable, in the state courts. *Pittsburgh, C. C. & St. L. R. Co. v. Knox*, — Ind. —, 98 N. E. 295.

On the general subject of the liability of a connecting carrier for loss beyond its own line—see note to *Rov v. Chesapeake & O. R. Co.* 31 L.R.A.(N.S.) 1.

246; *Chicago City R. Co. v. Chicago*, 142 Fed. 845; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Central R. Co. v. Murphey*, 196 U. S. 195, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514.

If the railroad company came under any obligation to the shipper for the through carriage of the goods, then the court erred in excluding the defense of the release by the shipper of the railroad company from liability for loss or injury to the goods, not occasioned by its own negligence or that of a connecting carrier.

Greenwald v. Weir, 130 App. Div. 696, 115 N. Y. Supp. 311.

The right of action was created by the statute, and jurisdiction to entertain it was conferred exclusively upon the Federal courts.

Sheldon v. Wabash R. Co. 105 Fed. 785; *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 981; *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso.* 91 C. C. A. 39, 165 Fed. 9; *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 356, 73 Atl. 754, 17 Ann. Cas. 324.

No appearance for defendants in error:

Mr. Justice Lamar delivered the opinion of the court:

In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell. The company denied liability on the ground that under the contract expressed in the bills of lading, its obligation and liability ceased when it duly and safely delivered the goods 489]*to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine Railroad. Neither the pleadings nor proof showed what this company did with the mohair, nor the cause of its nondelivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the

plaintiffs, — *Tex. Civ. App.* —, 117 S. W. 169, 170.

The question as to whether the plaintiff was entitled to recover the value of the goods at Lowell, or, as provided in the bill of lading, at the point of shipment, is suggested in one of the briefs. No such issue was made in the lower court, nor is it referred to in any of the many assignments of error involving the construction and constitutionality of the Carmack amendment to the Hepburn bill of 1906, providing that where goods are received for shipment in interstate commerce, the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149.

1. The jurisdiction of the state court was attacked, first, on the ground that § 9 of the original act of 1887 provided that persons damaged by a violation of the statute "might make complaint before the Commission . . . or in any district or circuit court of the United States." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.

It was contended that *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, ruled that this jurisdiction was exclusive, and from that it was argued that no suit *could be maintained in a [490 state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of §§ 8 and 9 of the act to regulate commerce. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 208, 55 L. ed. 179, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164.

The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.

Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved

party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb v. Connolly*, 111 U. S. 637, 28 L. ed. 546, 4 Sup. Ct. Rep. 544.

On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court 491 as well as in those of *the United States. This presumption would be strengthened as to a statute like this, passed not only for the purpose of giving a right, but of affording a convenient remedy.

2. The question as to the constitutionality of the Carmack amendment though ably and elaborately argued, is out of the case, having been decided adversely to the contention of the plaintiff in *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the *Riverside Case* it was admitted that the damage to the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is caused by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in *Re Released Rates*, 13 Inters. Com. Rep. 550; *Bernard v. Adams Exp. Co.* 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 A. & E. Ann. Cas. 351; *Travis v. Wells, F. & Co.* 79 N. J. L. 83, 74 Atl. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the non-delivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily ac-

cepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation *and delivery.[492 This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed.

*PATRICK B. MCCARTHY, Plff. in Err.,
v.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA.

(See S. C. Reporter's ed. 493-500.)

Limitation of actions — usury — national banks.

The "usurious transaction," from the date of which the two years' limitation prescribed by U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, for actions to recover back twice the amount of interest paid a national bank, begins to run, occurs on the date of the payment of the

NOTE.—As to when statute of limitations begins to run against an action to recover the penalty from a national bank for taking usury—see notes to *Citizens' Nat. Bank v. Gentry*, 56 L.R.A. 673, and *McCarthy v. First Nat. Bank*, 23 L.R.A.(N.S.) 336.

usurious interest, and not on the date when the debt was paid.

[For other cases, see Limitation of Actions, 341, 342, 457-459, in Digest Sup. Ct. 1908.]

[No. 122.]

Argued December 19, 1911. Decided February 19, 1912.

IN ERROR to the Supreme Court of the State of South Dakota, to review a judgment which affirmed a judgment of the Circuit Court of Pennington County, in that state, in favor of defendant in a suit to recover back twice the usurious interest paid to a national bank. Affirmed.

See same case below, 23 S. D. 269, 23 L.R.A.(N.S.) 335, 121 N. W. 853, 21 A. & E. Ann. Cas. 437.

Statement by Mr. Justice Lamar:

Patrick B. McCarthy, under the provisions of Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, brought suit against the First National Bank of Rapid City, South Dakota, for twice the amount of interest paid the bank.

The complaint alleged that, the maximum legal rate being 12 per cent, McCarthy, on August 27, 1887, borrowed from the defendant \$4,000, giving therefor promissory notes payable at different dates, each bearing 18 *per cent interest. These notes were not paid at maturity, and from time to time were renewed at the same rate. Many payments of usurious interest were made. The debt was finally consolidated into a note, bearing 12 per cent interest, dated May 22, 1889, for \$5,000, which included the original principal and unpaid interest. It was renewed and secured by mortgage July 22, 1891. McCarthy alleges that between August 27, 1887, and January 1, 1897, he paid on the original and renewal notes various sums, aggregating \$3,802.74, as interest, and that the defendant "knowingly . . . applied the same to the payment of usurious interest, and indorsed the same on the said several promissory notes as interest received thereon."

On January 26, 1897, the bank instituted proceedings to foreclose the mortgage given by plaintiff, his wife and others, to secure the debt. McCarthy filed a plea of usury, which was sustained, and, after purging the debt of usury and forfeiting all interest, a decree was finally entered, January 12, 1905, foreclosing the mortgage for \$5,951.56, made up of the original debt of \$4,000, taxes paid on the mortgaged property, and costs. On January 21 this sum was paid to the bank, and on January 25, 1905, plaintiff brought this suit for \$7,605.48, or twice the amount of interest paid.

The defendant set up, by its plea, that the action was barred, because not brought within two years from the date of payment of the usurious interest. The plaintiff replied that the statute only began to run from the date the debt was paid. For the purpose of showing that the payments on account of interest (\$3,802.74) did not equal the amount of the original debt (\$4,000), and that the judgment had been paid (January 21, 1905) less than two years before suit, he offered the record in the foreclosure proceedings. It was excluded by the trial court, but incorporated in the record by bill of exceptions.

Mr. Hannis Taylor argued the cause, and, with Messrs. Charles W. Brown, John F. Schrader, and Clarence L. Lewis, filed a brief for plaintiff in error:

Under § 5198 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3493) the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt.

McBroom v. Scottish Mortg. & Land Invest. Co. 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, 6 N. M. 573, 30 Pac. 859; Duncan v. First Nat. Bank, Fed. Cas. No. 4,135; First Nat. Bank v. Denson, 115 Ala. 650, 22 So. 518; Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895; First Nat. Bank v. Childs, 130 Mass. 519, 39 Am. Rep. 474; First Nat. Bank v. Turner, 3 Kan. App. 352, 42 Pac. 936; First Nat. Bank v. McInturff, 3 Kan. App. 536, 43 Pac. 839; Louisville Trust Co. v. Kentucky Nat. Bank, 102 Fed. 442, 87 Fed. 143; Harvey v. National L. Ins. Co. 60 Vt. 209, 14 Atl. 8; Cotton States Bldg. Co. v. Peightal, 28 Tex. Civ. App. 575, 67 S. W. 524; Wheaton v. Hibbard, 20 Johns. 290, 11 Am. Dec. 284; Stevens v. Lincoln, 7 Met. 525; Saunders v. Lambert, 7 Gray, 484; Smith v. Robinson, 10 Allen, 132; Hall v. First Nat. Bank, 30 Neb. 99, 46 N. W. 151; Kendall v. Crouch, 88 Ky. 199, 11 S. W. 587; Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Talbot v. Sioux Nat. Bank, 185 U. S. 182, 46 L. ed. 862, 22 Sup. Ct. Rep. 621.

At common law the borrower could not recover the penalty given by the statutes relating to usury, without paying or offering to pay at least the principal of the loan, and the decisions in the Duncan and McBroom cases result from the application of common-law principles, including the

doctrine of *locus penitentiæ* to the national bank act.

Wheaton v. Hibbard, 20 Johns. 290, 11 Am. Dec. 284; Scottish Mortg. & L. Invest. Co. v. McBroom, 6 N. M. 573, 30 Pac. 859; Stevens v. Lincoln, 7 Met. 525; Saunders v. Lambert, 7 Gray, 484; Smith v. Robinson, 10 Allen, 130; McBroom v. Scottish Mortg. & Land Invest. Co. 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852; Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895; First Nat. Bank v. Denson, 115 Ala. 650, 22 So. 518.

Mr. Charles J. Buell argued the cause, and, with Mr. A. K. Gardner, filed a brief for defendant in error:

Under § 5198 of the Revised Statutes of United States (U. S. Comp. Stat. 1901, p. 3493), the limitation of two years within which the borrower may sue for double the amount of usurious interest paid and received as such commences to run from the date of the usurious transaction, *viz.*, the date of the actual payment of usurious interest; and suit must be entered within two years from the date of such payment.

McCarthy v. First Nat. Bank, 23 S. D. 269, 23 L.R.A.(N.S.) 335, 121 N. W. 853, 21 Ann. Cas. 437; Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49; Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; Walsh v. Mayer, 111 U. S. 36, 37, 28 L. ed. 340, 341, 4 Sup. Ct. Rep. 260; First Nat. Bank v. McCarthy, 18 S. D. 218, 100 N. W. 16; Lealos v. Union Nat. Bank, 9 N. D. 60, 81 N. W. 56; Smith v. First Nat. Bank, 70 App. Div. 376, 75 N. Y. Supp. 131; First Nat. Bank v. Smith, 36 Neb. 199, 54 N. W. 254; Lanham v. First Nat. Bank, 46 Neb. 663, 65 N. W. 786; Washington Nat. Bldg. & L. Asso. v. Wendling, 102 Va. 279, 46 S. E. 296; Monongahela Nat. Bank v. Overholt, 96 Pa. 327; Lebanon Nat. Bank v. Karmany, 98 Pa. 65; Burnside v. Mealer, 26 Ky. L. Rep. 79, 80 S. W. 785; Buntyn v. National Mut. Bldg. & L. Asso. 86 Miss. 454, 38 So. 345; Citizens' Nat. Bank v. Donnell, 172 Mo. 384, 72 S. W. 925; Talbot v. Sioux Nat. Bank, 111 Iowa, 583, 82 N. W. 963; Talbot v. First Nat. Bank, 106 Iowa, 361, 76 N. W. 726; Chadwick v. Menard Bros. 104 La. 38, 28 So. 933; Webb, Usury, § 526; 5 Fed. Stat. Anno. p. 137.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

Section 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493), under 498] which this *suit was brought, provides that "taking, receiving, reserving, or

charging" more than a lawful rate of interest, when knowingly done by a national bank, shall be deemed a forfeiture of the entire interest. In case a greater than the lawful rate "has been paid, the person by whom it has been paid . . . may recover back . . . twice the amount of the interest thus paid, . . . provided such action is commenced within two years from the time the usurious transaction occurred."

The debt was created in 1887, was paid in full in January, 1905, and on January 25, of the same year, the maker of the note brought suit to recover twice the amount of the interest paid thereon prior to 1897.

In considering the bank's plea that the action was barred because not brought within two years, and the plaintiff's claim that the statute only ran from the date the debt was paid, the supreme court of South Dakota pointed out the irreconcilable conflict in the cases dealing with this question, and, after making careful analysis of all the authorities, reached the conclusion, in which we concur, that the statute begins to run from the date of the payment of the usurious interest. 23 S. D. 269, 23 L.R.A.(N.S.) 335, 121 N. W. 853, 21 A. & E. Ann. Cas. 437. Considering this review of the decisions, we shall only discuss the statute itself, and that briefly.

National banks are prohibited from making usurious contracts. If they disregard its provisions, the law not only furnishes a defense, but gives a right of action. As to the defense, there is no statute of limitations. Whenever sued, the debtor may plead the usurious contract, and be relieved from paying any interest whatever. But if he elects to avail himself of the cause of action, he must sue "within two years from the time the usurious transaction occurred."

If the making of the note was the "usurious transaction," from which date the statute began to run, the anomaly of the right to recover being barred before the 499]*cause of action arose would result in all cases where the debtor for two years after the loan failed to pay interest, even though he subsequently discharged the debt, principal and usury. If the final payment of the debt is the "usurious transaction," and suit must be brought in two years from that date, then there could never be a recovery in those cases where the debtor had paid usury, but was not able to pay the debt in full.

That the statute does not begin to run from the date of the loan, nor from the date of the satisfaction of the debt, but from the date interest is paid, appears from an analysis of the two class-

es of cases referred to in Rev. Stat. § 5198, noting that "interest paid" in the last clause is used in contradistinction to interest "reserved or charged," in the first sentence of the section. Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance, by way of discount, the statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank. These deductions by way of discount are not treated as payments. They do not come out of the debtor's pocket, though they lessen the amount which he receives when the loan is made, and when sued he may plead usury and escape liability for the amount thus charged or retained. But such reservation by the bank, not being a payment made by the debtor, he, of course, cannot avail himself of the right to maintain a suit given only to those who have paid interest.

But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, the right of the one and the liability of the other is fixed, the cause of action arises, and the statute of limitations begins to run. There is no *locus penitentiae*. That privilege is only granted to those banks which, 500] having charged *usury, may, by, a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the twofold penalty.

Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by statements of Mr. Justice Harlan in *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, which involved the construction of the usury statute of the territory of New Mexico. That act differed in several respects from Rev. Stat. § 5198. But that case did not rule that in a suit under the act of Congress, the statute did not run from the date usury was paid and received as such. This court did not understand that such was the meaning of that case, as appears from his opinion in *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390, which involved a construction. Rev. Stat. § 5198. For he there points out the difference between "paying" and "agreeing to pay," and says that, "if at any time the obligee actually pays usurious interest, as such the usurious transaction must be held to have then, and

not before, occurred, and he must sue within two years thereafter."

The Supreme Court of South Dakota properly held that the recovery of interest paid more than two years before suit was brought was barred, and its judgment is affirmed.

*GEORGE S. LATIMER, Appt., [501
v.

UNITED STATES.

(See S. C. Reporter's ed. 501-504.)

Statutes — judicial construction — re-enactment.

1. Congress, in using the words "unmanufactured tobacco," in the tariff act of 1897 (30 Stat. at L. 194, 169, chap. 11, U. S. Comp. Stat. 1901, pp. 1679, 1648), ¶ 215, must be deemed to have adopted the construction given by the Federal Supreme Court to those words as used in an earlier tariff act.

[For other cases, see Statutes, 302-311, in Digest Sup. Ct. 1908.]

Duties — tobacco sweepings — unmanufactured tobacco.

2. Tobacco sweepings or scrap used in the manufacture of stogies and cigarettes are dutiable at 55 cents a pound, under the tariff act of 1897, ¶ 215, as unmanufactured tobacco, and not at 10 per cent ad valorem under ¶ 463, as "waste not specially provided for in this act."

[For other cases, see Duties, 201-209, in Digest Sup. Ct. 1908.]

[No. 151.]

Submitted January 15, 1912. Decided February 19, 1912.

APPEAL from the District Court of the United States for Porto Rico to review a judgment which affirmed a decision of the board of general appraisers, overruling the importer's protest against a classification of tobacco sweepings by the collector of customs. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 138.

The facts are stated in the opinion.

Mr. Walter F. Welch submitted the cause for appellant. Mr. Edward Hatch was on the brief:

The merchandise involved in this suit is waste.

NOTE.—On the effect of the re-enactment of statute which has received a judicial construction—see note to *Sanders v. St. Louis & N. O. Anchor Line*, 3 L.R.A. 390.

On the interpretation of commercial and tradenames in tariff laws—see note to *Dennison Mfg. Co. v. United States*, 18 C. A. 545.

United States v. Schroeder, 35 C. C. A. 376, 93 Fed. 448.

Merchandise is classifiable for the purposes of duty in its condition as imported.

Worthington v. Robbins, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; Dwight v. Merritt, 140 U. S. 219, 35 L. ed. 453, 11 Sup. Ct. Rep. 768; United States v. Schoverling, 146 U. S. 82, 36 L. ed. 895, 13 Sup. Ct. Rep. 24.

The merchandise is more specifically provided for as "waste" than as "tobacco unmanufactured."

Brennan v. United States, 69 C. C. A. 395, 136 Fed. 743; United States v. Reiss, 69 C. C. A. 393, 136 Fed. 741; Nairn Linoleum Co. v. United States, 142 Fed. 214; T. D. 16,324, G. A. 3,153; T. D. 23,347, G. A. 5,017; T. D. 23, 637, G. A. 5,115; T. D. 28,050, abstract 14,869; T. D. 31,739, G. A. 7,242.

The rules of construction tend to resolve this question favorably to the importer.

Hartranft v. Wiegmann, 121 U. S. 399, 616, 30 L. ed. 1012, 1015, 7 Sup. Ct. Rep. 1240.

In case of uncertainty in the application of two conflicting provisions of the same act the last provision should prevail.

Powers v. Barney, 5 Blatchf. 202, Fed. Cas. No. 11,361.

This kind of waste is worth only 16 cents per pound; and if a duty of 55 cents should be imposed, it would be equivalent to an ad valorem duty of 340 per cent, which is unfair and unconscionable; and such prohibitive duty could not have been contemplated by Congress.

Shallus v. United States, 89 C. C. A. 445, 162 Fed. 653.

Assistant Attorney General **Wempel** submitted the cause for appellee:

The imported merchandise is still tobacco, and nothing but tobacco.

Seeberger v. Castro, 153 U. S. 32, 38 L. ed. 624, 14 Sup. Ct. Rep. 766.

Re-enactment of language which has been construed to include a given article is one of the strongest indications of the congressional intent to continue the existing status as to taxation.

United States v. Freeman, 3 How. 556, 11 L. ed. 724; The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Kupfer v. United States, T. D. 32,041.

The waste referred to in the tariff laws is not absolutely worthless, but it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

Patton v. United States, 159 U. S. 500, 503, 40 L. ed. 233, 234, 16 Sup. Ct. Rep. 89.

56 L. ed.

Mr. Justice Lamar delivered the opinion of the court:

In the process of manufacturing and handling tobacco small pieces are broken from the brittle leaves and fall to the floor of the warehouse or factory. These scraps are not treated as worthless, but are swept up, and, when cleaned, are used in the manufacture of a cheap grade of cigarettes and stogies.

The appellant shipped to Porto Rico a quantity of these sweepings, and the question arose as to whether the shipment was dutiable at 10 per cent ad valorem as "waste not specially provided for in this act," under ¶ 463 of the tariff act of 1897, or at 55 cents a pound, as "tobacco, manufactured or unmanufactured," under ¶ 215 of the same statute. 30 Stat. at L. 194, 169, chap. 11, U. S. Comp. Stat. 1901, pp. 1679, 1648. The customs officer classed it as "unmanufactured tobacco," and required the payment of a duty of 55 cents a pound. The importer protested and a case was made to test the question. On appeal, the General Board sustained the collector. It was affirmed by the district court of Porto Rico, and to reverse that judgment the importer has brought the case here.

There has been some difference of opinion as to the proper classification of scrap tobacco under the various tariff acts. In United States v. Schroeder, 35 C. C. A. 376, 93 Fed. 448, a higher grade of scrap was held to be "waste" within the meaning of the tariff act of 1890. [26 Stat. at L. 567, chap. 1244]. In Seeberger v. Castro, 153 U. S. 32, 38 L. ed. 624, 14 Sup. Ct. Rep. 766, it was decided that the clippings from the ends of cigars were dutiable as unmanufactured tobacco under the tariff act of 1883 [22 Stat. at L. 488, chap. 121, U. S. Comp. Stat. 1901, p. 2247].

*The plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, and for the further reason that, as the importer there made no claim that it should be taxed as waste, the court did not pass on that question. But it did definitely decide that such material, by whatever name called, was "unmanufactured tobacco."

The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court. United States v. Baruch, this day decided. [223 U. S. 191, ante, 399, 32 Sup. Ct. Rep. 306.] That such was the intention of Congress appears further from the fact that the duty of "10

per cent ad valorem on waste" is found in "Schedule N—Sundries." The word as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material. *Patton v. United States*, 159 U. S. 503, 40 L. ed. 234, 16 Sup. Ct. Rep. 89. But the scrap here involved retains the name and quality of tobacco. It is tobacco, and as such it is used for making cigarettes and stogies. It was therefore taxable under Schedule F, which fixes the duty on tobacco in all its forms,—manufactured or unmanufactured. The judgment is therefore affirmed.

505]*WILLIAM MILLER, Plff. in Err.,
v.

WILL R. KING, Substituted for the First
National Bank of Payette, Idaho.

(See S. C. Reporter's ed. 505-511.)

National banks — powers — trust.

A national bank is acting within the scope of its power, under U. S. Rev. Stat. § 5136, U. S. Comp. Stat. 1901, p. 3455, to exercise "all such incidental powers as shall be necessary to carry on banking," where it accepts an assignment of a judgment for collection, and agrees to hold the proceeds subject to the order of the assignor; and, if its attorney, after collecting the money, improperly pays it over to a corporation which claimed that the cause of action had been transferred to it prior to the rendition of the judgment, the bank may sue in its own name conformably to the local law, to recover from such attorney the proceeds of the judgment.

[For other cases, see *Banks*, IV. g, in *Digest* Sup. Ct. 1908.]

[No. 153.]

Argued January 22 and 23, 1912. Decided
February 19, 1912.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court for Malheur County, in that state, in favor of the assignee of a national bank in an action to recover from its attorney the proceeds of a judgment assigned to it for collection, which such attorney had improperly paid over to a third person. Affirmed.

See same case below, 53 Or. 53, 97 Pac. 542.

The facts are stated in the opinion.

Mr. James H. Richards argued the cause, and, with Mr. Oliver O. Haga, filed a brief for plaintiff in error:

A national bank cannot act as trustee under an express trust.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925; *Chemical Nat. Bank v. Havermale*, 120 Cal. 604, 65 Am. St. Rep. 206, 52 Pac. 1071; *Kerfoot v. Farmers' & M. Bank*, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; *Citizens' Central Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364.

The doctrine of *ultra vires*, as announced in the cases above cited, has been applied most rigidly to banks operating under the national banking act.

Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; *Citizens' Central Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 539, 41 L. ed. 817, 818, 17 Sup. Ct. Rep. 433.

Any contract or act of a national bank beyond the powers expressly conferred upon it by the statute, or fairly implied therefrom, and necessary in order to carry on the banking business, is *ultra vires* and void.

Bowen v. Needles Nat. Bank 87 Fed. 430; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 149 U. S. App. 596, 82 Fed. 799; *Farmers' & M. Nat. Bank v. Smith*, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129; *McCrary v. Chambers*, 48 Ill. App. 445; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Wiley v. First Nat. Bank*, 47 Vt. 546, 19 Am. Rep. 122; *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35; *Dresser v. Traders Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Cumberland Teleph. & Teleg. Co. v. Evansville*, 127 Fed. 187; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Kerfoot v. Farmers' & M. Nat. Bank*, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14.

An *ultra vires* contract is void; not merely voidable.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; 1 Page, Contr. § 310.

No action can be maintained on an *ultra vires* contract.

Citizens' Central Nat. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; Ashbury R. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; De la Vergne Refrigerating Mach. Co. v. German Sav. Inst. 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20; Bosshardt & W. Co. v. Crescent Oil Co. 171 Pa. 120, 32 Atl. 1120; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094.

The revocation of the bank's authority revoked all authority which the bank had in the matter.

Taylor v. Burns, 203 U. S. 120, 51 L. ed. 116, 27 Sup. Ct. Rep. 40; 1 Clark & S. Agency, §§ 157-162, 433; Frink v. Roe, 70 Cal. 309, 11 Pac. 820; 2 Enc. L. & P. 1249, 1250.

Mr. Will R. King, *in propria persona*, argued the cause, and, with Messrs. C. E. S. Wood and F. M. Saxton, filed a brief for defendant in error:

If the ground upon which the jurisdiction of the Supreme Court is invoked is that a title, right, privilege, or immunity was claimed under the Constitution, or a treaty, or a statute of or an authority exercised under the United States, and the decision was against such title, right, etc., the fact that the question was raised or claim made in the state court and was passed upon adversely to plaintiff in error must appear from the face of the record.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Sayward v. Denney, 158 U. S. 180, 184, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; California Powder Works v. Davis, 151

U. S. 389, 391, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Schuyler Nat. Bank v. Bollong, 150 U. S. 87, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24.

Where the provisions of the national bank act prohibit certain acts, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties.

Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; First Nat. Bank v. Stewart, 107 U. S. 677, 27 L. ed. 592, 2 Sup. Ct. Rep. 778; Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; Logan County Nat. Bank v. Townsend, 139 U. S. 77, 35 L. ed. 111, 11 Sup. Ct. Rep. 496; Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; 5 Fed. Stat. Anno. p. 83.

A national bank may engage in the business of collecting notes, bills of exchange, and other evidence of debt as an incident of the banking business, although the authority is not expressly mentioned in the statute.

Mound City Paint & Color Co. v. Commercial Nat. Bank, 4 Utah, 353, 9 Pac. 709; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; Keyes v. Bank of Hardin, 52 Mo. App. 323; Hanson v. Heard, 60 N. H. 190, 38 Atl. 788; Newport Nat. Bank v. Board of Education, 114 Ky. 87, 70 S. W. 186; Yerkes v. National Bank, 69 N. Y. 386, 25 Am. Rep. 208; White v. Third Nat. Bank, 7 Ohio Dec. Reprint, 666; Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

A national bank may act as trustee of an express trust.

Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 287, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188.

The Federal court will look beyond the Federal question only when it has been decided erroneously, and then only to see whether there are any other matters adjudged by the state court sufficiently broad to maintain the judgment.

McLaughlin v. Fowler, 154 U. S. 663, and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 99, 53 L. ed. 417, 425, 29 Sup. Ct. Rep. 220;

Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66.

Questions of fact will not be reviewed on a writ of error from this court to the highest court of a state.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 99, 100, 53 L. ed. 417, 425, 426; Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 222, 48 L. ed. 944, 948, 24 Sup. Ct. Rep. 632; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14.

Mr. Justice Lamar delivered the opinion of the court:

Miller, the plaintiff in error, was the attorney of Helmick in an action against Porter. The judgment obtained in that suit was assigned by Helmick to the First National Bank of Fayette, Idaho, which executed an instrument reciting that it would hold any money collected subject to the order of Hemlick. At the time of making the assignment, Helmick gave verbal instructions to pay part of the money when collected to Lauer. The bank placed the judgment in the hands of Miller, who collected the money, and, claiming to act as attorney for Helmick, paid over the proceeds to the Moss Mercantile Company, which asserted that the cause of action had been transferred to it prior to the rendition of the judgment. The bank thereupon brought suit against Miller for the recovery of the money thus collected by him and paid over to a third party. The defendant answered, denying that the bank had title; alleging that it had paid no consideration for the transfer; that it was intended to defraud creditors; setting up that Helmick had revoked the assignment and had given Miller a release. There was, however, no claim that the charter of the bank prevented it from taking the transfer or prosecuting the suit.

There were several trials of the case, and ultimately, with the consent of Helmick and Lauer, the bank assigned the judgment to King. He was substituted as plaintiff, and recovered a judgment against 510] Miller. The case was *taken to the supreme court, where it was contended that a national bank could not act as trustee on an express trust, so as to be able to institute and maintain a suit under the statute of Oregon, which provides that the trustee of an express trust may sue without joining the person for whose interest the action is prosecuted. The judgment was affirmed, and no Federal question is presented in the writ of error here except on the theory that, under Revised Statutes,

§ 5136, U. S. Comp. Stat. 1901, p. 3455, a national bank could not act as trustee of an express trust, and that therefore the suit was absolutely void, and could not proceed to judgment in the name of the substituted plaintiff.

A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children. Every such transaction would be voidable at the instance of the government. Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14. But under Revised Statutes § 5136, "it may exercise all such incidental powers as shall be necessary to carry on banking," and it may therefore act as a fiduciary and occupy a trust relation in matters connected with that business. It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere indorsement for purposes of collection, holding the proceeds as the indorser directs. There is no difference in law if the title is conveyed by a lengthier and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection. In a proper case, there is no reason why it might not go further and institute suit thereon in its own name for the recovery of what may be due. If the transfer was made, or the suit was being maintained, for purposes not *authorized by the charter of the [511 bank, and if the defendant was in a position where his rights were prejudiced thereby, it would be incumbent on him to raise that defense at the outset of the litigation, or as soon as he learned that fact.

In this case the assignment was made in order that the bank might collect the money, pay part to Lauer, and, in effect, hold the balance on deposit to the credit of Helmick. The judgment was not transferred to the bank for the mere purpose of enabling it to bring suit in its own name. At the time of the transfer no suit was contemplated, and, indeed, none was necessary, because the money was immediately paid by Porter. Suit only became necessary when the amount collected by Miller was later improperly paid over by him to the Moss Mercantile Company. There was nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat. § 5136, even if the defendant could raise

such question. *Kerfoot v. Farmers' & M. Bank*, supra. The laws of Oregon permitted an action to be maintained by the bank in its own name. There is no Federal question before us which authorizes a reversal, and the judgment is affirmed.

512] *UNITED STATES, Plff. in Err.,
v.
NORD DEUTSCHER LLOYD.

(See S. C. Reporter's ed. 512-519.)

Aliens — deportation — charge for return passage.

A foreign steamship company which lawfully collected in Germany the return passage money from emigrants embarking for New York violates the prohibition of the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1909, p. 447), § 19, against making any charge for the return of aliens unlawfully brought into the United States, or taking security therefor, where, after the deportation of such emigrants had been ordered, the steamship company retained the money with intent to make charge and secure payment for their return passage.

[Exclusion of aliens, see *Aliens*, VI., in Digest Sup. Ct. 1908.]

[No. 611.]

Argued January 12, 1912. Decided February 19, 1912.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to and quashing an indictment charging a foreign steamship company with taking security and making charge for the return passage of aliens unlawfully brought into the United States and ordered to be deported. Reversed.

See same case below, 186 Fed. 391.

Statement by Mr. Justice Lamar:

Writ of error to review a judgment sustaining a demurrer to an indictment charging the defendant with taking security and making charge for the return passage of aliens unlawfully brought into the United States, and ordered to be returned in pursuance of the immigration act of February, 1907 [34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1909, p. 447].

The indictment charges that the Nord Deutscher Lloyd, a German corporation, operated a line of steamers between Bre-

men and New York, maintaining an office and place of business in both cities. On November 25, 1910, in Bremen, it sold tickets to two aliens, entitling them to passage to New York and return. Before their embarkation the defendant collected from them 150 rubles for the return passage money in steerage. On arrival in New York the aliens were ordered to be deported to Germany, as likely to become public charges, because of scillity and inability to make a living. On December 16, 1910, after the unlawful bringing into this country of said aliens, and while they were liable to deportation on the vessel by which they came, the said 150 rubles were still held and retained in possession of the defendant up to (April 3, 1911) the date of filing the indictment, "the defendant so holding and retaining the same and making charge thereof for the return of such aliens, and being taken and continuously held by the said defendant, as security from the said aliens, for the payment of such charge for their return passage to Germany, aforesaid, in violation and evasion of § 19 of the immigration laws of the United States, approved February 20, 1907. The defendant . . . by the means aforesaid, at and within the southern district of New York, on December 16, 1910, unlawfully and wilfully did make charge for the return of aliens, so as aforesaid brought into this country in violation of law, and take security from them and keep and hold the same for the payment of such charge, then and there well knowing that such aliens had been brought to this country in violation of law."

The court sustained the demurrer on the ground that the money was paid and received in Germany, and that the facts did not amount to a violation of § 19, which provides: "That all aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came, on the vessels bringing them. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came." And if such owner shall refuse "to pay the cost of their maintenance while on land, or shall make any charge for the return of any such alien, or shall take any security from him for the *payment of [514 such charge," such owner shall be guilty of a misdemeanor.

Assistant Attorney General **Harr** argued the cause and filed a brief for plaintiff in error:

The rule that penal statutes are to be

NOTE.—As to what Chinese persons are excluded from the United States—see note to *Wong You v. United States*, 104 C. C. A. 538.

strictly construed is qualified by the further one that such statutes are not to be so strictly construed as to defeat the obvious intention of the legislature.

United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Morris*, 14 Pet. 464, 475, 10 L. ed. 543, 548; *United States v. Hartwell*, 6 Wall. 385, 395, 18 L. ed. 830, 832; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. ed. 890, 892, 18 Sup. Ct. Rep. 456.

Presumptions of intent from somewhat remote subsequent conduct are not unknown to the common law.

Bailey v. Alabama, 211 U. S. 452, 454, 53 L. ed. 278, 279, 29 Sup. Ct. Rep. 141; *Com. v. Rubin*, 165 Mass. 453, 43 N. E. 200.

Properly viewed, even where the charge is made or the security taken abroad for the return of an alien unlawfully brought to the United States, a substantial part of the transaction occurs within our jurisdiction. The service for which the charge is made or the security taken is performed partly within the territorial waters of the United States and partly on the high seas, either of which would be sufficient to give to this country jurisdiction of acts inhibited as contrary to its policies with respect to immigration of foreign commerce. (*American Banana Co. v. United Fruit Co.* 213 U. S. 355, 356, 53 L. ed. 831, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047.) As in the case of the provisions of the Elkins act, prohibiting the giving of rebates, and authorizing prosecution in any district through which the transportation may have been conducted (*Armour Packing Co. v. United States*, 209 U. S. 56, 73, 74, 52 L. ed. 681, 691, 692, 28 Sup. Ct. Rep. 428), may it not be said here that the transportation contrary to the inhibitions of the statute is an essential part of the offense? But, independent of this, the statute would apply, and the authority of Congress be upheld, as to acts occurring in a foreign jurisdiction which are intended to interfere with the legitimate operations of the government or to defeat the exercise of its rightful powers (*American Banana Co. v. United Fruit Co.* 213 U. S. 356, 53 L. ed. 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047).

See also *United States v. Craig*, 28 Fed. 795; *United States v. Lavarrello*, 149 Fed. 297.

Mr. Joseph Larocque argued the cause and filed a brief for defendant in error:

A statute will, as a general rule, be con-

strued as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation.

American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

Section 19 of the immigration act of 1907 (34 *Stat. at L. 898, 904, chap. 1134, [517 U. S. Comp. Stat. Supp. 1909, pp. 447, 458]) is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into this country. The government might in large measure protect itself by inspection, rejection, and order of deportation, but it is purposed, also, as far as possible, to protect the alien. He might be ignorant of our laws, and ought to be deterred from incurring the expense of making a passage which could only end in his being returned to the country from whence he came. This policy could best be subserved by securing the co-operation of the transportation companies, and to this end the statute required that they should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge. In the absence of this last provision the company might well afford to accept as passengers those known or suspected to belong to the excluded class. It would receive from them their passage money from Europe to America. If they passed the inspection, the transaction was ended. If they were deported, the company would be at the trifling expense of maintaining them while here. But if it could charge and secure payment for the return passage, it would collect two fares instead of one. This would have made the transportation of an excluded alien more profitable than the carrying of one who could lawfully enter. This was so obvious that the statute not only required the cost of their passage to be borne by the transportation company, but prohibited the making of a charge, or the taking of security, for the return passage, which might be collected or enforced at the end of the journey.

It is said, however, that no such charge was made in New York; that the indictment shows only the case of an ordinary

sale of a round-trip steerage ticket from Bremen to New York, and that what was lawfully done in Germany cannot be punished as a crime in New York.

The statute, of course, has no extraterritorial operation, *and the defendant cannot be indicted here for what he did in a foreign country. *American Banana Co. v. United Fruit Co.* 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047. But the parties in Germany could make a contract which would be of force in the United States. When, therefore, in Bremen the alien paid and the defendant received the 150 rubles for a return passage, they created a condition which was operative in New York. If, in that city, the company had refused to honor the ticket, the alien could there have enforced his rights. In like manner, if by reason of facts occurring in New York the statute operated to rescind the contract, the rights and duties of the parties could there be determined, and acts of commission or omission, which, as a result of the rescission, were there unlawful, could there be punished.

If, as argued, the company did nothing in New York except to retain money which had been lawfully paid in Germany, the result is not different, because, under the circumstances, nonaction was equivalent to action. The indictment charges that on December 16, 1910, it was found that the aliens had been unlawfully brought into this country. The company at once was under the duty of taking them back at its own cost. Instead of returning to them the money previously received for such transportation, the defendant retained it up to the date of the indictment, April 3, 1911, with intent to make charge and secure payment for their passage to Bremen. This retention of the money, with such intent, was an affirmative violation of the statute. The company could not take the aliens back free of charge, as required by law, and at the same time retain the fare covering the same trip.

The demurrer admits that, with knowledge that it was bound to carry the excluded aliens back at its own cost, the defendant in New York made a charge, and retained the 150 rubles, with intent to apply that money in satisfaction thereof. If that be true, the defendant violated 519] *the statute within the southern district of New York, and can there be indicted and tried.

The judgment must therefore be reversed.

56 L. ed.

METROPOLITAN WATER COMPANY,
Appt.,
v.
KAW VALLEY DRAINAGE DISTRICT OF
WYANDOTTE COUNTY, KANSAS, et al.

(See S. C. Reporter's ed. 519-524.)

Appeal — from circuit court — jurisdiction below — prior appeal to circuit court of appeals.

1. The Federal Supreme Court cannot review, as presenting a question of jurisdiction, a decree of a Federal circuit court dismissing a bill in aid of an attempt to remove condemnation proceedings from a state court, which decree was necessitated by the mandate of a circuit court of appeals, which court, being of the opinion that the condemnation proceedings did not amount to a "suit" within the meaning of the removal statutes, had reversed an order of the circuit court, granting a temporary injunction restraining the further prosecution of the proceedings, and had remanded the cause with directions to proceed in accordance with its opinion, since there was an opportunity afforded to obtain a review of the jurisdictional question, either upon a certificate of the circuit court of appeals, or on a writ of certiorari to that court. [For other cases, see *Appeal and Error*, 990-993, in *Digest Sup. Ct.* 1908.]

Certiorari — to circuit court of appeals — final judgment.

2. A judgment of a circuit court of appeals which, being of the opinion that condemnation proceedings did not amount to a "suit" within the meaning of the removal statutes, reversed a decree of a circuit court granting a temporary injunction on a bill in aid of an attempt to remove such proceedings from a state court, and remanded the cause with directions to proceed in accordance with its opinion, must be treated, for the purpose of testing the right to a review by certiorari, as the equivalent of a direction to enter a final decree against the complaint for want of jurisdiction. [For other cases, see *Certiorari*, II. b, in *Digest Sup. Ct.* 1908.]

Appeal — judgment — dismissal.

3. The circuit court of appeals, on an appeal from a mere interlocutory order, may direct the bill to be dismissed, if it appears that the complainant is not entitled to maintain the suit.

[For other cases, see *Appeal and Error*, 5481-5490, in *Digest Sup. Ct.* 1908.]

[No. 844.]

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741, and *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333.

On certiorari from Federal Supreme Court to circuit court of appeals—see note to *United States v. Dickinson*, 53 L. ed. U. S. 711.

Argued and submitted January 16, 1912.
Decided February 19, 1912.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree dismissing, conformably to the opinion of the Circuit Court of Appeals for the Eighth Circuit, a bill in aid of an attempt to remove condemnation proceedings from a state court. Dismissed.

See same case below in Circuit Court of Appeals, 108 C. C. A. 393, 186 Fed. 315.

Statement by Mr. Justice Lamar:

The Metropolitan Water Company, a corporation of the state of West Virginia, owned land which the Kaw Valley Drainage District, a corporation of the state of Kansas, desired to acquire for public purposes.

Under the provisions of the act regulating the condemnation of land, the defendant 520] in error presented to the *judge of the district court of Wyandotte county, a petition for the appointment of commissioners to value the property of the complainant, necessary to be condemned for drainage purposes. The water company immediately filed with the judge a petition to remove the case to the United States circuit court. After argument this petition was denied and commissioners were appointed. The complainant at once filed, in the United States circuit court, its bill in aid of the removal proceeding, praying that the defendant and the commissioners be enjoined from further prosecuting the condemnation proceedings. Among other things it alleged that the act violated the 14th Amendment because it deprived the complainant of his property before judicial ascertainment of its value and before payment—in that when the report of the commissioners was filed with the register of deeds, the defendant, on paying the amount of the award, could take possession of the property; and, though an appeal to the district court was permitted, the defendant could retain possession in the meantime on giving bond to pay the amount of the verdict.

To this bill the defendant demurred, and after hearing, a temporary injunction was granted, restraining the defendant from proceeding further to condemn the property of the complainant. This order was reversed by the circuit court of appeals, which, in an elaborate opinion, held that the statute was valid, and that until an appeal was taken from the award of the commissioners the proceeding was in the nature of an inquest to determine damages, and not a "suit" within the meaning of the removal statute, and therefore not

removable into the Federal court thereunder (108 C. C. A. 393, 186 Fed. 315).

The mandate directed "that the order granting the injunction be reversed and that the cause be, and the same is hereby, remanded to the said circuit court, with directions for proceeding in accordance with the opinion *of this court." On the re-521 turn of the mandate, the circuit court sustained the demurrer and, in allowing the appeal to this court, certified that it dismissed the bill solely on the ground of the want of jurisdiction.

Mr. Willard P. Hall argued the cause and filed a brief for appellant.

Mr. L. W. Keplinger submitted the cause for appellees. Mr. C. W. Trickett was on the brief.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

While in form this is an appeal from the decree of the circuit court for the district of Kansas, it is really an effort to review a decision of the circuit court of appeals of the eighth circuit. From the statement of facts it is manifest that, in dismissing the bill, the circuit court merely applied the ruling that the petition for the appointment of commissioners was not the institution of a "suit" within the meaning of the removal act. If there was no suit which could be removed, it was not possible to maintain a bill in aid of removal proceedings thus decided to be void. When, therefore, the circuit court followed the opinion to its logical conclusion and dismissed the bill, it did only what it was bound to do. In obeying these directions it committed no error, and its decree cannot be reversed, even if it should appear that the court of appeals erred in holding that the condemnation proceedings did not amount to a suit within the meaning of the removal acts. The complainant had another remedy to test the correctness of that decision. It was open to it to ask the circuit court of appeals to certify the question of jurisdiction to this court. If that motion had been overruled, the complainant had the further right to apply for a writ of certiorari. If the writ *had been522 granted, the question of jurisdiction could have been tested here. If the writ of certiorari had been then denied, the complainant would have remained bound by the decision of the circuit court of appeals as the law of the case, which could be changed neither by the circuit court directly, nor indirectly by the reversal of a decree properly entered in pursuance of the mandate of the

appellate court. *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4.

The case here is not like *Globe Newspaper Co. v. Walker*, 210 U. S. 361, 52 L. ed. 1098, 28 Sup. Ct. Rep. 726, where the judgment of the circuit court that the declaration was "insufficient in law" (130 Fed. 593) was reversed by the circuit court of appeals, and remanded "for further proceedings according to law" (2 L.R.A.(N.S.) 913, 72 C. C. A. 77, 140 Fed. 305, 5 A. & E. Ann. Cas. 274). At the trial there was a verdict for the plaintiff. But during that hearing the defendant moved that the action be dismissed because the court was without jurisdiction. It was held that from this decision an appeal could be taken under § 5 of the act of 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

The case is ruled by *Brown v. Alton Water Co.* 222 U. S. 325, ante, 221, 32 Sup. Ct. Rep. 156, although the facts there were the converse of those shown by the present record. There the circuit court dismissed the bill for want of jurisdiction. That decree was reversed by the court of appeals. After the filing of the mandate in the circuit court, a final decree was entered in favor of the complainant. Thereupon the case was brought here, the judge certifying that the defendants had challenged the jurisdiction of the court as a Federal court to hear and determine the cause. That appeal was dismissed on the ground that the circuit court was bound to follow the decision of the circuit court of appeals,—it being said that "if error was committed in so doing, it is not for the circuit court to pass upon that question. The circuit court could not do otherwise than carry out the mandate from the court of appeals, and 523]could *not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court."

It is urged that the decision in the *Alton Case* does not apply, because in it there had been a final decree dismissing the bill for want of jurisdiction, while in the present case the ruling of the circuit court of appeals was made on a review of an interlocutory order, from which, it is said, no writ of certiorari could issue. It is argued that the complainant was obliged to wait until a final decree was entered, and then, for the first time its right of appeal became perfect, under § 5 of the act of 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), permitting cases to be brought to this court on questions of jurisdiction.

We need not consider when a writ of certiorari may issue to review decisions on 56 L. ed.

interlocutory orders by the circuit court of appeals, for, in any event, its judgment in the present case must be treated as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the circuit court "should proceed in accordance with the opinion" operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the circuit court to do except to dismiss the bill. It was within the power of the circuit court of appeals to make such an order on an appeal from an interlocutory order. For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407, that, on appeal from a mere interlocutory order, the circuit court of appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit. *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Ex parte National Enameling & Stamping Co.* 201 U. S. 162, 50 L. ed. 708, 26 Sup. Ct. Rep. 444; *Bissell, Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545 (5), 556-560.

*It follows, therefore, that the circuit court of appeals had authority to make a ruling which finally disposed of the case; that the complainant then had the right to ask it to certify the question of jurisdiction, and, if that was refused, might have applied to this court for a writ of certiorari. Having failed successfully to prosecute these remedies, the judgment of the circuit court of appeals remained conclusive upon the parties, and binding upon the circuit court and every other court to which the case could by any possibility be taken. For these reasons, the question as to whether there was a suit which was removable cannot be considered, and the appeal must be dismissed.

UNITED STATES, Appt.,
v.

CHARLES E. ELLICOTT and John B. Norris, Copartners, Trading as Ellicott Machine Company.

(See S. C. Reporter's ed. 524-543.)

Appeal — time for taking — court of claims.

1. A judgment of the court of claims is not final, so as to set in motion the time for

taking an appeal therefrom, until a motion for a new trial, if entertained by the court, has been disposed of.

[For other cases, see Appeal and Error, 2571-2585, in Digest Sup. Ct. 1908.]

Contracts — construction.

2. Provisions in a schedule for the construction of barges for the United States, giving with much detail the weight and dimensions of structural materials, are not affected by a provision in the contract subsequently entered into for the construction of such barges in accordance with the specifications contained in such schedule, "with such modifications" as are shown on a specified drawing outlined in a designated letter, where such drawing, without any reference to weight and dimensions of materials, gives a schedule of displacement, load, and draft, with the total net weight

of the barge, the letter authorizes distribution of such weight in any manner desired, and the contract elsewhere authorizes an inspection of all the "material" furnished, provides for payment for the barges when completed in accordance with the "specifications," letter, and drawing, and that no change or modification involving an alteration in the "specifications as to character, quantity, and quality" of material, which would either increase or diminish the cost of the work, should be made unless agreed to in writing.

[For other cases, see Contracts, II. d, 1, in Digest Sup. Ct. 1908.]

Contracts — certainty — conflict between essential provisions.

3. An irreconcilable conflict between essential provisions of a contract for the construction of barges for the United States,

NOTE.—On practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

When time for taking appeal to, or suing out writ of error from, the Federal Supreme Court, begins to run.

In computing the time within which a writ of error must be brought or an appeal taken, the day of the entry of the judgment, decree, or order appealed from should be excluded. *Smith v. Gale*, 137 U. S. 577, 34 L. ed. 792, 11 Sup. Ct. Rep. 185.

The rights of parties with respect to the time of appeal are to be determined by the date of actual entry, or of the signing and filing of the final decree, although it purports to be entered as of the date of a prior order settling its terms. *Providence Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. ed. 762.

And where a decree was drawn and placed in the hands of the clerk on an understanding that it was to be entered when approved by the court as of that date, it cannot be regarded as passed for the purposes of appeal until the day on which it was returned to the clerk by the judge and entered. *Seymour v. Freer*, 5 Wall. 822, 18 L. ed. 564.

The time within which a writ of error must be sued out begins to run from the day the judgment is entered in the record book of the court proceedings, although it may not then have been recorded in the judgment docket. *Pollys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369.

A decree of the circuit court cannot be reviewed on appeal by the United States Supreme Court unless the appeal is taken within two years after the entry of such decree, although taken within two years from the time the decree took full effect. *Radford v. Folsom*, 131 U. S. 392, 33 L. ed. 203, 9 Sup. Ct. Rep. 792.

The time within which an appeal must be taken begins to run from the entry of a decree dismissing the bill, with costs, al-

though a decree was afterward entered which included judgment for the amount of the costs as taxed. *Fowler v. Hamill*, 139 U. S. 549, 35 L. ed. 266, 11 Sup. Ct. Rep. 663.

Where the priority of liens upon property is the subject-matter of the suit, a decree which finally determines the entire controversy litigated is a final decree, and an appeal must be taken therefrom within the time limited by law or it will be too late, although the fund is afterwards brought into court for final distribution, as decreed. *Bank of Lewisburg v. Sheffey*, 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. Rep. 755.

A writ of error prosecuted within sixty days from the entry by a circuit court of an order designating the day of execution of one convicted of murder, and that the death warrant issue, is in time, under the act of February 6, 1889, § 6, allowing such writ during the term, or within such time, not exceeding sixty days thereafter, as the court may allow by order entered of record, where, of the two orders previously entered, one, if it could be regarded as a final judgment, was void because entered on Sunday, and the other does not appear to have been made in the presence of the defendant. *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761.

Where a decree of the court below is amended, such amended decree is the final decree from which the time to appeal must be reckoned. *United States v. Gomez*, 1 Wall. 690, 17 L. ed. 677.

An appeal from a special decree is in time to operate as a supersedeas, whether taken within ten days after the decision is pronounced and entered on the minutes, or within ten days after the decree is settled and signed by the judge and filed with the clerk. *Silsby v. Foote*, 20 How. 290, 15 L. ed. 822.

Since the judgment of affirmance of the New York court of appeals becomes a final judgment, on which execution can issue, only when it is entered in the supreme court, to which the record is returned with an order directing that court to enter judgment accordingly, this is the date from

which will prevent the contractor from recovering for failure to carry it out, exists where the specifications, which are left in full force, prescribe with much detail the weight and dimensions of the structural materials, while the contract itself provides for the construction of the barges in accordance with the specifications, "with such modifications" as are shown by certain proposals contained in the contractor's bid, under which he claims the right to use materials of an inferior size, weight, and power of resistance.

[For other cases, see *Contracts*, I. d. 3, in *Digest Sup. Ct.* 1908.]

[No. 85.]

Argued December 7 and 8, 1911. Decided February 26, 1912.

which the time within which a writ of error must issue in order to operate as a supersedeas begins to run. *Green v. Van Buskerk*, 3 Wall. 448, 18 L. ed. 245.

Following this decision it was held in *Brumagin v. Chew*, 21 N. J. Eq. 180, that because no execution can issue from the New Jersey court of appeals, the time within which a writ of error from the Supreme Court of the United States must issue in order to operate as a supersedeas did not begin to run until the filing in the New Jersey court of chancery of the decree of affirmance which, with the record, was remitted to that court.

But, under similar circumstances, the court has adopted a different rule. *Wurts v. Hoagland*, 105 U. S. 701, 26 L. ed. 1109. Here the New Jersey court of errors and appeals had affirmed the judgment of the state supreme court and remitted the record to that court. A writ of error from the Federal Supreme Court was issued within sixty days of the filing of the remittitur, but more than sixty days after the judgment was rendered by the court of errors and appeals. The court held that this was too late to operate as a supersedeas. It does not seem possible to reconcile this decision with *Green v. Van Buskerk*, supra, as the practice in New York and New Jersey seems in this regard to be identical. The court did concede, however, in *Wurts v. Hoagland*, that in those states where the highest court does not have possession of the record, but decides questions certified by the inferior courts, and merely issues a rescript, directing the latter what judgment to render, the case would, perhaps, be different.

The right of appeal from the court of private land claims on the part of the United States continued to exist under § 9 of the act creating that court until six months next after the receipt by the Attorney General of a statement of the case and the points decided. *United States v. Pena*, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

A decree does not take final effect for the purpose of an appeal until an application

APPEAL from the Court of Claims to review a judgment for the recovery from the United States of damages for refusing to permit the carrying out of a contract for the construction of barges. Reversed.

See same case below, 43 Ct. Cl. 469; on motion for new trial, 44 Ct. Cl. 127.

The facts are stated in the opinion.

Solicitor General Lehmann argued the cause and filed a brief for appellant:

The commission had no authority, without readvertising, to enter into a contract for barges of a radically different type from those originally specified.

Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *Chip-*

for rehearing, made in season and entertained by the court, is disposed of. *Voorhees v. John T. Noye Mfg. Co.* 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295; *Texas & P. R. Co. v. Murphy*, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497; *Northern P. R. Co. v. Holmes*, 155 U. S. 137, 39 L. ed. 99, 15 Sup. Ct. Rep. 28.

If a petition for rehearing is presented in season, and entertained by the court, the time limited for suing out a writ of error to operate as a supersedeas does not begin to run until the petition is disposed of. *Texas & P. R. Co. v. Murphy*, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497; *Slaughter-House Cases*, 10 Wall. 273, 19 L. ed. 915.

The time within which a writ of error from the Federal Supreme Court must be served in order to operate as a supersedeas begins to run from the day on which a motion for a new trial was overruled. *Rutherford v. Penn. Mut. L. Ins. Co.* 1 McCrary, 120, 1 Fed. 456; *Brown v. Evans*, 8 Sawy. 502, 18 Fed. 56.

A motion made during the term, to set aside the judgment or decree, suspends its operation so that it does not take effect for the purpose of determining the time within which the writ of error must be sued out or the appeal taken, in order to operate as a supersedeas, until the date when the motion is denied. *Memphis v. Brown*, 94 U. S. 715, 24 L. ed. 244; *Washington, G. & A. R. Co. v. Bradley*, 7 Wall. 575, 19 L. ed. 274.

The same is true where a petition filed during the term to open the final decree for certain purposes is entertained by the court. *Brockett v. Brockett*, 2 How. 238, 11 L. ed. 251.

But a petition for a rehearing or motion for a new trial, made after the term, does not suspend the operation of the decree for the purpose of determining the time within which the appeal must be taken. *Cam-buston v. United States*, 95 U. S. 285, 24 L. ed. 448.

The thirty days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a cir-

pewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *Detroit Free Press Co. v. State Auditors*, 47 Mich. 135, 10 N. W. 171; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374.

The late Solicitor General Bowers and Mr. Barton Corneau, Special Assistant to the Attorney General, also filed a brief for appellant:

This appeal was prayed in apt time.

Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; *Memphis v. Brown*, 94 U. S. 715, 24 L. ed. 244; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Voorhees v. John T. Noye Mfg. Co.* 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; *Texas & P. R. Co. v. Murphy*, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497.

The writing executed by the parties expresses with seeming clearness an agreement for the construction of barges of the dimensions shown on the plan, but of materials of the size, weight, and character prescribed by the specifications; and the facts that such construction would require barges of greater weight than was noted on the plan should not be permitted to alter the plain meaning of the language used.

Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; *White v. Hoyt*, 73 N. Y. 511.

At most the impossibility of constructing a barge of the proposed dimensions and specified materials without exceeding the weight noted on the plan only renders the meaning of the writing ambiguous, and imposes on the court the duty to ascertain by extrinsic evidence the true intent of the parties. Accordingly, the court of claims erred in holding as a matter of law that it was immaterial in this case whether or not the evidence showed that the minds of the parties never met.

Walker v. Tucker, 70 Ill. 532, 8 Mor. Min. Rep. 672; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 21 L. ed. 64; *Moran v. Prather*, 23 Wall. 492, 23 L. ed. 121; *Reed v. Merchants' Mut. Ins. Co.* 95 U. S. 23, 24 L. ed. 348.

If the instrument must be construed as

evidencing an agreement to construct the barges of lighter and smaller materials than those specified, it is absolutely void, because the canal commissioners had no authority to make a contract for the construction of a barge which did not conform, at least, substantially, with the specifications as to the weight and size of materials.

District of Columbia v. Bailey, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184; *Nash v. St. Paul*, 11 Minn. 174; *Gil. 110*; *Overshiner v. Jones*, 66 Ind. 452; *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216; *People ex rel. Ream Pav. Co. v. Board of Improvement*, 43 N. Y. 227; *People ex rel. Trundy v. Van Nort*, 65 Barb. 331.

Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. Where there is a written contract, and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.

James v. Morgan, 1 Lev. 111; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *Baxter v. Wales*, 12 Mass. 365; *Hume v. United States*, 132 U. S. 406, 412, 33 L. ed. 393, 397, 10 Sup. Ct. Rep. 134.

Mr. James Piper argued the cause, and, with Messrs. Francis K. Carey and A. A. Hoehling, Jr., filed a brief for appellees:

The only judgment from which appellant could properly appeal is the final judgment of the court of claims; and no appeal will lie to this court from a mere order of the court of claims, overruling the motion for a new trial, such order not being in the nature of a final judgment, and its disposition resting entirely in the discretion of the trial court.

Kellogg v. United States, 19 Ct. Cl. 73.

Appellant could have filed at any time within ninety days after final judgment an application for the allowance of an appeal, and such application would have tempora-

culit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court, and, by its rules of practice, petitions for rehearing may be presented at any time during the term. *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50.

A motion to set aside a decree, filed by persons not then parties to the suit, and

who had no right to intervene except upon leave, does not suspend the decree so as to give sixty days from the denial of the motion for obtaining a supersedeas. *Sage v. Central R. Co.* 93 U. S. 412, 23 L. ed. 933.

The court below may set aside a judgment and enter it anew during the term for the purpose of giving it effect for a supersedeas. *Memphis v. Brown*, 94 U. S. 715, 24 L. ed. 244.

rily suspended the further running of the time incident to the filing, consideration, and disposition of a motion for a new trial.

United States v. Ayres, 9 Wall. 609, 19 L. ed. 627; Ex parte Roberts, 15 Wall. 384, 25 L. ed. 131.

It would seem idle to contend that so long as the subject-matter of the advertisement and specifications be not departed from there can be absolutely no modification or change in respect of mere detailed matters incident to such subject-matter.

International S. S. & R. Supply Co. v. United States, 13 Ct. Cl. 209; McKee v. United States, 12 Ct. Cl. 504; Garfield v. United States, 93 U. S. 242, 23 L. ed. 779.

Mr. Chief Justice **White** delivered the opinion of the court:

Whether or not the United States is responsible in damages because of a refusal to permit the carrying out of an alleged contract made with a copartnership, the Ellicott Machine Company, who are appellees, for the construction for the Isthmian Canal Company of six steel dump barges, is the issue here required to be decided. From a judgment for \$10,000, entered in the court of claims, in favor of the Ellicott Machine Company, because of the refusal referred to, the United States took this appeal.

It will conduce to a clear understanding of the controversy to fully summarize the facts found below, and we proceed to do so.

After two unsuccessful attempts to procure satisfactory proposals for the construction and delivery of the six steel dump barges, the Isthmian Canal Commission, by advertisement and specifications, dated May 29, 1906, invited the proposals which culminated in the making of the alleged contract. One of the clauses of the advertisement reads as follows:

"Preliminary inspection will be made at the point of manufacture or purchase, to determine whether the material meets the requirements set forth in the specifications, and final inspection will be made at the point of delivery as above.

....."
In the specifications, among other things, it was recited as follows:

"The following specifications and requirements are general only as indicating the class of construction desired.

532] *"Barges of heavy construction for rough service, built in accordance with best modern marine practice, are desired.

"Bidders will be required to submit with their proposals plans in sufficient detail
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to show the proposed size of members and details of construction.

"The breadth of the barges should not be less than 25 feet nor more than 32 feet. They should have sufficient depth and length to carry a full load of sand on a draft of not more than 8 feet, and with not less than 30" freeboard when loaded. They will be rectangular in plan, with rake at each end about 11" long. . . ."

As shown by an excerpt in the margin,† the weight and *dimensions of the [533 structural materials were prescribed with much detail under the head of "Framing." In reply to this advertisement, appellee submitted a proposal to construct the desired barges, "subject to specifications of circular 310-C, with such modifications as are here shown on drawing No. 2105, dated June 7, submitted herewith." The plan referred to, as so submitted, showed the outline of a barge 101 feet 4 inches long, 30 feet wide, and 10 feet 6 inches in height, and a note on it read as follows:

"Capacity of bins—350 cu. yards. Maximum loaded draft when carrying 350 cu. yds. of material weighing 3240 lbs. per cu. yard, not to exceed 8'—0".

After examination of the bids by F. B. Maltby, division engineer on the Canal Zone, that official returned the bids to the general purchasing officer of the Commission *in Washington, accompanied by a let-[534 ter dated June 26, 1906. Therein, among other things, Mr. Maltby said: "It is noted that the drawing submitted by the Ellicott Machine Works does not show any detail, as required by the specifications. It is assumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications." A sketch was inclosed "showing the desired arrangement of the hinges on the hopper doors and the method of securing timber lining to hoppers," and various suggestions were made

†Framing.

Floor beams forward and aft of the hoppers and in the rake should not be less than 10" deep, and extended in one piece to the turn of the bilges. They will be spaced 24" center to center. Frames to be not less than 3½" x 5½", angles overlapping the floors not less than 18", and connected with them and to floor beams with proper gusset plates. Bilges to be of as short radius as it is practicable to bend the angles and plates.

In addition to the transverse bulkheads mentioned above, there will be a water-tight bulkhead at each end of each rake.

Transverse water-tight bulkheads will be made of 10.2 pound plate with double-riveted lap joints, stiffened with vertical

explanatory of the details shown on this sketch. Thereupon D. W. Ross, purchasing officer, prepared and transmitted to the Ellicott firm a draft of contract for the construction and delivery of the barges, but it was returned with the suggestion that article 1 thereof be rewritten, so as to provide for the construction of—

“six steel dump barges in accordance with specifications contained in circular No. 310-C of the Isthmian Canal Commission, dated May 29, 1906; with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter, and sketch are attached herewith and form part of this contract.”

In the letter returning said draft of contract, it was stated that—

“our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require.”

Claimant also, at the request of said Ross, 535]addressed *a letter, dated July 27, 1906, to Maltby, in which it submitted—“print No. 2105 revised July 27, specifying details as called for in your letter of June 26, 1906, of hinges, hoisting gear, and method of securing timber lining to hoppers.”

angle bars 3" x 3" x 5½", spaced 2" apart, except that the plates forming the ends of the hoppers will be of 21-pound plate, stiffened with 4" x 4" x ½" angle bars, spaced 2' apart.

In the space forward and aft of the hoppers there should be a central longitudinal bulkhead of 10.2 pound plate, fastened at the top of the floor beams and deck beams by 4" x 4" x ½" angle; it will be stiffened by vertical 3" x 3" x 5½" angles, spaced 2' apart. This bulkhead should extend from the hoppers to each end of the barges.

In addition to this bulkhead there will be 2 longitudinal lattice trusses, one on each side, midway from the center bulkhead to the side of the hull. They will have top and bottom cord of 3" x 3" x ½" angles, riveted to each floor and deck beam, lattice bars to be 3" x 3" x ½" angles made in double panels, and joined top and bottom with proper gusset plates with not less than 3 rivets in each landing. These trusses will extend from the hoppers to the rake.

In the rake there should be a 3" x 3" x ½" angle stanchion secured to each deck

In said letter, this statement also was made:

“We have also inserted on the drawing a schedule of displacement, load, and draft, showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire.”

The alleged contract, the subject of this controversy, was then executed, F. P. Shonts, chairman of the Commission, signing for the party of the first part. Following a recital that “the Isthmian Canal Commission, for and on behalf of the United States of America, and the said Ellicott Machine Company, had covenanted and agreed, to and with each other, as follows.” The first article of the contract was inserted, reading as follows:

“Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310-C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch

beam and floor timber on line with the said trusses.

Deck beams to be of 5" x ¾" Z bars spaced one to each frame, each beam to be attached to its frame by ½" gusset.

Gunwales to be not less than 4½" x 4½" x ½" angle running inside the side plating and below the deck.

The hull plating should be 21 pound on the bottom; bilges should be 21 pounds; the side plating may be of 18-pound plate and in no more than 2 streaks.

The deck should have a checkered stringer streak on each side 30" wide and about ½" thick; remaining deck may be of 15-pound plating.

All plating to be worked “in” and “out” on longitudinal streaks, longitudinal laps to be double-riveted. All girth seams to be double-riveted to butt straps.

There should be a nosing or fender streak of 8" x 8" yellow pine supported by 4" x 4" x ½" angles top and bottom. This nosing should extend entirely about the barge. On each side of the full length there should be a second fender streak of the same section about 3' below the deck.

are attached hereto and form a part of this contract."

It was provided in article 3 as follows: **536]** "Article 3. That the party of the first part, by its duly authorized agent, shall have the right to inspect at any time during the process of construction of these barges, any and all material and workmanship used, or to be used, in said construction, and such inspection of said barges, and of the material used, or to be used, in the construction thereof, and of the workmanship thereon, may be made by the party of the first part, or its duly authorized agent, at any place where said materials may be found, and at the place of construction of said barges. In addition to the above, when said barges, or either of them, are pronounced by the party of the second part to be completed and ready for final inspection, such inspection may be made by the party of the first part, by its duly authorized agent, at the place or places where such barges, or either of them, have been constructed, such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue print mentioned, in article 1 hereof, and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned."

In article 8, among other things it was provided as follows:

"The barges herein contracted for shall be completed in accordance with the specifications, letter, and blue print annexed hereto and made a part hereof. . . ."

By article 9 it was agreed that payment would be made of the stipulated price for the six barges "upon their construction and delivery in accordance with the terms of this contract and the papers attached hereto."

537] *It was provided in the last article of the contract as follows:

"Article 12. If, at any time during the prosecution of this work, it shall be found advantageous or necessary to make any change or modification in said barges, or either of them, and this change or modification should involve such alteration in the specifications as to character, quantity, and quality, whether of labor or material, as **56 L. ed.**

would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices both of material and labor thus substituted for those specified in the original contract, and before taking effect must be approved by the chairman of the Isthmian Canal Commission: Provided, that no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligations arising from such modification were incurred."

Two days after the execution of the contract, claimants presented to the government inspector of dredges a list of materials intended to be used by them in the construction of said barges, but upon examination of said list it was found by said inspector of dredges that the dredges which the claimants proposed to construct were different from those described in circular letter and specifications 310-C, set forth in the petition, the principal component parts or members being reduced in weight, size, and power of resistance, and thereupon the same was disapproved by the officers of the government. Demand was thereupon made that the claimants should adhere to the original specifications, which they refused to do, and, as a result, the United States abrogated the contract.

Soon afterwards this suit was commenced. By the petition judgment for \$30,000 was demanded *as the "gains and profits[**538** which claimants would have made had they constructed the barges in accordance with the contract, as the terms of that instrument were construed by the contracting firm." The court of claims, as already stated, gave judgment against the United States for the sum of \$10,000. There is no statement in the findings as to the loss sustained by the claimants. Evidently, however, the conclusion to award the sum stated was based upon the hypothesis mentioned in the closing paragraph of the opinion of the court below, reading as follows:

"In consideration of all of the facts in the case, and in view of the difference between the cost of doing certain work and what claimants were to receive for it, making reasonable deduction of the less time engaged and release from the care, cost, risk, and responsibility attending a full execution of the contract, the court decides that claimants are entitled to recover as profits the sum of \$10,000, and accordingly judgment against the defendants for said amount is hereby ordered." [**43 Ct. Cl.**

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A motion to dismiss the appeal first requires attention. The facts are as follows:

The judgment against the United States was entered on May 18, 1908. Eighty-four days afterwards, on August 10, 1908, defendant filed a motion for a new trial. This motion was argued and submitted on November 23, 1908, and was overruled on January 4, 1909, in the term which began on December 7, 1908. Seventeen days afterwards, on January 21, 1909, the United States filed a motion to amend the findings of fact; on February 8, 1909, the motion was argued and submitted; and on February 15, 1909, the motion was overruled in part and allowed in part. Ten days afterwards, on February 25, 1909, the United States made application for and gave notice of an appeal "from the judgment rendered in the above-entitled cause on the 4th day of January, 1909."

539] *The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment (Rev. Stat. § 708, U. S. Comp. Stat. 1901, p. 575), and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, "but was merely from the order overruling the motion for a new trial."

The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the court of claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 680, 681, 42 L. ed. 1192, 1194, 18 Sup. Ct. Rep. 786. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of. *Texas & P. R. Co. v. Murphy*, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497.

Coming to the merits. The claimant in effect reiterates in the argument at bar the position taken by the court below in the opinions by it rendered, reported in 43 Ct. Cl. 469 and 44 Ct. Cl. 127. We shall therefore dispose of the case by reviewing the opinions of the court below.

In the opinion delivered upon the original

hearing it was observed that "the litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants, as to certain changes in the terms of an original advertisement for bids for the construction of the said six steel dump barges of a specified size, strength, and weight," etc. It was, however, held that the contract was clear and unambiguous in terms, and that the evidence "revealed a degree of negligence *on the part of the agents of the de-[540 fendants from which they could not be allowed to extricate themselves by the abrogation of a duly executed contract in order to shift from themselves responsibility." The claimants, it was said, in their second bid, made part of the contract, had in detail specifically set forth the strength, weight, and measurement of the barges, and that "the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendant's circular No. 310-C." The claimants, however, it was further observed, had called the attention of the defendant to the great difference between its then bid and the prior bid, and before the execution of the contract had noted on the blue print submitted by them and attached to the contract "the net weight of the barges," and stated that "this weight was to be distributed in such manner as the defendants might instruct." The printed specifications, it was held, although made part of the contract, could not govern, since the letter of claimants of July 27 and the blue print would have to be entirely ignored. It was also said that the materials proposed to be used by the claimants in the construction of the barges, although "reduced in weight, size, and power of resistance" from those prescribed by the specifications, did not constitute "a substitution of different strength and material for those provided in the specifications of the defendant as to the manner of constructing the barges, but was "rather a modification thereof."

We have, however, reached the conclusion, as well from the fact that the specifications were expressly made part of the contract as from various provisions of the contract which we have excerpted, that it cannot in reason be held that the specifications must be ignored, and as they cannot, therefore, be treated as having been abrogated, *it inevitably follows that the[541 alleged contract should have been held void for uncertainty.

It is, we think, in reason, impossible to construe the "modifications" referred to in the first article of the contract as having relation to the dimensions, etc., of the material so specifically described in the portions of the specifications embraced under the heading "Framing," since in that event a clear inconsistency would arise between the terms of that article and the terms of the specifications, also constituting part of the contract. And although this conclusion is, we think, so certain as to require no additional demonstration than the mere consideration of the terms of the two provisions, its conclusiveness is an addition convincingly shown by an analysis of the contract as a whole. The provision of article 3 in regard to the right of the government at any time during the progress of the work on the barges to inspect all the material furnished clearly imports that the contract had precisely settled the character of such material. So also does the provision in the same article in regard to final inspection, wherein it is provided: "Such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue prints mentioned in article 1 hereof, and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof does not conform to the requirements above mentioned." Again, prominence is given in article 8 to the fact that, in the construction of the barges, the specifications are to be given effect, the provision being that "the barges herein contracted for shall be completed in accordance with the specifications, *letter, and blue print annexed hereto and made a part hereof. . . ." So also, in article 9, payment is to be made only when the barges have been constructed and delivered "in accordance with the terms of this contract and the papers attached hereto," of which papers the specifications formed a part. Article 12 also clearly negates the conception that it could have been intended by the parties that material parts of the specifications should be treated as not forming a portion of the contract, although declared by its terms to be a part thereof, since the binding efficacy of the specifications as to material is therein emphasized. The article, in substance, provided

ed that no change or modification "involving an alteration in the specifications as to character, quantity, and quality, whether of labor or material, as would either increase or diminish the cost of the work," should be made unless "agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and price both of material and labor thus substituted for those specified in the original contract," etc. Manifestly, this article was drawn upon the conception, not that the contract did not, but that it did specifically, provide as to what material should be furnished for the work, and no other source could be resorted to for light as to the material contracted to be supplied than the specifications which it is now urged ought by construction to be removed from the contract.

Thus viewing the contract as a whole and determining that the specifications, so far as the "framing" schedule is concerned, should have been treated as unaffected by the provisions of article 1, it is evident that there was a conflict so irreconcilable between essential provisions of the assumed contract as to render it impossible to enforce it as an agreement between the parties. This result of the absolutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can *only be escaped by indulging in one of [543 two hypotheses; either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or, conversely, that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to pass that the contract was so irresponsible to and destructive of the advertised proposals as to nullify them, and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity.

Under the circumstances, therefore, the court erred in treating the contract as a valid agreement, and in awarding judgment against the United States.

Judgment reversed.

ONTARIO LAND COMPANY, Appt.,
v.

CHARLES H. WILFONG and May A. Wilfong, His Wife, and Walter J. Reed.†

(See S. C. Reporter's ed. 543-559.)

Delinquent taxes — foreclosure.

1. The omission of the county treasurer to file a certificate of delinquency with the clerk of the court in proceedings to foreclose the lien of the county for delinquent taxes, as required by the Washington statute, is not fatal to the validity of the proceedings, where jurisdiction has been obtained by the issue of the certificate and publication of the summons, as the filing of such certificate is directory, and not mandatory.

Delinquent taxes — foreclosure — judgment.

2. The judgment in proceedings to foreclose the lien of a county for delinquent taxes under the Washington statute is not void for failure to file the application for judgment until the day of its entry.

Pleading — complaint — filing.

3. The filing of a complaint in proceedings to foreclose the lien of a county for delinquent taxes before publication of summons is not jurisdictional, notwithstanding the requirement of Ball, Wash. Code, § 4878, that publication of summons shall not be had until after the filing of the complaint. [For other cases, see Pleading, I. v, in Digest Sup. Ct. 1908.]

Writ and process — sufficiency of summons — delinquent taxes.

4. The judgment in proceedings under the Washington statute to foreclose the lien of a county for delinquent taxes is not rendered invalid by the fact that the summons requires answer within sixty days after the first publication, instead of within sixty days after the "date of" the first publication.

[For other cases, see Writ and Process, II. c, in Digest Sup. Ct. 1908.]

Evidence — presumption of validity of tax deed.

5. A tax deed is not void because notice of sale was not posted nor otherwise given, as, under the laws of Washington, a tax deed is prima facie evidence not only of the validity of the deed and order under which the sale was made, but also of the regularity of the prior proceedings.

[For other cases, see Evidence, 453-471, in Digest Sup. Ct. 1908.]

†Death of Walter J. Reed, one of the appellees herein, suggested November 20, 1911, and appearance of Lydia McMillan Reed, as executrix of the estate of Walter J. Reed, deceased, as a party appellee herein, filed and entered.

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 544

Constitutional law — due process of law — in tax proceedings — notice.

6. Foreclosure of the lien of a county for delinquent taxes, resulting in a tax sale and deed under which property marked "reserved" on an official plat is described as specified numbered blocks, not designated on the plat, but which would have constituted such blocks if the tract reserved had been divided into blocks and numbered, does not deprive the owner of his property without due process of law, where he not only had notice from the record that the designated blocks were listed for taxation, and that they would occupy the place marked on the plat as reserved, but also had notice that the tract marked "reserved" was not otherwise listed for taxation, and had actual knowledge that the authorities were attempting to tax the reserved tract under the description of the designated blocks.

[For other cases, see Constitutional Law, 725-744, in Digest Sup. Ct. 1908.]

[No. 160.]

Argued January 24, 1912. Decided February 26, 1912.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Eastern District of Washington, Southern Division, in a suit to quiet title to certain land, against certain tax deeds issued to defendants, sustained the validity of such deeds. Affirmed.

See same case below, 96 C. C. A. 293, 171 Fed. 51.

The facts are stated in the opinion.

Mr. Arcadius L. Agatin argued the cause, and, with Mr. William W. Billson, filed a brief for appellant:

These lands were not described in the tax proceedings.

Ronkendorff v. Taylor, 4 Pet. 349, 359, 362, 7 L. ed. 882, 885, 886; *Miller v. Daniels*, 47 Wash. 411, 92 Pac. 268; *Bird v. Benlisa*, 142 U. S. 664, 670, 35 L. ed. 1151, 1153, 12 Sup. Ct. Rep. 323; *Stout v. Mastin*, 139 U. S. 151, 152, 35 L. ed. 121, 122, 11 Sup. Ct. Rep. 519; *Tallman v. White*, 2 N. Y. 66; *Hill v. Mowry*, 6 Gray, 551; *Zink v. McManus*, 121 N. Y. 259, 24 N. E. 467;

13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436 and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

Miller v. Williams, 135 Cal. 185, 67 Pac. 788; Curtis v. Brown County, 22 Wis. 167; Williams v. Central Land Co. 32 Minn. 440, 21 N. W. 550; 2 Cooley, Taxn. 3d ed. p. 935; Schattler v. Cassinelli, 56 Ark. 172, 19 S. W. 746; Jones v. Pelham, 84 Ala. 208, 4 So. 22; People v. Mahoney, 55 Cal. 286; Greene v. Lunt, 58 Me. 534; Bidwell v. Webb, 10 Minn. 59, Gil. 41, 88 Am. Dec. 56; Jackson v. Sloman, 117 Mich. 126, 75 N. W. 282; Clemens v. Rannels, 34 Mo. 583; Wooters v. Arledge, 54 Tex. 395; Jackson ex dem. Livingston v. De Lancey, 13 Johns. 552, 7 Am. Dec. 403; Mitchell v. Ireland, 54 Tex. 301; Kleber, Void Judicial Sales, § 354.

To ascertain how far the court may go beyond the deed and plat, in aid of the concededly ambiguous description, the first inquiry is whether the ambiguity is patent or latent; and if patent, the deed is void, and no resort to extrinsic evidence of identification is permissible.

Jones, Real Prop. in Conveyancing, §§ 337, 338; Brown v. Guice, 46 Miss. 299; Jennings v. Brizeadine, 44 Mo. 332.

That the ambiguity is patent here is apparent on slight reflection. The tax deeds contain no other description or means of identification than by mere reference to Capitol Addition. There is nothing in the deeds or the plat to suggest the possibility of locating the land, or point to any source from which evidence may be sought to make the description intelligible. It is not a case, therefore, of latent ambiguity, since the essential elements of such ambiguity are absent here.

Jones, Real Prop. in Conveyancing, §§ 339-344.

The ambiguity is clearly patent on the face of the deed, because the plat referred to in the deed is as much a part of the deed as if it were written out upon the face of the deed itself.

Jones, Real Prop. in Conveyancing, § 424; Dolde v. Vodicka, 49 Mo. 98; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Hardin v. Jordan, 140 U. S. 371-380, 35 L. ed. 428-432, 11 Sup. Ct. Rep. 808, 838.

Applying, therefore, to the deeds in question, the rules of ordinary conveyancing, no evidence of what was intended to be conveyed by the grantor would be admissible to support a description void on its face.

Jones, Real Prop. in Conveyancing, § 336.

The lack of description is not cured by the owner's personal knowledge of the tax, whether accidentally derived or otherwise.

Stuart v. Palmer, 74 N. Y. 195, 30 Am. Rep. 289; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 753; Roller v. Holly, 176 U. S. 398-409, 44 L. ed. 520-524, 20 Sup. Ct. Rep. 410; Ronkendorff v. Taylor, 4 Pet. 349, 56 L. ed.

362, 7 L. ed. 882, 886; Brown v. Denver, 7 Colo. 305, 3 Pac. 455; Baltimore v. Scharf, 54 Md. 517; State ex rel. Blaisdell v. Billings, 55 Minn. 475, 43 Am. St. Rep. 524, 57 N. W. 206, 794; Powers v. Larabee, 2 N. D. 141, 49 N. W. 724; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474.

Tax foreclosure proceedings and the service of summons thereunder are governed by the general statutes applicable in the commencement of "civil actions."

William's v. Pittock, 35 Wash. 271, 77 Pac. 385; McManus v. Morgan, 38 Wash. 528, 80 Pac. 786; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536; Bartels v. Christensen, 46 Wash. 478, 90 Pac. 658.

The requirement for filing the complaint before publication is therefore jurisdictional.

Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Murphy v. Lyons, 19 Neb. 89, 28 N. W. 328; Anderson v. Coburn, 27 Wis. 558; Witt v. Meyer, 69 Wis. 595, 35 N. W. 25; 17 Enc. Pl. & Pr. 51-56; Cummings v. Tabor, 61 Wis. 185, 21 N. W. 72; Charles v. Morrow, 99 Mo. 638, 12 S. W. 903; Klenk v. Byrne, 143 Fed. 1008; Kleber, Void Judicial Sales, § 122; McManus v. Morgan, 38 Wash. 528, 80 Pac. 786.

Failure to file certificate of delinquency is fatal to jurisdiction.

Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

The tax judgment is void for want of jurisdiction, because the tax summons is not in conformity to law.

Williams v. Pittock, 35 Wash. 271, 77 Pac. 385; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536; McManus v. Morgan, 38 Wash. 528, 80 Pac. 786; Bartels v. Christensen, 46 Wash. 478, 90 Pac. 658.

The failure in the summons to state that the complaint has been filed is a substantial departure from the statutory requirements for a summons, and therefore the court acquired no jurisdiction to enter judgment, and the judgment entered thereon is wholly void.

Brown, Jurisdiction, § 41; Wade, Notice, 2d ed. §1030; 26 Am. & Eng. Enc. Law, 692; Sutherland, Stat. Constr. 454, 455; Maxwell, Interpretation of Statutes, 333-337; Blackwell, Tax Titles, 287, 288; Odell v. Campbell, 9 Or. 305; Lyman v. Milton, 44 Cal. 630; Hayes v. Lewis, 21 Wis. 663; Kendall v. Washburn, 14 How. Pr. 380; Durham v. Betterton, 79 Tex. 223, 14 S. W. 1060; Fernekes v. Case, 75 Iowa, 152, 39 N. W. 238; Black v. Clendenin, 3 Mont. 44; Calkins v. Miller, 55 Neb. 601, 75 N. W. 1108; Delaware Western Constr. Co. v. Farmers' & M. Nat. Bank, 33 Tex. Civ. App. 658, 77 S. W. 628; 20 Enc. Pl. & Pr.

1115; *Clifford v. Tomlinson*, 62 Minn. 197, 64 N. W. 381.

The judgment is void because the summons required answer "within sixty days after first publication," instead of "within sixty days after the date of the first publication."

Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Bailey v. Hood*, 38 Wash. 700, 80 Pac. 559; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810.

The tax deeds are void because no notice of sale was posted or otherwise given.

Martin v. Barbour, 140 U. S. 634, 642, 35 L. ed. 546, 549, 11 Sup. Ct. Rep. 944; *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561, 88 N. W. 989; *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739; *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481; *Blackwell v. First Nat. Bank*, 10 N. M. 555, 63 Pac. 43; *Baumgardner v. Fowler*, 82 Md. 631, 34 Atl. 537; *Olson v. Phillips*, 80 Minn. 339, 83 N. W. 189; *Rustin v. Merchants' & M. Tunnel Co.* 23 Colo. 351, 47 Pac. 300; *Alexander v. Gordon*, 41 C. C. A. 228, 101 Fed. 96; *Black, Tax Titles*, p. 205; 2 *Cooley, Taxn.* 3d ed. 928-930.

The record in the case at bar is entirely silent as to notice of the sale being posted. This being so, the fact should be deemed established that there was no such notice, because the burden is on the tax purchaser to show that the notice was posted, and we objected to the introduction of the tax deeds in evidence on that ground.

Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; *Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803; *Brooks v. Union Twp.* 68 N. J. L. 133, 52 Atl. 238; *Black, Tax Titles*, 2d ed. §§ 346, 443; 2 *Cooley, Taxn.* 915, 916.

The burden of proof as to notice of sale is not changed by the statute of Washington (*Ballinger's Code*, 1767) providing that "deeds executed by the county treasurer shall be prima facie evidence . . . that the sale was conducted in the manner required by law."

2 *Cooley, Taxn.* 3d ed. 1006; *Wilson v. Lemon*, 23 Ind. 433, 85 Am. Dec. 471; *Beekman v. Bigham*, 5 N. Y. 366; *Westbrook v. Willey*, 47 N. Y. 458; *Carpenter v. Shiners*, 108 Cal. 359, 41 Pac. 473; *Kepley v. Fouke*, 187 Ill. 162, 58 N. E. 303; *King v. Cooper*, 128 N. C. 347, 38 S. E. 924; *Johnson v. Harper*, 107 Ala. 706, 18 So. 198; *Carnahan v. Sieber Cattle Co.* 34 Colo. 257, 82 Pac. 592; *Richards v. Beggs*, 31 Colo. 186, 72 Pac. 1077; *Ayer v. Dillard*, 45 Fla. 179, 33 So. 714.

Mr. Benjamin S. Grosscup argued the cause, and, with Mr. Ira P. Englehart, filed a brief for appellees:

A question which involves merely the construction of state statutes and the application thereto of general legal principles is not a Federal question.

Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

In every one of the numerous cases where this court has retained jurisdiction, a Federal question of real merit has been controlling, and in every instance where the record does not present a Federal question of real merit, the appeal or writ of error has been dismissed.

Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

A Federal question must be involved as controlling. If the court has jurisdiction by reason of a real Federal question, it will dispose of the whole case, and not relegate the parties to another jurisdiction for determination of incidental questions.

Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

The law of Washington has constituted the superior court a court of record and of general jurisdiction, and the statutes have conferred upon that court authority to foreclose tax liens. Its judgment is not subject to collateral attack except upon the ground of jurisdiction. If competent jurisdictional matter is stated in the process initiating the cause, so as to invoke judicial action, the judgment is conclusive as to all incidental questions. Whether the facts are sufficient to sustain jurisdiction once acquired is judicial action, and can no more be questioned collaterally than any other element of a judgment.

Harvey v. Tyler, 2 Wall. 328, 342, 17 L. ed. 871, 873; *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Kromer v. Friday*, 10 Wash. 640, 32 L.R.A. 671, 39 Pac. 229; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. ed. 490; *Applegate v. Lexington & C. C. Min. Co.* 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742.

The tax deed is made prima facie evidence of every fact connected with the legality of the proceeding.

Ward v. Huggins, 7 Wash. 621, 32 Pac. 740, 1015, 36 Pac. 285; *Warren v. Oregon & W. R. Co.* 99 C. C. A. 473, 176 Fed. 336.

Mr. Justice McKenna, delivered the opinion of the court:

Suit to quiet title to certain real estate situate in North Yakima, state of Washington, against certain tax deeds issued to appellees by the county treasurer of Yakima county.

It was brought in the circuit court for the eastern district of Washington, southern division. A decree was entered in favor of appellant. 162 Fed. 999. It was reversed by the circuit court of appeals. 96 C. C. A. 293, 171 Fed. 51.

The case depends upon the sufficiency of the tax deeds which appellant assails in its bill, after averments of diversity of citizenship, alleging the following: The land is part of Capitol Addition to North Yakima, and is designated on a plat thereof as "Reserved." It appears from the plat, which is attached to the bill, that the tract is surrounded by blocks, the lines of which and of the streets, if extended over 548]the tract, would constitute it *blocks 352, 372, 353 and 373. The "Reserved" was platted as Herman's Addition, and a plat duly recorded in the office of the county recorder of Yakima county on the 8th of December, 1904, and since the execution and recording of the plat the "Reserved" has not been otherwise known or designated than by lots and blocks, according to the recorded plat. Before the recording of the plat the "Reserved" tract was not known or designated by any other than by that name, and as a matter of fact there were not upon the map blocks or lots designated as blocks 352, 372, 353 and 373, nor any block or parcel of land to which such description could be made to apply; and it is averred that therefore the description in the tax proceedings was utterly void on its face, for the reason that it does not describe any land.

In 1901 Yakima county commenced proceedings in the superior court of Yakima county, the county being plaintiff and Edward Whitson and a large number of other persons were named as defendants, which included, among other lands, blocks 352, 353, 372 and 373, Capitol Addition to North Yakima. The proceedings purported to be under the laws of Washington for the foreclosure of tax liens, and culminated in a judgment and tax deeds. A pretended summons and notice were issued and published, but neither appellant nor any person was ever made or named a party defendant in the proceedings, either in the application for judgment or in the tax summons or notice as filed or published, nor in the tax judgment, and the owners of the blocks were designated as "unknown." The judgment was entered by default, and neither appellant nor any other person ever appeared or answered in the proceeding.

Appellees' claim of title rests exclusively on the tax judgment and deeds, and is based upon a certain decision of the supreme court of the state in a case in which

appellant was plaintiff and one Jay Yordy et al. were *defendants, which case in-[549]volved lands within the tract designated "Reserved" herein, the decision of which was based "upon pretended principles of law which the court in that case applied in palpable violation of the provisions of the 14th Amendment of the Constitution of the United States."

It is alleged that by the "law of the land," in order to constitute a proper and legal notice under the 14th Amendment it is necessary that in a tax proceeding *in rem* the description of the property sought to be sold must be so full and clear as to disclose to persons of ordinary intelligence, without resort to inferences, what property is thus intended to be taken. It is further alleged that the notice in the tax proceedings had not that sufficiency, and that, hence, to hold the judgment and deeds valid would deprive appellant of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. The protection of the Amendment is claimed, "and that because of the aforesaid unconstitutional decision of the state supreme court, the principles of which, if applied here, may deprive your orator of its property in violation of the said 14th Amendment, your orator invokes the protection of said article in this case, and hereby claims protection thereunder against the pretended claims of said defendants" (appellees).

There are other allegations, to the following effect: The judgment and tax deeds are void, because the court was without jurisdiction of the proceedings, because the notice of summons does not contain the specification of process, notice, or summons, as required by the laws of Washington, either in form or substance; that the summons was never served except by a pretended publication, and that neither it nor the application for judgment or complaint for the foreclosure of the tax liens was ever filed in the office of the clerk of the superior court; that *no certificate of[550] delinquency upon which the proceedings were based was ever filed in that court, as required by the laws of Washington, and that no complaint or application for judgment was ever filed in the office of the clerk of the court until the day of the entry of judgment.

That no notice of sale was ever given or posted, as required by law, and that the sale by the county treasurer of block 373 for \$76.77 and block 353 for \$76.77 was wholly unauthorized by the judgment and in excess of his authority; that appellant is willing and has offered to pay into

court the amount of taxes assessed against the property which may be found to be justly due. A copy of the decision of the state supreme court in the Yordy Case is attached to the bill.

The answer of appellees denied the allegations of the bill, and set up title under the tax proceedings and the sale and deed thereunder.

They alleged that the land, by the description of blocks, was taxed for state, county, and municipal purposes for several years prior to September, 1902, and that the taxes being delinquent on said blocks, the county of Yakima filed in the office of the clerk of the county its summons, notice, and petition to foreclose the tax lien of the county, the case being entitled, "Yakima County, State of Washington, Plaintiff, v. Edward Whitson et al., Defendants," and duly published the same "by law made and provided." That thereafter, such proceedings being had, a judgment and decree was entered foreclosing the tax lien, the court adjudging the land subject to taxation, and that the taxes due upon it were delinquent, and directed the land to be sold.

It is alleged that the judgment was duly filed for record in the office of the clerk and recorded, and that the county treasurer gave notice of sale and sold the property, as required by law, to appellees, and executed a deed therefor to them.

551] *It is further alleged that appellant had not paid taxes on the land for many years, knew that taxes thereon were delinquent, knew of the fact of assessment, and all the subsequent proceedings and sale, "and permitted the same to be conducted without making any objection whatsoever," and is therefore estopped to claim any interest against appellees.

A motion is made to dismiss, on the ground that the bill is based on diversity of citizenship, that the decision of the circuit court of appeals decided the case on questions of state and general law, and that the only question of a Federal nature has been decided by this court adversely to appellant in *Ontario Land Co. v. Yordy*, 212 U. S. 152, 53 L. ed. 449, 29 Sup. Ct. Rep. 152, "thereby removing from the consideration of the circuit court of appeals any substantial Federal question."

The motion is denied. The bill attacks the constitutionality of the state law as applied by the supreme court of the state, and whether the Yordy Case applies runs into the merits.

It will be observed that as grounds of suit the following propositions are presented by the bill: (1) The insufficiency of the description of the land, it never having

been known as lots and blocks, but designated or marked on the plat of Capitol Addition as "Reserved," and always known and designated as such. (2) The court acquired no jurisdiction of the property because the notice of summons was void on its face, for the reason that it did not contain the specifications of process, notice, or summons in such cases required by the laws of Washington, and did not comply with the statute either in form or substance. (3) There was no service of summons except by publication, but that prior to the publication neither the summons nor the application for judgment or the complaint was ever filed in the office of the clerk of the superior court. (4) No certificate of delinquency was filed in the office of the clerk of the *court, as re-[552] quired by the laws of Washington, and no complaint or application for judgment until the day of entry of the judgment. (5) No notice of sale under the judgment was ever given or posted, as required by law, and that the sale was in excess of the authority of the county treasurer.

All these propositions but the first rest upon the contention that the laws of Washington were not complied with in the particulars mentioned. For instance, it is contended that the certificate of delinquency was not filed in the office of the clerk of the court, and no complaint or application for judgment until the day of the entry of judgment. This is the most important of the contentions, and we will first dispose of it.

The laws of Washington provide that any day after taxes are delinquent, the treasurer of the county shall have the right, and it is his duty upon demand and payment of the taxes and interest, to issue a certificate of delinquency against such property, the holder of which may at any time after the expiration of three years give notice to the owner of the property that he will apply to the superior court of the county in which the property is situated for a judgment foreclosing a lien against the property. The contents of the notice and the time for appearance are prescribed, and the county attorney is directed to furnish forms to the certificate holder.

After the expiration of five years from the date of delinquency, if no certificate has been issued, the county treasurer is required to issue certificates of delinquency to the county, and file the certificates with the clerk of the court, and the treasurer shall thereupon, with the assistance of the county prosecuting attorney, proceed to foreclose in the name of the county the tax liens embraced in such certificates, and

the same proceedings shall be had as when the certificates are held by individuals.

Summons may be served and notice given 553] exclusively *by publication in one general notice describing the property as the same is described in the tax rolls. The certificates of delinquency may be general, including all property, the proceedings to foreclose may be brought in one action, and unknown owners, described as such, and all persons owning or claiming the property, are required to take notice of the proceedings and of all steps thereunder. And it is provided that the court shall examine each application for judgment for foreclosing the tax lien, hear and determine the matter in a summary manner without other pleading, and pronounce judgment as the right of the case may be, for the taxes, penalties, interest, and costs, "and such judgment shall be a several judgment against each tract." Ballinger's Code, §§ 1749 et seq.

The certificate of delinquency was not filed. It was issued as required by law, and a summons was published and notice given that judgment would be applied for. The application was subsequently made and judgment rendered. This is shown by the judgment roll in the tax proceedings which was introduced in evidence. The application for judgment, after the title of the court and parties, set forth the following:

"Yakima county, plaintiff in the foregoing entitled action, by Wm. B. Dudley, its treasurer and legal representative, relates as follows:

"That it is the holder of certificate of delinquency issued on the 31st day of January, A. D. 1898, by Yakima county, state of Washington, the same being for taxes then due and delinquent, together with penalty, interest, and costs thereon, upon real property situate in said county, assessed to the defendants herein for the years and in the amount hereinafter stated.

"That no redemption of said property has been made, and there is now due plaintiff herein on said certificate of delinquency the amount set forth below, following each description, marked 'total.'"
554] *In the description is the property in suit, assessed to unknown owners.

Foreclosure of the lien was prayed, and that judgment be given against each piece of property.

It also appears from the judgment roll that summons for publication was issued which recited that the county held certificate of delinquency; that the taxes were delinquent, time for appearance designated to defend the action or pay the amount due, and it was stated that in case of

"failure so to do," judgment would be rendered foreclosing the lien. Judgment was subsequently entered and the property ordered to be sold. The judgment states as follows:

"This cause having this 2d day of September, 1902, been brought to be heard upon the application for judgment foreclosing tax lien filed herein, and the defendants and each of them having been duly served with notice as by law required, and no appearance having been made by said defendants, or either of them, and upon the proofs adduced, it appearing to the court that the statements and allegations set forth in said application are true, the court finds as follows:

"That the plaintiff herein is the owner and holder of certificate of delinquency issued on the 31st day of January, 1898, by the county of Yakima, state of Washington, the same being for taxes then due and delinquent, together with penalty, interest, and costs thereon, upon real property situate in said county, assessed to the defendants herein for the years and in the amount hereinafter stated. That more than five years have elapsed since the original date of delinquency of the taxes for the year 1895, which are included in said certificate of delinquency."

But it is objected that it does not appear that the certificate of delinquency was filed by the county treasurer with the clerk of the court, and that the omission is fatal to the validity of the proceedings.

*To the contention the court of ap-[555] peals answered that the filing of the certificate was directory, not mandatory, and, therefore, not jurisdictional, and to sustain this position cited *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267. In that case the validity of foreclosure proceedings was attacked on the ground, among others, that the certificate of delinquency was not filed in the clerk's office before publication of summons, and it was hence argued that the court had not acquired jurisdiction of the property. The court, in the foreclosure proceedings, made a *nunc pro tunc* order declaring that the certificates were, in fact, filed before the first publication of summons, and not at the time the file mark upon the certificate showed. The supreme court decided that the issue of the certificate was the essential thing and gave the court jurisdiction of the cause, and, having jurisdiction, and it appearing by the record that the certificates were filed in time, it followed that the point now raised related to a mere irregularity, which should have been raised in the foreclosure case. The court also ruled that the correction was one

that could be made during the progress of the action, and that therefore the appellant in the case was estopped to raise the objection in the appellate court. The court finally observed: "The summons and its publication, we think, complied with the law. The property owner was therefore within the jurisdiction of the court, and was required to take notice of the action. The summons was by publication, it is true, but under § 3, pp. 385, 386, Laws of 1901, 'all persons owning or claiming to own, or having or claiming to have, an interest therein, are hereby required to take notice of said proceeding, and of any and all steps thereunder.'"

The language of the court, it must be admitted, is not as precise in distinguishing the elements of its decision as one would like, but we think the ground of its ruling is that jurisdiction having been obtained by the issue*of the certificate and the publication of the summons, the omission to file the certificate in the clerk's office is a defect or irregularity to which objection must be made in the case. In other words, the filing is not jurisdictional, for the court expressed the view that the "delinquency thought to be fatal" (the omission to file the certificate) ". . . could in no manner affect the rights of the appellants" in the action. The conclusion is reasonable. It would yield too much to technicality to give to the omission to file the certificate the controlling effect contended for by appellant. We have seen that the certificate was exhibited to the court and constituted one of the grounds of judgment.

As remarked by Judge Gilbert, speaking for the court of appeals:

"The revenue and taxation law of Washington is exceptionally lenient to the delinquent taxpayer, and offers him unusual protection in providing that his property may not be sold for delinquent taxes except upon foreclosure proceedings and after a long period of delinquency,—three years in the case of foreclosure by an individual certificate holder . . . and five years in the case of foreclosure by the county." In both cases there is public notice given and proceedings in court,—time and opportunity enough, we think, even to an accidental or negligent omission to pay taxes, and more than enough to the calculated and culpable delinquency charged against appellants in this case.

The courts of the state have refused to consider as essential to the proceedings in court to foreclose the lien for the taxes the omission of some merely ministerial duty of an officer which in no way could affect the rights of the property owner. Miller

v. Henderson, 50 Wash. 200, 96 Pac. 1052, and Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

In this connection we may observe that the proceedings in this case are the same as those passed on in *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257, 212 U. S. 152, 53 L. ed. 449, 29 Sup. Ct. Rep. 152. It was*contended there, as here, that[557 the proceedings were void because of the failure to file the certificate of delinquency. The supreme court of the state declined to consider the contention, holding that it was not open, as the land company had not tendered the delinquent taxes, as required by the laws of the state. In this court it was not explicitly urged except in a petition for rehearing. The rehearing was not granted.

The other objections to the validity of the tax proceedings are presented in the briefs of appellant under two heads as to the judgment and one as to the deeds, as follows: (1) The judgment is void because of failure to file the application until the day of the entry of the judgment. (2) The judgment is void for want of jurisdiction, because the summons did not inform the defendants in the proceedings "that any complaint was filed in court, or that it was filed at all." (3) The tax deeds are void because no notice of sale was posted or otherwise given.

These grounds of objection are untenable. The laws of Washington are as clear as they are simple in their requirements. They do not require a complaint to be filed before the publication of summons, but provide for an application for judgment after the publication of summons, and the court is explicitly directed to examine the application and to "hear and determine the matter without other pleading." There is a careful avoidance of complexity and expense. The property is proceeded against, and the procedure is made simple. The certificates of delinquency may be issued in one general certificate in book form, and unknown owners may be proceeded against as such. And it is provided that all persons owning or claiming to have an interest in the property are "required to take notice of the said proceedings and of any and all steps thereunder." See *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385.

It is, however, contended that the supreme court of Washington has decided that § 4878 of Ballinger's Code is *appli-[558 cable to tax proceedings, and that it requires "that publication of summons shall not be had until after the filing of the complaint." And it is hence contended

that the filing of the complaint before publication is jurisdictional.

The supreme court of the state has not decided as contended. It has decided exactly the other way. Indeed, it has held that if there were a total omission to file a complaint, the judgment would not be void. *Snohomish Land Co. v. Blood*, 40 Wash. 626, 82 Pac. 933; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786, and *Bartels v. Christensen*, 46 Wash. 478, 90 Pac. 658, are not apposite, being constructions of the statute before its amendment in 1901.

In this connection is urged the very technical objection that "the summons required answer 'within sixty days after the first publication' instead of 'within sixty days after the date of the first publication.'" To sustain this objection *Williams v. Pittock*, supra, is cited. It does not sustain the objection. It would be surprising if it did.

The objection to the validity of the deeds is also without merit. Under the laws of the state a tax deed is prima facie evidence, not only of the validity of the deed and order under which the sale was made, but also of the regularity of the prior proceedings. *Warren v. Oregon & W. R. Co.* (C. C. A. Ninth Circuit) 99 C. C. A. 473, 176 Fed. 336, and cases cited.

This brings us to the first proposition of appellant; that is, the insufficiency of the description of the land in the certificate of delinquency and in the summons, judgment, and order of sale, and that therefore they were inadequate for notice and due process of law. This contention, however, was considered in *Ontario Land Co. v. Yordy*, supra, and decided adversely to appellant.

As we have seen, the proceedings in that case were those involved in this. It was held 559] that the company was *charged with notice of the platting and the condition shown by the plat of the Capitol Addition to North Yakima, that he had notice from the records of the listing and assessment for taxation of the blocks, 352, 353, 372 and 373, and that they would occupy the place marked upon the official plat as "Reserved." The company also "had notice," it was said, "that the tract marked 'Reserved' was not otherwise listed or assessed for taxation," and that the blocks "were used by the authorities for describing the 'reserved' tract." The presumption of knowledge thus arising was fortified, it was said, by actual knowledge "that the authorities were attempting to assess and tax this 'reserved' tract under the description of blocks 352, etc." Both were grounds of decision. In other words, the decision 56 L. ed.

was not based alone on actual knowledge of what property was intended to be taxed, but upon the sufficiency of the description to identify the land in connection with the notice given to appellant by the record. And this was not *obiter*. *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 222 U. S. 237, ante, 180, 32 Sup. Ct. Rep. 86.

A like presumption exists in the case at bar, and there is testimony of like actual knowledge.

Judgment affirmed.

*SOUTHERN PACIFIC RAILROAD[560 COMPANY, D. O. Mills and Homer S. King, Trustees, and Central Trust Company of New York, Trustee, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 560-565.)

Public lands — conflicting railroad grants.

None of the lands lying within either the granted or the indemnity limits of the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), were subject to selection as indemnity lands by the Southern Pacific Railroad Company, under the act of March 3, 1871 (16 Stat. at L. 573, 579, chap. 122), § 23, although lying within the indemnity limits of such grant, and although the Atlantic & Pacific Railroad Company had forfeited its grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), before the Southern Pacific Railroad Company made its selection.

[For other cases, see Public Lands, 313-319, in Digest Sup. Ct. 1908.]

[No. 121.]

Argued January 26, 1912. Decided February 26, 1912.

A PPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of California, annulling patents to lands issued to the Southern Pacific Railroad Company. Affirmed.

See same case below, 93 C. C. A. 150, 167 Fed. 514.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause and filed a brief for appellants:

The status of lands within indemnity lim-

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison*, T. & S. F. R. Co. 28 L. ed. U. S. 794.

its at the time of selection determines entirely the right of the railroad thereto.

Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; Re Alabama & C. R. Co. 20 Land Dec. 408; Re Southern P. R. Co. 26 Land Dec. 452; Allers v. Northern P. R. Co. 9 Land Dec. 452; Northern P. R. Co. v. Halvorson, 10 Land Dec. 15; Missouri, K. & T. R. Co. v. Beal, 10 Land Dec. 504; Northern P. R. Co. v. Moling, 11 Land Dec. 138; Hensley v. Missouri, K. & T. R. Co. 12 Land Dec. 19; Northern P. R. Co. v. Bass, 13 Land Dec. 201; Hastings & D. R. Co. v. St. Paul, M. & M. R. Co. 13 Land Dec. 535; St. Paul, M. & M. R. Co. v. Munz, 17 Land Dec. 288; South & North Ala. R. Co. v. Hall, 22 Land Dec. 273; Southern P. R. Co. v. McKinley, 22 Land Dec. 493.

It cannot be supposed that it was the intention to overrule long-established principles without even mentioning the cases in which they were elaborately discussed and established.

Holmes v. Oregon & C. R. Co. 7 Sawy. 399, 9 Fed. 229.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, was limited solely to a question of place or granted lands.

Southern P. R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154.

Solicitor General **Lehmann** argued the cause and filed a brief for appellee:

The question is *res judicata* because of a decision of this court in Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

Southern P. R. Co. v. United States, 189 U. S. 447, 451, 452, 47 L. ed. 896, 899, 900, 23 Sup. Ct. Rep. 567; United States v. Southern P. R. Co. 184 U. S. 49, 53, 46 L. ed. 425, 428, 22 Sup. Ct. Rep. 285; Southern P. R. Co. v. United States, 200 U. S. 341, 50 L. ed. 507, 26 Sup. Ct. Rep. 296.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill brought by the United **564**] States to annul *patents for lands lying within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of March 3, 1871, chap. 122, § 23, 16 Stat. at L. 573, 579, known as the branch-line grant, and within the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866, chap. 278, 14 Stat. at L. 292. The Atlantic & Pacific road forfeited its grant (act of July 6, 1886, chap. 637, 24 Stat. at L. 123), and thereafter the South-

ern Pacific selected the two parcels in question, as indemnity under its branch-line grant, one of them lying within the granted, and the other within the indemnity, limits of the Atlantic & Pacific. It relies on the general principle that whether lands are subject to selection as indemnity depends upon the state of the lands at the time the selection is made. Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305. The circuit court, however, held that the right in this particular case had been decided not to exist (152 Fed. 314), and the circuit court of appeals affirmed the decree (93 C. C. A. 150, 167 Fed. 514).

We are of opinion that the decision was right. In Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, the lands in controversy embraced among others, as stated by Mr. Justice Harlan, "lands within the Southern Pacific indemnity limits and the Atlantic & Pacific granted limits; [and] lands within the common indemnity limits of both grants." Id. 47. It was held that the forfeiture to the United States did not enlarge the right of the Southern Pacific to select the lands in question, and the decree was for the United States. The proposition laid down in United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152, and United States v. Colton Marble & Lime Co. 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163, was applied to Southern Pacific branch-line indemnity lands. Whatever may be thought of the grounds for making an exception to the principle of Ryan v. Central P. R. Co. supra, the exception was established for this case. An elaborate argument was *made on petition for rehearing that **565** the decision could not be extended to indemnity lands, but the petition was denied. In Southern P. R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154, the dismissal of the bill without prejudice to claims that by interpretation are said to include indemnity claims imports no limitation of the previously established law, and, on the other hand, in Southern Pacific R. Co. v. United States, 189 U. S. 447, 451, 452, 47 L. ed. 896, 899, 900, 23 Sup. Ct. Rep. 567, the case in 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, was followed and the practice of the Land Department in accordance with that decision was mentioned as a further ground. There may be distinctions between the latest decision and this, but, in view of the rightly established understanding, it is too late to set them up now.

Decree affirmed.

UNITED STATES, Appt.,
v.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. Mills and Homer S. King, Trustees, and Central Trust Company of New York, Trustee. (No. 128.)

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. Mills and Homer S. King, Trustees, and Central Trust Company of New York, Trustee, Appts.,

v.

UNITED STATES. (No. 129.)

(See S. C. Reporter's ed. 565-572.)

Public lands — conflicting railroad grants.

1. Land lying within the primary limits of the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), and also within the indemnity limits of the grant made by the same act to the Southern Pacific Railroad Company, might, after the forfeiture by the Atlantic & Pacific Railroad Company of its grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), be selected as indemnity lands by the Southern Pacific Railroad Company.

[For other cases, see Public Lands, 313-319, in Digest Sup. Ct. 1908.]

Res judicata — matters concluded — railroads.

2. A determination in a suit by the United States against the Southern Pacific Railroad Company, tried as a bill to quiet title, against claims of such company under the branch line grant made by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), that it took no title to lands lying within the primary limits of the grant to the Atlantic & Pacific Railroad Company, made by the act of July 27, 1866, is not a bar to a claim by the Southern Pacific Railroad Company to the same land under a selection as indemnity lands, made after the forfeiture of its grant by the Atlantic & Pacific Railroad Company, on the theory that such land was also embraced within the indemnity limits of the main line grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, and that under such act each road, in case of conflict, took half the land within conflicting place limits.

[For other cases, see Judgment, 636-639, in Digest Sup. Ct. 1908.]

[Nos. 128 and 129.]

Argued January 26, 1912. Decided February 26, 1912.

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Music-
56 L. ed.

A PPEAL AND CROSS APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of California, sustaining the rights of the Southern Pacific Railroad Company to certain indemnity lands selected by it, and denying its rights in other land on the ground that a prior decision was conclusive. Affirmed as to the first point and reversed as to the second.

See same case below, 93 C. C. A. 146, 167 Fed. 510.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause and filed a brief for the Southern Pacific Railroad Company et al.:

The government, by its Attorney General, has insisted that no issue was presented in Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, involving the grant to the Southern Pacific Railroad under the main line grant of 1866. We have this court so holding not only in 168 U. S. 1, but in the subsequent case in 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154. Notwithstanding all this, the Attorney General now claims that, in spite of the position which he took in 168 U. S. 1, the railroad company is barred by that case from asserting any claim under the main line grant of 1866 to any land which happened to be physically embraced within the suit in 168 U. S. 1, but only in its character and capacity of branch line grant land under the act of 1871.

The title to indemnity lands remains in the United States until selection and approval.

New Orleans P. R. Co. v. Parker, 143 U. S. 42, 57, 36 L. ed. 66, 70, 12 Sup. Ct. Rep. 364; United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 374, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 512, 33 L. ed. 687, 695, 10 Sup. Ct. Rep. 341; Barney v. Winona & St. P. R. Co. 117 U. S. 228, 232, 29 L. ed. 858, 860, 6 Sup. Ct. Rep. 654; Clark v. Herington, 186 U. S. 206, 209, 43 L. ed. 1128, 1130, 22 Sup. Ct. Rep. 872.

Under the ordinary principles of law in regard to quieting title to property the defendant is not barred from asserting in a subsequent suit a title which he has acquired after the original suit has been tried.

Barrows v. Kindred, 4 Wall. 399, 18 L. ed. 383.

al Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

Solicitor General **Lehmann** argued the cause and filed a brief for the United States:

The Southern Pacific is not entitled to select, as being within the indemnity provisions of its main line grant (made by the act of July 27, 1866), any lands which were subject to the primary provisions of the Atlantic & Pacific grant, made by the same act.

Southern P. R. Co. v. United States, 168 U. S. 1, 61, 62, 42 L. ed. 355, 381, 18 Sup. Ct. Rep. 18; *Bardon v. Northern P. R. Co.* 145 U. S. 535, 545, 36 L. ed. 806, 811, 12 Sup. Ct. Rep. 856; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 364, 365, 40 L. ed. 177, 182, 183, 16 Sup. Ct. Rep. 17; *Chicago, M. & St. P. R. Co. v. United States*, 159 U. S. 372, 374, 376, 40 L. ed. 185, 186, 16 Sup. Ct. Rep. 26; *St. Paul & S. E. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 732, 28 L. ed. 872, 876, 5 Sup. Ct. Rep. 334; *Clark v. Herington*, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872.

Acts of Congress of this character are not only grants, but are statutes, subject to rules of statutory construction. They must receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instrument of private conveyance. And, further, if rights claimed under the government are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 740, 23 L. ed. 634, 637; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 360, 40 L. ed. 177, 181, 16 Sup. Ct. Rep. 17.

On July 5, 1886,—the day before the Atlantic & Pacific forfeiture,—the Southern Pacific certainly could not have made selections within these primary limits.

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790.

If it could not select then, it cannot now, unless Congress has granted that privilege.

Chicago, M. & St. P. R. Co. v. United States, 159 U. S. 372, 375, 40 L. ed. 185, 186, 16 Sup. Ct. Rep. 26; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349–366, 40 L. ed. 178–183, 16 Sup. Ct. Rep. 17.

The restoration of these lands to the public domain was certainly intended to subject them to the operation of the general

land laws, but this is all that was intended. There is no sign of intention to subject them to the Southern Pacific grant of 1866.

Clark v. Herington, 186 U. S. 206, 209, 210, 46 L. ed. 1128, 1130, 1131, 22 Sup. Ct. Rep. 872.

The forfeiture provision in the Atlantic & Pacific grant (§ 8, act of July 27, 1866) was a condition subsequent, which could be enforced only by the United States.

Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103.

To give to the act of 1886 the double effect of devoting the lands to the general homestead laws and also to the special Southern Pacific act is warranted neither by its own language nor by that of the prior legislation.

United States v. Southern P. R. Co. 146 U. S. 570, 615, 36 L. ed. 1091, 1104, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

This reservation to the United States was just as effective and made the lands included within it subject to the same exemptions as did the reservation of the even-numbered sections in the granting act of 1866. The lands so reserved could not, therefore, be selected by the railroad.

United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 368, 35 L. ed. 766, 768, 12 Sup. Ct. Rep. 13.

A claim entirely analogous to the one now made was unsuccessfully advanced by the Southern Pacific in *Southern P. R. Co. v. United States*, 189 U. S. 447, 47 L. ed. 896, 23 Sup. Ct. Rep. 567.

See also *Chicago, M. & St. P. R. Co. v. United States*, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17.

The title to such of the lands in exhibit B of the bill as were included in the former case is *res judicata*. It is immaterial that the right now asserted was not asserted then. The bill was to quiet title, and the right now relied on should have been put forward at the time, as it could have been. The object of the rule is to end litigation.

United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 216, 217, 46 L. ed. 1132, 1133, 1134, 22 Sup. Ct. Rep. 820; *Dowell v. Applegate*, 152 U. S. 327, 341, 346, 38 L. ed. 463, 468, 470, 14 Sup. Ct. Rep. 611.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill brought by the United

States to quiet title and cancel patents and for an accounting, as to lands lying within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of July 27, 1866, chap. 278, § 18, 14 Stat. at L. 292, known as the main-line grant, and within the primary limits of the grant made to the Atlantic & Pacific Railroad Company by § 3 of the same act. The Atlantic & Pacific road forfeited its grant (act of July 6, 1886, chap. 637, 24 Stat. at L. 123), and thereafter the Southern Pacific selected the parcels in question as indemnity under its main-line grant. The rights of the Southern Pacific under this grant were not subordinated to those of the Atlantic & Pacific under the same statute, as they were by its branch-line grant of 1871, considered in our last decision, but in case of conflict each road took half within the conflicting place limits. *Southern P. R. Co. v. United States*, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154. The special grounds for the decision between the same parties in 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, followed in the case preceding this, do not exist here. Therefore the circuit court and the circuit court of appeals held that the state of the lands at the time of selection determined the right, with an accidental exception that we shall explain. 152 Fed. 303, 93 C. C. A. 146, 167 Fed. 510. Both parties appeal; the United States from the *decision on the main point, the Southern Pacific from what concerns the excepted lands.

The government argues that as the lands selected lay within the primary limits of the Atlantic & Pacific, they cannot have been contemplated as possibly falling into the indemnity lands of the other road. It refers to an intimation in *Southern P. R. Co. v. United States*, 189 U. S. 447, 452, 47 L. ed. 896, 900, 23 Sup. Ct. Rep. 567, made with regard to the branch-line grant and to lands within the place limits of the Southern Pacific but for the paramount right of the Texas Pacific, that as the indemnity grant was "not including the reserved numbers," "it might be argued" that those words excluded the secondary claim to the same lands by way of indemnity after a forfeiture of the Texas Pacific grant. It suggests that *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305, relied on for the ground of decision below, concerned land which the United States was claiming at the time of the indemnity grant, and which it ultimately acquired, and that its authority should be

limited to such a case. But we are of opinion that these arguments ought not to prevail.

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course, the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the government created upon valuable consideration, and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply *because in a different event they would [571 have been subject to a paramount claim. It seems to us, in short, that *Ryan v. Central P. R. Co.* supra, should be taken to establish a general principle, and should not be limited to its special facts. As to the suggestion in 189 U. S. 447, 452, the words "not including the reserved numbers" refer primarily, at least, to the numbers reserved from any part of the grant by the terms of the act, and the suggestion was made only as to a claim of indemnity from lands in and adjoining a strip to which the title under the primary grant failed. Whether there was anything in it in any aspect we need not consider now. It certainly cannot affect this case.

A more delicate question is presented by the appeal of the Southern Pacific. It is this: A part of the lands in controversy were not only within the main line indemnity limits of the Southern Pacific and the primary limits of the Atlantic & Pacific, but also within the indemnity limits of the Southern Pacific branch-line grant. It is agreed that they were embraced in the decree against the right of the Southern Pacific under its branch-line grant in 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, and the argument is that the matter is *res judicata*, on the ground that a decree or judgment is binding as to all *media concludendi*, and that the former decree established the right of the United States to this land. *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *United States v. California & O. Land Co.*

192 U. S. 355, 358, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266. But the selections in this case were made after the decree in 168 U. S. 1, and if the matter were at large, it would seem a strong thing to hold an adjudication conclusive not only as to existing titles under the grant in controversy, but as to merely possible sources of title in the future under a different and distinct grant. We shall not discuss that question, however, or consider just how far the decisions have gone. The Solicitor General candidly agreed that the government should not and would not rely upon 572] this *ground, if it had taken a position inconsistent with it in the earlier case, and it seems to us plain that it did so, and expressly deprecated any reference in that case to the rights under the main-line grant.

It appears that the bill in 168 U. S. 1, was brought, or at least tried, as a bill to quiet title against claims of the Southern Pacific under the branch-line grant, and that during the litigation on that question there was pending another bill to quiet title under the main-line grant, being the one before this court in 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154. It is said, and we do not understand it to be disputed, that in oral argument and printed brief before the circuit court of appeals the counsel for the government repeated that title under the main-line grant was not involved, and that if that question ever arose there would be pleadings and proof upon it. The court in its decision (168 U. S. 29) stated the claim of the Southern Pacific to be under the act of 1871 [16 Stat. at L. 573, chap. 122] (the branch-line grant). Again, in the case between the same parties in 183 U. S. 519, 533, the court said that it was not adjudged in the former cases that the Southern Pacific had no title to any real estate by virtue of the act of 1866 [14 Stat. at L. 292, chap. 278]; and although it also said that of course the decrees were conclusive as to the title to the property involved in them, still, in view of the conduct and disposition of the cause as to the branch-line grant, if for no other reason, we think that it would be inequitable for the United States now to rely upon the decree in that cause as conclusive upon the parties in this. It follows that as the present decision was in favor of the United States with regard to the last-mentioned lands, it must be reversed (No. 129), and that otherwise (No. 128) it stands affirmed.

Decree reversed.

*KANSAS CITY SOUTHERN RAIL-
WAY COMPANY, Plff. in Err.,

v.

C. H. ALBERS COMMISSION COMPANY.

(See S. C. Reporter's ed. 573-598.)

Error to state court — raising question below.

1. A right or immunity under a statute of the United States is "specially set up and claimed" in the state court within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, where a railroad company insists, throughout garnishment proceedings brought against it for charges in excess of a special rate entered into with the garnishment debtor alone, that no recovery could be had against it consistently with the interstate commerce act, as, in disregarding the agreement for the special rate, it only conformed to the provisions of such act governing rates to be applied to interstate shipments.

[For other cases, see *Appeal and Error*, 1178-1191, in *Digest Sup. Ct.* 1908.]

NOTE.—As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations—see note to *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 94 C. C. A. 230.

On the validity of contracts in business which it is a misdemeanor to transact—see note to *Levison v. Boas*, 12 L.R.A. (N.S.) 609.

On the effect of provisions of the interstate commerce act against rebates upon contracts prescribing rates less than those fixed in accordance with the act—see note to *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L.R.A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to *Home for Incurables v. New York*, 63 L.R.A. 329.

Error to state court — examination of record.

2. The United States Supreme Court may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a general finding of facts against one party necessarily involves the decision of questions of law bearing upon a Federal right claimed by such party in the state court.

[For other cases, see Appeal and Error, 1436-1445, in Digest Sup. Ct. 1908.]

Error to state court — jurisdiction — Federal question.

3. A general finding against a common carrier in garnishment proceedings against it by a creditor of a shipper, to recover charges in excess of a special rate agreed upon, necessarily involves the decision of questions of the interpretation and application of the interstate commerce acts of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), and March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), so as to give the United States Supreme Court jurisdiction, where such carrier claimed in the state court that the rates collected, though in excess of the special rate agreed on, were the lawful rates applicable to the shipments, as shown by schedules filed with the Interstate Commerce Commission.

[For other cases, see Appeal and Error, 1436-1445, in Digest Sup. Ct. 1908.]

Carriers — interstate freight rates — posting.

4. Interstate freight rates are established when schedules thereof are regularly printed, filed with the Interstate Commerce Commission, and kept open to public inspection by the carrier at its freight offices, although such rates may not be posted in public and conspicuous places, as required by § 6 of the interstate commerce act of February 4, 1887, as amended by the act of March 2, 1889, as posting is not essential to make rates legally operative, but is required only as a means of affording special facilities to the public for ascertaining the rates actually in force.

[For other cases, see Carriers, III. g., in Digest Sup. Ct. 1908.]

Carriers — interstate freight rates — establishment.

5. The sanction of the other roads to schedules of freight rates containing a heading indicating their adoption by a particular road "in connection with" other designated railroads, which are the roads over which a haul, when there is such, from common points to the particular railroad, would be made, is not essential to the establishment of such rates in a proceeding involving shipments over such railroad and a connecting line not included among the other roads designated, from a city which is not one of the common points.

[For power to prescribe and decide as to rates, see Carriers, III. c., in Digest Sup. Ct. 1908.]

Carriers — interstate freight rates — applicability.

6. Schedules of freight rates of a designated railroad, indicating that they were adopted by it "in connection with" other specified roads over which shipments from the common points, if any, would be made, may be applicable to a shipment over a different railroad from a city which is not a common point, where such schedules do not restrict the rate to shipments received from the roads specified, but indicate its applicability to shipments received from any connecting line.

7. Uncontradicted testimony cannot be disregarded, though not the best evidence, when offered and admitted without objection.

Evidence — secondary evidence — admission without objection.

[For other cases, see Evidence, 2261, in Digest Sup. Ct. 1908.]

Carriers — interstate freight rates — applicability.

8. Shipments over connecting lines, even though moving on through bills of lading, must, under the interstate commerce act, take the lawfully established local rate in force on each line, where there is no established joint through rate.

Carriers — interstate freight rates — departure from.

9. An agreement with a single shipper for shipments over connecting lines having no joint through rate, at less than the established local rates for each road, is void and does not prevent the collecting of the established local rate by such carriers, under the interstate commerce act of February 4, 1887, § 6, as amended by the act of March 2, 1889, providing the manner for establishing rates, and making it unlawful for a carrier to depart from any rate so established and in force at the time and requiring connecting carriers agreeing on joint through rates to file schedules with the Interstate Commerce Commission, and prohibiting any deviation from an established joint rate while in force.

[For discrimination in freight rates generally, see Carriers, III. e., in Digest Sup. Ct. 1908.]

[No. 18.]

Argued October 26, 1911. Decided February 26, 1912.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Crawford County, in that state, holding a common carrier liable as garnishee to a creditor of a shipper. Reversed.

See same case below, 79 Kan. 59, 99 Pac. 819.

The facts are stated in the opinion.

Mr. Cyrus Crane argued the cause, and, with Mr. Samuel W. Moore, filed a brief for plaintiff in error:

The case is properly here for review.

The plaintiff's motion to dismiss or affirm should be overruled.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

The case is analogous to the claim, frequently asserted in this court, that subsequent state legislation has impaired the obligation of a contract. In such cases the well-established rule is that this court will determine for itself whether there is a contract, valid and binding, between the parties, and whether its obligation has been impaired by the legislative action of the state.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

The same rule is applied by this court in actions to enforce a judgment rendered in a foreign state, where it is insisted that for various reasons it is not entitled to full faith and credit in the state where suit is instituted. This court, on writ of error, may determine for itself the nature of the original liability upon which the judgment was rendered.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Neither the findings nor the rulings of the state court should be permitted to prevent the determination of the right asserted under the Constitution and laws of the United States.

St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A. (N.S.) 802, 30 Sup. Ct. Rep. 476.

The inflexibility of published rates must be maintained in every court until the Commission shall, by its order, level the rate for the benefit of everyone.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Missouri, K. & T. R. Co. v. New Era Mill. Co.* 80 Kan. 141, 101 Pac. 1011; *American Union Coal Co. v. Pennsylvania R. Co.* 159 Fed. 278; *Van Patten v. Chicago, M. & St. P. R. Co.* 81 Fed. 545; *State ex rel. Crow v. Atchison, T. & S. F. R. Co.* 176 Mo. 687, 63 L.R.A. 761, 75 S. W. 776; *Carlisle v. Missouri P. R. Co.* 168 Mo. 652, 68 S. W. 898; *Morrisdale Coal Co. v. Pennsylvania R. Co.* 106 C. C. A. 269, 183 Fed. 929.

Proportional rates are proper.

F. H. Bascom Co. v. Atchison, T. & S. F. R. Co. 17 Inters. Com. Rep. 356; *Re of Form & Contents of Rate Schedules*, 4

Inters. Com. Rep. 701; *Moore, Interstate Commerce*, § 48; *Barnes, Interstate Transp.* § 80-D; *Serry v. Southern P. Co.* 18 Inters. Com. Rep. 556; *North Bros. v. St. Louis & S. F. R. Co.* 13 Inters. Com. Rep. 153; *Kansas City Transp. Bureau v. Atchison, T. & S. F. R. Co.* 16 Inters. Com. Rep. 195; *Lindsay Bros. v. Baltimore & O. S. W. R. Co.* 16 Inters. Com. Rep. 6; *Re-Through Routes & Through Rates*, 12 Inters. Com. Rep. 172; *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400, 82 C. C. A. 135, 153 Fed. 1, s. c. 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* 218 U. S. 89, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830.

The existence of the proportional rate was established by the tariff itself, which it was admitted had been duly filed with the Commission. The presumption, in the absence of proof, would be that rates between these points had been duly and legally established.

Meeker v. Lehigh Valley R. Co. 162 Fed. 354; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 108, 121, 52 L. ed. 705, 713, 28 Sup. Ct. Rep. 493; *Clement v. Louisville & N. R. Co.* 153 Fed. 979; *American Union Coal Co. v. Pennsylvania R. Co.* 159 Fed. 278.

This proportional rate was as fixed and inflexible, by reason of its being established in accordance with law, as though it had been fixed by an act of Congress. No contract or other device could vary or depart from it. Any contract undertaking to vary from the published rate would be void.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Hawley v. Kansas & T. Coal Co.* 48 Kan. 593, 30 Pac. 14; *Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan. 232, 5 Inters. Com. Rep. 241, 38 Pac. 266; *Kizer v. Texarkana & F. S. R. Co.* 66 Ark. 348, 50 S. W. 871; *Armour Packing Co. v. United States*, 153 Fed. 1; *Chesapeake & O. R. Co. v. Standard Lumber Co.* 98 C. C. A. 81, 174 Fed. 107; *Southern R. Co. v. Harrison*, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; *St. Louis & S. F. R. Co. v. Ostrander*, 66 Ark. 567, 52 S. W. 435; *Bullard v. Northern P. R. Co.* 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; 223 U. S.

Ralcligh & G. R. Co. v. Swanson, 102 Ga. 754, 39 L.R.A. 275, 28 S. E. 601; Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co. 38 Mo. App. 191; Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457; Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; Savannah, F. & W.'R. Co. v. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995; Indianapolis, D. & S. R. Co. v. Ervin, 118 Ill. 250, 59 Am. Rep. 369, 8 N. E. 862; Missouri, K. & T. R. Co. v. Bowles, 1 Ind. Terr. 250, 40 S. W. 899; Gerber v. Wabash R. Co. 63 Mo. App. 145; Atchison, T. & S. F. R. Co. v. Holmes, 18 Okla. 92, 90 Pac. 22; Missouri, K. & T. R. Co. v. Stoner, 5 Tex. Civ. App. 50, 23 S. W. 1020; San Antonio & A. P. R. Co. v. Clements, 20 Tex. Civ. App. 498, 49 S. W. 913; Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144; Georgia R. Co. v. Creety, 5 Ga. App. 424, 63 S. E. 528.

The lower court erroneously took the position that where two railway companies have no joint through rate published as the law requires, they may make a joint through rate by private contract, agreeing among themselves upon the divisions thereof, without filing with the commission a schedule showing the rate, and that a shipper not only may avail himself of this unpublished rate, but of the divisions thereof; and may require each of the railway companies to handle his shipments upon tender of its proportion or division of such unpublished rate.

Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428, 14 L.R.A. (N.S.) 400, 82 C. C. A. 135, 153 Fed. 1.

A shipper is not entitled to avail himself of a division of a through rate.

Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123, 25 L. ed. 75; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; Sayward v. Dexter, H. & Co. 19 C. C. A. 176, 44 U. S. App. 376, 72 Fed. 758; American Exch. Nat. Bank v. Northern P. R. Co. 76 Fed. 130; Metropolitan Trust Co. v. Topeka Water Co. 132 Fed. 702; German Alliance Ins. Co. v. Home Water Supply Co. — L.R.A. (N.S.) —, 99 C. C. A. 258, 174 Fed. 768.

Messrs. John M. Wayde and Philip P. Campbell argued the cause, and, with Mr. Carl O. Pingry, filed a brief for defendant in error:

Making a claim in such general terms as the interstate commerce act, without calling the attention of the court to the

particular sections or provisions of the statute relied upon, is too general to give this court jurisdiction to review the case.

Kipley v. Illinois, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Hoyt v. Sheldon (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Farney v. Towle, 1 Black, 350, 17 L. ed. 216; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

When any right, title, privilege, or immunity is claimed under a Federal statute on a writ of error to a state court, that right, title, privilege, or immunity must be especially set up and claimed in the state court in the proper time and in the proper way. Where the case arises under the 3d clause of the jurisdictional statute, the right, title, privilege, or immunity must be specially set up or claimed.

Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24; Manning v. French, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258.

The supreme court, in an action of law, at least, has no jurisdiction to review the decision of the highest court of the state on a pure question of fact, although a Federal question would or would not be presented, according to the way in which the question of fact was decided.

Lewis v. Campau, 3 Wall. 106, 18 L. ed. 211; Hall v. Jordan, 15 Wall. 393, 21 L. ed. 72; Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. ed. 245; Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 511, 14 Sup. Ct. Rep. 1199.

All questions of fact are settled by the decision of the state court.

Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Re Buchanan, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723; Lewis v. Campau, 3 Wall. 106, 18 L. ed. 211; Hall v. Jordan, 15 Wall. 393, 21 L. ed. 72; Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. ed. 245; Carpenter v. Williams, 9 Wall. 785, 19 L. ed. 827; Republic River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Martin v. Marks, 97 U. S. 345, 24 L. ed. 940; Kenney v. Effinger,

115 U. S. 577, 29 L. ed. 498, 6 Sup. Ct. Rep. 185; *Quinby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

The court nowhere held in its opinion that the railway company was not entitled to all of the rights and privileges which the interstate commerce law gave it, but simply held that it failed to establish sufficient facts by the evidence to bring it within the law and to relieve it from the obligations of its contract. This is not depriving the railway company of any right, title, or privilege under the law.

Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Merced Min. Co. v. Boggs*, 3 Wall. 304, 18 L. ed. 245; *Quinby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Martin v. Marks*, 97 U. S. 345, 24 L. ed. 940; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; 17 Mor. Min. Rep. 704; *France v. Missouri*, 154 U. S. 667, and 26 L. ed. 86, 14 Sup. Ct. Rep. 1191; *Kenney v. Effinger*, 115 U. S. 577, 29 L. ed. 498, 6 Sup. Ct. Rep. 185.

We are unable to adopt a construction of the interstate commerce act which will practically compel the carrier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

Little Rock & M. R. Co. v. St. Louis S. W. R. Co. 26 L.R.A. 195, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 630; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Chicago & N. W. R. Co. v. Osborne*, 3 C. C. A. 347, 10 U. S. App. 430, 4 Inters. Com. Rep. 257, 52 Fed. 915; *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 919.

It is the settled construction of the act that it does not make it obligatory upon connecting carriers to enter into traffic arrangement for through billing and rating, either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals which have had occasion to

consider the subject, and it is based on the fact that, in enacting the commerce act, Congress did not see fit to adopt that provision of the English railway and canal traffic act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made.

Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. 4 Inters. Com. Rep. 261, 47 Fed. 771; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

Through rates are matters of agreement between carriers.

Wentworth, Interstate Commerce Law, pp. 23, 24, 37; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 3 I. C. C. Rep. 1, 2 Inters. Com. Rep. 454; *Capelhart v. Louisville & N. R. Co.* 4 I. C. C. Rep. 265, 3 Inters. Com. Rep. 278; *Re Clark*, 3 I. C. C. Rep. 649, 2 Inters. Com. Rep. 797; *Southern P. Co. v. Interstate Commerce Commission*, 200 U. S. 554, 50 L. ed. 593, 26 Sup. Ct. Rep. 330; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

Through rates are not necessarily illegal which, when divided between carriers, give them less than their local rates, provided that the through rate itself is not less than some one of the locals, or unjustly discriminatory against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed.

L. Lippman & Co. v. Illinois C. R. Co. 2 I. C. C. Rep. 584, 2 Inters. Com. Rep. 414; *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co.* 3 I. C. C. Rep. 450, 2 Inters. Com. Rep. 721; *New Orleans Cotton Exch. v. Illinois C. R. Co.* 3 I. C. C. Rep. 534, 2 Inters. Com. Rep. 777; *Hamilton v. Chattanooga, R. & C. R. Co.* 4 I. C. C. Rep. 686, 3 Inters. Com. Rep. 482; *Detroit Board of Trade v. Grand Trunk R. Co.* 2 I. C. C. Rep. 315, 2 Inters. Com. Rep. 199; *Poughkeepsie Iron Co. v. New York C. & H. R. R. Co.* 4 I. C. C. Rep. 195, 3 Inters. Com. Rep. 248.

The apportionment of rates on different parts of a through line does not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance.

Brady v. Pennsylvania R. Co. 2 I. C. C. Rep. 131, 2 Inters. Com. Rep. 78.

A railroad company is under special obligations to give reasonable rates for its

local business, but there are many influences which may affect through rates, while not bearing upon local rates at all; or, if at all, in less degree.

Wentworth, Interstate Commerce Law, p. 18.

Through rates are not required to be made on a mileage basis, nor local rates to correspond with the division of a joint through rate over the same line. Mileage is usually an element of importance, and due regard to distance proportion should be observed in connection with the other considerations that are material in fixing transportation charges.

McMorran v. Grand Trunk R. Co. 3 I. C. C. Rep. 252, 2 Inters. Com. Rep. 604.

Purely local rates are such as are made from station to station, and with some approximation to distance, and are never, in railroad circles, made use of in connection with rates for long distances, which are made in disregard of rates to and from numerous intermediate stations.

Wentworth, Interstate Commerce Law, p. 34; Martin v. Chicago, B. & Q. R. Co. 2 I. C. C. Rep. 25, 2 Inters. Com. Rep. 32.

On a through and continuous line the carrier cannot escape responsibility for unjust charges by breaking haul in two, and calling itself a separate carrier.

Brady v. Pennsylvania R. Co. 2 I. C. C. Rep. 131, 2 Inters. Com. Rep. 78; Re Grand Trunk R. Co. 3 I. C. C. Rep. 89, 2 Inters. Com. Rep. 496; United States v. Mellen, 4 Inters. Com. Rep. 247, 53 Fed. 229; Wentworth, Interstate Commerce Law, p. 54.

An indictment alleging that the share of a joint rate taken by one company is less than its local rate for a shorter haul, etc., is bad.

Ray, Freight Carriers, 652.

Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions.

Martin v. Southern P. Co. 2 I. C. C. Rep. 1, 2 Inters. Com. Rep. 1.

While it is the duty of the court to see that the provisions established by Congress are not frittered away on technical or trifling grounds, yet it is also their duty to see that such legislation is not carried beyond its clear scope, and that the owners of private capital invested in the business of transportation be not deprived of their liberty of contract and right of control any further than the law making power has intended that they should be.

Chicago & N. W. R. Co. v. Osborne, 3 C. C. A. 347, 10 U. S. App. 430, 4 Inters. Com. Rep. 257, 52 Fed. 912.

As to the distinction between joint rates and other rates, see Chicago & N. W. R. Co.

v. Osborne, 3 C. C. A. 347, 10 U. S. App. 430, 4 Inters. Com. Rep. 257, 52 Fed. 912; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Judson, Interstate Commerce, p. 190, § 150; Allen v. Oregon R. & Nav. Co. 98 Fed. 16; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 284, 36 L. ed. 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 415.

A scheme for establishing compulsory through rates should be surrounded by proper safeguards, and its operation limited by proper restrictions.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 626; Railway Co. v. Platt, June 26, 1907, Inters. Com. Rep.

We are not unmindful of the general proposition that contracts which are prohibited by law are invalid and cannot be enforced. However, to this general rule there are five exceptions which are recognized by high authority as well as by persuasive reasoning.

The contracts are upheld:

1. Where public policy requires the intervention of the court;

2. Where the parties are not *in pari delicto*;

3. Where the law which makes the agreement unlawful was intended for the special protection of the party seeking relief;

4. Where the illegal purpose has not been consummated;

5. Where the party complaining can exhibit his case without relying on the illegal transaction.

9 Cyc. 550; Packard v. Byrd, 73 S. C. 1, 6 L.R.A.(N.S.) 547, 51 S. E. 678; Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041; Eastern Expanded Metal Co. v. Webb Granite & Constr. Co. 195 Mass. 356, 81 N. E. 251, 11 Ann. Cas. 631; Tootle v. Taylor, 64 Iowa, 629, 21 N. W. 115; Bemis v. Becker, 1 Kan. 226; Mason v. McLeod, 57 Kan. 105, 41 L.R.A. 548, 57 Am. St. Rep. 327, 45 Pac. 76.

To invalidate a contract for illegality, the illegality must be inherent. It is not enough that it be associated even closely. It must be a part of the contract.

Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346.

No findings of fact aside from the general judgment were requested by the plaintiff in error at the trial court, and the plaintiff in error is concluded by the findings of fact made by the supreme court. Whether those findings are correct or incorrect, they are conclusive, and the only question before this court is whether, taking the facts as found by the supreme court of Kansas, the decision or judgment of the supreme court violated any of the provisions of the interstate commerce act.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

When no question is raised as to the validity of a statute of the United States, but merely as to the application of the statute to the case, no Federal question arises.

Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

On a writ of error to a state court in a law case this court will not enter into a consideration of the testimony.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Boardman v. Toffey*, 117 U. S. 271, 29 L. ed. 898, 6 Sup. Ct. Rep. 734; *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Crary v. Devlin*, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; *Merced Min. Co. v. Boggs*, 3 Wall. 304, 18 L. ed. 245.

The interstate commerce act did not fix rates. The interstate commerce act, as it existed at the time of the shipments in question, gave no power to the Interstate Commerce Commission or to the courts to fix rates. The right to make rates was left with the carriers under the act as it had been before the passage of the act.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414,

18 Sup. Ct. Rep. 45; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

The fact that two or more roads have one joint tariff does not prevent one of the roads from having a different joint rate with other roads, neither does it raise a presumption that it does not have such rate.

Little Rock & M. R. Co. v. St. Louis S. W. R. Co. 26 L.R.A. 195, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775.

We have been unable to find any decision, either state or Federal, which holds that a contract based on an unpublished rate applicable to the rate of shipment in question cannot be enforced as between the carrier and shipper, when the rate is not shown to be unjust and unreasonable, or does not discriminate either in favor of or against other shippers on the same haul, or does not conflict with a lawfully established rate which is applicable. The validity of such contracts has been upheld in the following cases:

Missouri P. R. Co. v. Relf, 78 Kan. 463, 97 Pac. 477; *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607; *Southern Kansas R. Co. v. J. W. Burgess Co.* — Tex. Civ. App. —, 90 S. W. 189; *Gulf, C. & S. F. R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119; *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134; *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 84 Miss. 339, 66 L.R.A. 453, 37 So. 134; *Southern P. Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061; *Virginia Coal & Iron Co. v. Louisville & N. R. Co.* 98 Va. 776, 37 S. E. 315; *Cherry v. Chicago & A. R. Co.* 191 Mo. 489, 2 L.R.A.(N.S.) 695, 109 Am. St. Rep. 830, 90 S. W. 381.

The principle involved in this case comes clearly within the right to contract recognized by this court.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 555, 50 L. ed. 593, 26 Sup. Ct. Rep. 330; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

*Mr. Justice Van Devanter delivered the opinion of the court:

This was a proceeding in garnishment under the laws of the state of Kansas. The C. H. Albers Commission Company had re-

covered a judgment in the district court of Crawford county, in that state, against Robert L. Forrester and Joseph M. Forrester, doing business as Forrester Brothers, in the sum of \$10,333.72, with interest, and had brought the Kansas City Southern Railway Company into the case, as a garnishee, upon a general allegation that it was indebted to Forrester Brothers. The railway company, which will be spoken of as the garnishee, appeared and denied that allegation. Under the practice in that state the issue so framed was, without other pleadings, brought on for trial as a civil action. The trial was begun before the court and a jury, but later the jury was discharged, with the consent of the parties, and the trial proceeded before the court alone. The case made by the evidence was this:

The garnishee was operating a railroad extending from Kansas City, Missouri, to Texarkana, Texas. Another railroad, which will be spoken of as the northern line, connected with it at Kansas City and extended northward to Omaha, Nebraska. Forrester Brothers were buyers and sellers of grain, with offices at St. Louis, Missouri. In the late summer or early fall of 1901 the two roads, at the solicitation of Forrester Brothers, entered into an oral agreement with the latter whereby they were granted a special rate on corn and oats to be shipped in car-load lots from Omaha *via* Kansas City to Texarkana. The evidence was conflicting as to whether the rate agreed upon for the through haul was 12½ or 16½ cents per hundred pounds, but it was one or the other, and the garnishee was to charge and receive 8 cents for the haul over its road, and the remainder was to go to the northern 585]line. The evidence *was also conflicting as to whether the agreement was to terminate on the 31st of October, or was to continue until all the shipments then contemplated by Forrester Brothers were completed. After the agreement was made, and in reliance thereon, Forrester Brothers made large purchases of corn and oats at Omaha for shipment to and sale at Texarkana, as they had contemplated doing when soliciting the special rate. The agreement was observed by the garnishee until and including the 31st of October, and during that time the shipments were carried on through bills of lading. Thereafter the garnishee disregarded the agreement, required that the shipments be rebilled at Kansas City, and collected a 10-cent rate for the haul over its road until November 10, and thereafter a 14-cent rate. The payment of the larger rates was made by an agent of Forrester Brothers at Kansas City, who did not know of the agreement. By exacting the larger

rates the garnishee received \$10,527.55 more than it would have received under the 8-cent rate. No schedule embodying the 12½ or 16½-cent rate, whichever it was, for the through haul, or the 8-cent rate for the haul over the garnishee's road, was filed with the Interstate Commerce Commission; and neither was any memorandum or statement of the oral agreement so filed. Apart from the agreement there was no joint through rate applicable to these shipments.

When the agreement was made there was in force on the garnishee's road a "proportional rate" of 10 cents per hundred pounds on corn and oats moving from Kansas City to Texarkana. This rate was not applicable to shipments originating at Kansas City, but only to such as originated elsewhere on connecting lines. Nor was it invariably confined to the movement from Kansas City to Texarkana, for it included also the haul, when there was such, to Kansas City from certain common points, such as St. Joseph, Atchison, and Leavenworth, which usually *enjoyed the[586 Kansas City rates, and were not reached by the garnishee's road, but by other roads. Thus, shipments originating on lines connecting at the common points with the roads leading to Kansas City took this rate from the common points to Texarkana. As applied to such shipments the rate was joint as well as proportional, and as applied to others it was a proportional rate of the garnishee alone. It was embodied in a schedule duly filed with the Interstate Commerce Commission, and remained in force until November 10, when it was superseded by a like rate of 14 cents, shown in an amendatory schedule so filed. These schedules bore a heading indicating that they were adopted by the garnishee "in connection with" other designated railroads, they being the roads over which the haul, when there was such, from the common points to the garnishee's road, would be made. The northern line was not one of them, nor was Omaha one of the common points. There was a like provision for the haul, when there was such, from Texarkana to common points therewith, and also a designation of the railroads over which that haul would be made; but as that feature of the schedules is immaterial here, it may be eliminated from consideration.

As explaining a proportional rate and indicating the correct application of the one just named, F. M. King, an experienced station agent of the garnishee, testified:

Q. I will ask if you know whether or not the words "proportional rates," have a well-defined and understood meaning in rail-

road business and on the Kansas City Southern.

A. They have; yes, sir.

Q. Now, just tell briefly what those terms mean, those words "proportional rates," if you know.

A. A proportional rate is a rate put in to cover business . . . coming to our lines from other points, applying to commodities where we have no through rates. It is put in in order to protect a shipper on a long haul. For instance, a shipment 587]coming from . . . points *out of Kansas where there is no through rate published, . . . we accept if from the connecting line and bill it out then on a proportional rate, which is less than the local tariff rate.

Q. Now, you spoke there of a local tariff rate; if those words have a well-defined meaning, I wish you would state what those are.

A. A local rate is a rate applying locally from one station to another on the same road.

Q. In that term "local rate," as distinguished from "proportional rate," how about the origin of the shipment?

A. That is where it originates and terminates on the same line.

And E. E. Smythe, the general freight agent of the garnishee, under whose direction the schedules embracing this proportional rate were prepared and filed, testified:

Q. Mr. Smythe, what is meant in railroading by "common points?"

A. Common points are points which take the same rate. . . .

Q. Common points are comparatively close together, taking the same rates?

A. Yes, sir.

Q. How far north is Omaha from Kansas City?

A. 220 or 226 miles. . . .

Q. How far north from Kansas City is Atchison and Leavenworth?

A. Between 30 and 40 miles.

Q. And St. Joe about 60 miles north of Kansas City?

A. Yes, sir, 60.

Q. Is Omaha a common point with Leavenworth, Atchison, St. Joe, and Kansas City?

A. No, sir. . . .

Q. Now, Mr. Smythe, I will ask you to state what is known in railroading as "proportional rates," what does that expression mean, if it has any fixed or definite meaning?

A. Proportional rates are rates established

in a great many centers—grain centers, if you please—on grain coming from any territory which may be shipped there for re-shipment. . . .

Q. I will ask you if the words "proportional rates" have a fixed and definite meaning among railroad men, especially among traffic men?

A. Yes, sir. . . .

Q. Can you give us an illustration, so we will understand it more definitely? Give your own illustration of shipments coming into Kansas City and *going out[588 again.

A. We will take Wichita, Kansas. Some Kansas City firm will buy hay and grain there from a Wichita dealer, or some point in that territory, and ship that hay to Kansas City to John Jones Commission Company. Mr. Jones pays the freight on that car, and in the meantime . . . he may have sold that car of hay or grain to go to New Orleans, . . . and he accordingly comes to you, or presents to the general agent the expense bill covering the freight in, and when that is checked to see that the correct rate is applied, it goes out on a proportional rate from Kansas City or any other point where the proportional rate applies, at the proportional rate named in the tariff. . . .

Q. Explain in your own way.

A. You want me to explain what that tariff [the proportional one now under consideration] means? What it would apply on?

Q. Yes, sir, just explain the meaning of this expression "in connection with the Chicago Great Western" and the other roads.

A. That tariff would apply on grain coming into Kansas City on any railroad in America [and bound] to Texarkana. . . .

Q. You say it would apply on grain coming into Kansas City from any point in the world? Yes, sir, any place in America.

This testimony, bearing upon the meaning of the proportional rate schedules, was not in any way contradicted.

It was not shown whether those schedules were sanctioned by the other railroads over which the haul, when there was such, from the common points to the garnishee's road, was to be made; and while it was shown that those schedules were regularly printed, and that copies thereof were sent to the freight offices of the garnishee at Kansas City and other points, and were there kept open to public inspection, it was not shown that copies were posted in public and conspicuous places in those offices.

Respecting the existence of an applicable local rate on the northern line from Omaha

to Kansas City, the witness Smythe testified:

Q. I will ask you to state if you know 589]*what the rate was in 1901 on grain between Omaha and Kansas City.

A. Yes, sir.

Q. I will ask you to state what it was.

A. The rate was 9 cents.

Q. Is that what you call a legal rate?

A. It was the legal rate; yes, sir.

Q. That is, between Omaha and Kansas City?

A. Yes, sir.

Q. On what roads was that in effect?

A. In effect over the Burlington, Missouri Pacific, and all lines reaching Omaha running into Kansas City.

This testimony was offered and admitted without objection, and its effect was in no way impaired or qualified, save as the same witness, as also others, testified to the existence of a rate of 6½ cents, called the "Missouri arbitrary," on grain carried from Omaha to Kansas City when destined to points beyond. If this latter was an individual rate of the northern line, and not a conventional division of some joint through rate, as to which the testimony was somewhat uncertain, it was applicable to the shipments in question; otherwise the 9-cent rate was applicable. In either event there was a lawful local rate covering the haul over the northern line.

At the trial the plaintiff took the position, not that the proportional rate was unreasonable, preferential, discriminatory, or otherwise objectionable under the interstate commerce act, but that the special agreement was valid, and the garnishee consequently was under a common-law liability to Forrester Brothers for all that it had collected in excess of the stipulated 8-cent rate for the haul over its road. And the garnishee's position, insisted upon throughout the trial, is reflected by the following declarations of law which it tendered and the court rejected:

"Where an interstate shipment of merchandise passes from the point of origin to the point of destination over the lines of two separate carriers, and such carriers have not, by agreement, established a joint rate over their said lines, and filed and published the same in the manner required by the interstate commerce act, then the only lawful charge for transportation to be ap- 590]plied to such *shipment is the published tariff rate of the first carrier from the point of origin of the shipment to the point of connection with the second carrier, plus the published tariff charge of the second carrier from the point of connection

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with the first carrier to the point of destination.

"On interstate shipments of merchandise the only lawful rates applicable thereto are such rates as have been filed and published in the manner required by the interstate commerce act."

And, applying those declarations to the evidence, the garnishee insisted that during the time of the shipments in question, lawfully established local rates, applicable thereto, were in force upon the two roads, and that those rates were not superseded or displaced by the special agreement with the shipper; that the rates agreed upon, that is, the joint through rate and the 8-cent rate, never became legally operative, because never embraced in any schedule filed with the Interstate Commerce Commission; and, finally, that the charges exacted for the haul over its road conformed to the lawfully established rate, and were the only charges which lawfully could have been accepted.

The trial court sustained the plaintiff's position, made a general finding in its favor, and entered judgment thereon against the garnishee. The supreme court of the state affirmed the finding and judgment (79 Kan. 59, 99 Pac. 819), and this writ of error was then allowed.

Consideration must first be given to a motion to dismiss, advanced upon two grounds: (1) That no right or immunity under a statute of the United States was "specially set up or claimed," within the meaning of Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, in the state courts, and (2) that in those courts the facts were found generally against the garnishee, that the finding is conclusive upon this court, and that the errors assigned, when rightly considered, but challenge the finding, and therefore present nothing which is open to review.

*The first ground obviously is not[591 tenable. The garnishee insisted throughout the proceedings that no recovery could be had against it consistently with the interstate commerce act, because, in disregarding the agreement for the special rate and in exacting the proportional rate, first of 10 and later of 14 cents, it but conformed to the provisions of that act governing the rates to be applied to interstate shipments. This was an adequate assertion of a right or immunity under that act, for it named the act, indicated wherein it was claimed to be applicable, and invoked its protection. *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075.

The second ground has more color, but is also untenable. While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in *Mackay v. Dillon*, 4 How. 421, 447, 11 L. ed. 1038, 1050, where the state courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision "on the effect of such evidence may be fully considered here." In *Dower v. Richards*, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704, where the conclusiveness of findings of fact by a state court was elaborately considered, it was recognized that where the question is "of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court." In *Stanley v. Schwalby*, 162 U. S. 255, 274, 277-279, 40 L. ed. 960, 966-968, 16 Sup. Ct. Rep. 754, which was an action of ejectment, 592]*the validity of an authority exercised under the United States was drawn in question, and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the state court found that he had such knowledge. In this court it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said: "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence." And, upon examining the evidence, this court held it to be "wholly insufficient, in fact and in law,

to support the conclusion that the attorney had any notice of the previous deed to McMillan," and accordingly reversed the judgment of the state court. And in *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, a case arising under the Federal safety appliance law, wherein the state court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery, this court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute. *Perhaps the most frequent[593 exercise of this power occurs in cases arising under the clause of the Constitution forbidding a state to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 697, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265, a leading case upon the subject, contains this statement of the settled rule: "Whether an alleged contract arises from state legislation, or by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States." A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state. *Huntington v. Attrill*, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224, was such a case. It was a suit in Maryland upon a judgment obtained in New York under a statute of the latter state imposing a liability for the debts of a corporation upon a director making a false certificate respecting its condition. The court of appeals of Maryland held that the judgment was for a strictly penal liability, and therefore not within the protection of the full-faith-and-credit clause. But when the case came here it was held that "if the state court declines to give full faith and credit to a judgment of another state because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability." And upon reaching the con-

clusion that in that instance the original liability was not strictly penal, this court reversed the judgment of the court of appeals of Maryland.

594] *When due regard is had for the rule before indicated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence, which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the Federal right set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the *résumé* which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the interpretation and application of the interstate commerce act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154, 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), and also of other questions of law bearing upon the Federal right, such as the legal effect of evidence.

Coming, then, to the questions arising upon the case made by the evidence, we have seen that when the agreement for the special rate was made, and during the time of the shipments in question, there was in force on the garnishee's road a lawful proportional rate, at first of 10 and later of 14 cents, applicable to these shipments, unless it was objectionable in some of the following particulars:

(a) Although it was shown that the schedules embodying this rate were regularly printed, duly filed with the Interstate Commerce Commission, and kept open to public inspection at the freight offices of the garnishee at Kansas City and other points, it was not shown that copies were posted in public and conspicuous places in those offices, as required by § 6 of the interstate commerce act. Posting, however, was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates *actually in force*. Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358.

(b) It was not shown that these schedules were sanctioned by the other railroads designated therein, they *being the roads over which the haul to the garnishee's road from the common points was to be made when the shipments were received from connecting lines at those points. Such a showing, however, was not necessary here. The other roads had no interest in the rate as applied to shipments received by the garnishee from the northern line at Kansas City, as were the shipments in question.

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As applied to them the rate was not joint, but an individual rate of the garnishee. The sanction of the other roads was essential only to its application to the haul from the common points, when there was such.

(c) As before stated, the heading of those schedules indicated that they were adopted by the garnishee "in connection with" other designated railroads, they being the ones just mentioned as interested in the rate when applied to shipments received from connecting lines at the common points. This, it is contended, meant that the rate was applicable only to shipments received by the garnishee from those roads. But an examination of the schedules satisfies us that they had no such meaning. The heading merely reflected the fact that the rate, in some of its applications, was to be a joint one as between the garnishee and the designated roads. The schedules themselves did not restrict the rate to shipments received from those roads, but, on the contrary, indicated that it was applicable to shipments received by the garnishee at Kansas City from any connecting line. This view of it was fortified, unnecessarily, as we think, by the uncontradicted testimony of expert witnesses, who declared that the rate was applicable to shipments originating on any connecting line, whether received by the garnishee at Kansas City, or by one of the designated roads at a common point.

The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to *Kansas city. True, this testimony[596 was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded. Diaz v. United States, 223 U. S. 442, ante, 500, 32 Sup. Ct. Rep. 250; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 9, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; United States v. McCoy, 193 U. S. 593, 598, 48 L. ed. 805, 807, 24 Sup. Ct. Rep. 528. And while it may have been left somewhat uncertain as to which of two such rates, one of 6½ and the other of 9 cents, was the applicable one, it was disclosed with certainty that it was one or the other.

Such being the state of the evidence, the necessary conclusion, as matter of law, is that an applicable and lawfully established local rate was in force on each road. And as it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates, unless the latter were superseded or displaced by the special agreement.

We are thus brought to the question of the validity of that agreement. Not only did it contemplate a departure from the established local rates for the benefit of a single shipper, but no schedule embracing the rates agreed upon was filed with the Interstate Commerce Commission. Section 6 of the interstate commerce act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and 597] likewise *prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences, and the like. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates, and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act. The true effect of the statute in this regard—we speak of the statute as it existed in 1901—is clearly stated in the opinion of the circuit court of appeals for the eighth circuit, in *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, 833, as follows:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one

road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, *each participating carrier im-[598 ppliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic."

We conclude, as matter of law, that the special agreement was void, that the established local rates were unaffected by it, that the rate collected by the garnishee was the applicable legal rate, and that the finding and judgment should have been in favor of, and not against, the garnishee.

To avoid any misapprehension in respect of the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damages under the interstate commerce act, and no claim that the rate collected was unreasonable, preferential, discriminatory, or otherwise violative of that act, but only an attempt to enforce a supposed liability for a breach of the special agreement. See *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, ante, 288, 32 Sup. Ct. Rep. 114.

For the reasons given, the judgment of the Supreme Court of Kansas is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

*UNITED STATES, Plff. in Err., [599
v.

HARVEY C. MILLER and Morris F. Miller.
(No. 607.)

UNITED STATES, Plff. in Err.,
v.

HARVEY C. MILLER and Morris F. Miller.
(No. 608.)

(See S. C. Reporter's ed. 599-605.)

Appeal — by government in criminal case — scope of review.

1. The question presented for decision on
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direct writ of error to a circuit court from judgments sustaining demurrers to indictments under the act to regulate commerce of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), making it a misdemeanor for a shipper knowingly to solicit, accept, or receive a rebate or concession whereby property is transported in interstate commerce at a less rate than that named in the tariffs "published and filed" by the carrier, on the ground that the indictments did not allege that the schedules and tariffs claimed to have been violated were posted in the manner required by law, is whether compliance with the requirements of the act as to posting of tariffs is essential to bring a tariff within the descriptive terms of the act. [For other cases, see Appeal and Error, I. e. in Digest Sup. Ct. 1908.]

Carriers — interstate freight rates — posting.

2. Compliance with the requirements of § 6 of the act to regulate commerce of June 29, 1906, that copies of schedules and tariffs for the use of the public shall be "posted" in two public and conspicuous places in every depot, so as to be readily accessible to the public, is not essential to bring a tariff within the provision of such act making it a misdemeanor for any shipper knowingly to solicit, accept, or receive a rebate or concession whereby property is transported in interstate commerce at a less rate than that named in the tariffs "published and filed" by such carrier, as publication is a step in establishing rates, while posting is a duty arising from the fact that they have been established.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

[Nos. 607 and 608.]

Argued January 9, 1912. Decided February 26, 1912.

IN ERROR to the Circuit Court of the United States for the Southern District of Georgia to review judgments sustaining demurrers to indictments for violation of the act to regulate commerce by accepting rebates. Reversed.

See same case below, 187 Fed. 375.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for plaintiff in error:

The posting of rates in the depots was not essential to their establishment.

United States v. Howell, 4 Inters. Com. Rep. 818, 56 Fed. 21; Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 450, 452, 51 L. ed. 562-564, 27 Sup. Ct. Rep. 358.

NOTE.—On review by government in criminal case, under the act of March 2, 1907—see note to United States v. Stevenson, 54 L. ed. U. S. 153.
56 L. ed.

Mr. **Alexander A. Lawrence** argued the cause, and, with Messrs. M. Hampton Todd and William W. Osborne, filed a brief for defendants in error.

Posting being a condition precedent to the operation of the penal provision of the statute under consideration, no departure from an unposted rate subjects the shipper to such penal provisions.

Hardaway v. State, 1 Ga. App. 150, 58 S. E. 141; United States v. Cook, 17 Wall. 174, 21 L. ed. 539; United States v. Wood, 145 Fed. 410; Camden Iron Works v. United States, 85 C. C. A. 585, 158 Fed. 564.

Mr. Justice **Van Devanter** delivered the opinion of the court:

These were indictments under that provision of the act to regulate commerce (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149) which makes it a misdemeanor for a shipper knowingly to solicit, accept, or receive, from any common carrier subject to the act, a rebate or concession whereby property is transported in interstate commerce "at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act;" and the question presented for decision is whether compliance with the requirement in respect of the posting of tariffs in the depots, stations, or offices of the carrier, is essential to bring a tariff within the descriptive terms of that provision. We say this is the question for decision, because it appears from the record that the circuit court, in sustaining demurrers to the indictments, placed its decision solely upon the ground that they did "not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law," and because upon these direct writs of error we must accept that court's interpretation of the indictments, and confine our review to the question of the construction of the statute involved in its decision. United States v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123; United States v. Kissel, 218 U. S. 601, 606, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124.

That the act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates, whether individual or joint, to be charged for "the transportation in interstate commerce of property over their lines, and that the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of this court. In speaking of the rates which must be

thus observed, the act variously designates them as the rates "named in the tariffs published and filed," the "charges which have been filed and published," the "charges which are specified in the tariff filed and in effect at the time," the "regular charges . . . as fixed by the schedules of rates provided for in this act," and the "regular rates then established and in force;" but in none of these expressions is there any suggestion that posting is a necessary step in establishing rates; that is, in making them legally operative. Of course, these expressions, although differing in words, are identical in meaning, and to ascertain that meaning recourse must be had to § 6 of the act, which, at the time of the offenses charged in these indictments (1907-8), declared:

"Sec. 6. That every common carrier subject to the provisions of this act shall file with the Commission created by this act, and print and keep open to public inspection, schedules showing all the rates, fares, and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established [meaning adopted]. . . . Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . . *Provided, That the Commission may, in its discretion and for good cause shown, . . . modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. . . . No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act. . . ."

It is the contention of the defendants that a tariff is not published in the sense in which the act uses that term unless printed copies are "kept posted in two public and conspicuous places in every depot," etc., and it was this contention that prevailed in the circuit court. But, in our opinion, it is not sound. Publication and posting in the sense of the act are essentially dis-

tingent. This is the import of the provision that the requirements relating to "publishing, posting, and filing" may be modified by the Commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form, preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates,—a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed.

Like views of the posting clause were expressed in *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358, and upon further consideration we perceive no reason for departing from them. See also *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* 223 U. S. 573, ante, 556, 32 Sup. Ct. Rep. 316.

Whether, by failure to comply with that clause, a carrier becomes subject to a penalty, is apart from the present case and need not now be considered.

The judgments are reversed, and the cases are remanded for further proceedings in conformity with this opinion.

Reversed.

PHILADELPHIA COMPANY, Appt.,
v.

HENRY L. STIMSON,† Secretary of War.

(See S. C. Reporter's ed. 605-633.)

United States — suit against officer.

1. The exemption of the United States

†Resignation of Jacob M. Dickinson as Secretary of War suggested November 13, 1911, and Henry L. Stimson, his successor in office, substituted as party appellee herein.

NOTE.—On suit against Federal officers or agents as suit against United States—see
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from suit does not preclude an action to prevent the Secretary of War from causing criminal proceedings to be instituted against a riparian owner because of the reclamation and occupation of his land outside prescribed harbor limits, if his rights of property were wrongfully invaded in fixing such limits.

[For other cases, see *United States*, 183-189, in *Digest Sup. Ct.* 1908.]

Injunction — restraining institution of criminal proceedings.

2. One whose property rights have been invaded in fixing harbor lines may maintain an action to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against him in accordance with the provisions of the act of Congress of March 3, 1899 (30 Stat. at L. 1121, 1151-1153, chap. 425, U. S. Comp. Stat. 1901, pp. 3541, 3542, 3544), §§ 11, 12, 17, for undertaking the reclamation and occupation of land belonging to him beyond the prescribed harbor limits.

[For other cases, see *Injunction*, 39, in *Digest Sup. Ct.* 1908.]

Courts — territorial limitation — Secretary of War.

3. An action to prevent the Secretary of War from causing threatened criminal proceedings to be instituted against a riparian owner because of the reclamation and occupation of land outside prescribed harbor limits, in the fixing of which such owner claims that his property rights have been invaded, will lie in a court of equity in the District of Columbia in which jurisdiction of the person of the Secretary of War has been properly obtained, although complainant will be required to prove his title to land outside such harbor limits, the harbor line is claimed to be a cloud upon his title, and such land is in a navigable river in Pennsylvania, outside the territorial jurisdiction of the court.

[For other cases, see *Courts*, 66-74, in *Digest Sup. Ct.* 1908.]

Waters — avulsion — submergence.

4. The loss of land, caused by its washing away from time to time by heavy floods and freshets in a rapidly flowing stream, during a course of years, falls upon the riparian owner, so as to preclude him from reclaiming land thus submerged inside the former line of high water.

[For other cases, see *Waters*, 122-142, in *Digest Sup. Ct.* 1908.]

Pleading — avulsion.

5. An allegation that land was washed away from time to time by heavy floods and freshets, so that a large part of land be-

came slightly submerged during a course of years, is insufficient to show that there was at any particular time such a sudden, violent, and visible change in the channel of the stream as to entitle the riparian owner to retain his boundary to the original line.

[For other cases, see *Waters*, 122-142, in *Digest Sup. Ct.* 1908.]

Harbor lines — effect of raising of water by dam — rights of subsequent purchasers.

6. The lawful building of a dam by the United States in the interest of navigation, to increase the depth of water in a harbor in a navigable river, by which an island therein was submerged to a much greater extent than previously, and water over a part thereof rendered navigable at certain times, gives a subsequent purchaser of such island no right to relief because of its construction, in an action by him against the Secretary of War, to have harbor lines fixed in accordance with conditions existing before his purchase set aside.

Commerce — control of navigable waters — fixing harbor lines.

7. The action of a state in providing by statute for fixing the lines of ordinary high and low water in certain rivers, and that the lines so fixed shall be firm and stable for the purposes intended by the statute, however effective as between the state and riparian owners to fix a permanent boundary at the high-water line so fixed, gives such owners no rights which will prevent Congress, in the exercise of its right to regulate commerce, from fixing harbor lines in accordance with the high-water mark as changed by the wearing away of the banks in the course of years.

[For other cases, see *Commerce*, II. a, in *Digest Sup. Ct.* 1908.]

Harbors — changing lines of.

8. The act of the Secretary of War in fixing harbor lines for an island in a navigable river, several hundred feet outside the high-water mark, does not exhaust his authority so as to prevent him from subsequently changing the lines so as to make them coincide with the actual high-water mark, in order more fully to preserve the river from obstruction.

[For other cases, see *Harbors*, in *Digest Sup. Ct.* 1908.]

[No. 70.]

Argued November 16, 1911. Decided March 4, 1912.

note to *Louisiana v. Garfield*, 53 L. ed. U. S. 92.

On injunction against criminal proceedings—see notes to *Crichto v. Dahner*, 21 L.R.A. 84; *Hall v. Dunn*, 25 L.R.A. (N.S.) 193; *Denton v. McDonald*, 34 L.R.A. (N.S.) 454; and *Arbuckle v. Blackburn*, 51 C. C. A. 133.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 56 L. ed.

L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

On the establishment of dock lines—see note to *Grand Rapids v. Powers*, 14 L.R.A. 498.

APPPEAL from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of the District, sustaining a demurrer to a bill to set aside certain harbor lines so far as they encroached on complainant's land, and to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against complainant for reclamation and occupation of land outside of the prescribed limits. Affirmed.

See same case below, 33 App. D. C. 338.

The facts are stated in the opinion.

Mr. William L. Marbury argued the cause, and, with Messrs. Morgan H. Beach, W. Graham Bowdoin, and Samuel McClay, filed a brief for appellant:

The rights of riparian owners on navigable waters, which include the question of how far, if at all, their title to land shall be deemed to be affected by the action of the water, are determined and governed by the laws of the respective states.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 10 Sup. Ct. Rep. 210.

In the state of Pennsylvania it is settled that the soil up to low-water mark in a navigable stream is the property of the commonwealth.

Monongahela Bridge Co. v. Kirk, 46 Pa. 120, 84 Am. Dec. 527.

That being the case, the power of the state of Pennsylvania to regulate and determine by law the effect which any change in the high- and low-water mark, caused by the action of the water, should have upon its title and that of the riparian owner, would seem not fairly open to question.

Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 10 Sup. Ct. Rep. 210; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228.

Overflowing of the complainant's property, caused by the construction by the government in improving the harbor, would be *damnum absque injuria*; but it has never been contended until now that the owner of the property would not have the right to protect himself against such injury if he could, at his own expense, either by excluding or expelling the water.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622.

When, as here, instead of the submergence or loss of land being caused by the gradual and imperceptible encroachment of the

water, it is caused by sudden floods and freshets, the law is well settled that the title of the owner of the island is not affected, and that he may at any time exclude the water or occupy the land itself submerged in any way he pleases.

Rex v. Yarborough, 3 Barn. & C. 91, 4 Dowl. & R. 790, 27 Revised Rep. 292, 1 Eng. Rul. Cas. 458; *Angell, Tide Waters*, 1st ed. 71; *Emans v. Turnbull*, 2 Johns. 314, 3 Am. Dec. 427; 2 Bl. Com. 261; *Hargrave's Law Tracts*, 28; *Gould, Waters*, § 158; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581; *Wallace v. Driver*, 61 Ark. 429, 31 L.R.A. 319, 33 S. W. 641; *Hunt, Boundaries*, p. 29; *St. Louis v. Rutz*, 138 U. S. 226, 245, 34 L. ed. 941, 949, 11 Sup. Ct. Rep. 337; *Nebraska v. Iowa*, 145 U. S. 519, 36 L. ed. 798, 12 Sup. Ct. Rep. 976; *Widdecombe v. Rosemiller*, 118 Fed. 295.

This proceeding is not virtually a suit against the United States, but a suit to restrain the defendant, an executive officer of the Federal government, from exceeding his authority, to the impairment of the property rights of the claimant.

United States v. Lee, 106 U. S. 218, 219, 27 L. ed. 181, 1 Sup. Ct. Rep. 240; *Noble v. Union River Logging R. Co.* 147 U. S. 171, 172, 37 L. ed. 125, 126, 13 Sup. Ct. Rep. 271; *American School v. McAnnulty*, 187 U. S. 108-110, 47 L. ed. 96, 97, 23 Sup. Ct. Rep. 33; *Scott v. Donald*, 165 U. S. 112, 41 L. ed. 653, 17 Sup. Ct. Rep. 262; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Osborn v. Bank of United States*, 9 Wheat. 842, 6 L. ed. 229; *New Orleans v. Paine*, 147 U. S. 264, 37 L. ed. 163, 13 Sup. Ct. Rep. 303; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541.

A court of equity will entertain a bill to restrain the institution and prosecution of criminal proceedings, as threatened in this case, for the reason that such prosecution would interfere with, and in effect destroy, the property rights of the complainant in the land in question. Because in fact the prosecution of such proceedings would entirely deprive plaintiff of the use of its property, and constitute such a taking of private property for public uses as a court of equity will always enjoin.

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541; *Dobbins v. Los Angeles*, 195 U. S. 241, 49 L. ed. 177, 25 Sup. Ct. Rep. 18; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 401; *Greenwich Ins. Co. v. Carroll*, 125 Fed. 126; *Frewin v. Lewis*, 4 Myl. & C. 249, 9 Sim. 66; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Georgia R. & Bkg. Co. v. Atlanta*, 223 U. S.

118 Ga. 490, 45 S. E. 256; Central Trust Co. v. Citizens' Street R. Co. 80 Fed. 225.

The action of the defendant and his agent in seeking forcibly to prevent the complainant from building upon its land constitutes an interference with, and practically a destruction of, the complainant's property rights, and such action, if permitted to be persisted in, would constitute in law a taking of the complainant's property without compensation, in violation of his rights under the Constitution of the United States, and especially under the 5th Amendment thereof.

Georgia R. & Bkg. Co. v. Atlanta, 118 Ga. 491, 45 S. E. 256; 1 Lewis, Em. Dom. ¶ 56; Eaton v. Boston, C. & M. R. Co. 51 N. H. 511, 12 Am. Rep. 147.

The fact that the land of the plaintiff of which the defendant is depriving the plaintiff the possession by threatening it with criminal prosecution if it uses the land—which, in other words, the defendant is attempting to take without compensation—is not located in the District of Columbia does not deprive the supreme court of the District of jurisdiction.

Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Phelps v. McDonald, 99 U. S. 298, 25 L. ed. 473.

Assistant Attorney General Knaebel argued the cause and filed a brief for appellee:

As riparian owner, with or without the fee of the river bed, the appellant is in no position to complain of the new harbor line. No "taking" of property is involved in the incidental losses which result to such an owner from the exercise by Congress of its paramount power to improve and protect navigation. The navigable waters are the public property of the nation, and subject to all the requisite legislation by Congress.

Gilman v. Philadelphia, 3 Wall. 725, 18 L. ed. 99.

Congress may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

South Carolina v. Georgia, 93 U. S. 4, 11, 12, 23 L. ed. 782, 784.

And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power.

Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239.

Although the title to the shore and submerged soil is in the various states and in-

dividual owners under them, it is always subject to the servitude in respect of navigation, created in favor of the Federal government by the Constitution, and riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard.

Gibson v. United States, 166 U. S. 269, 272, 276, 41 L. ed. 996, 1000, 1002, 17 Sup. Ct. Rep. 578.

The pier involved in Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48, not only cut off permanently all access to navigability from plaintiff's land, but was also constructed on submerged land—part of the river bed—of which he held the fee, yet it was held to be *damnum absque injuria*.

See also Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803; Hawkins Point Light-House Case, 39 Fed. 77.

In this case reliance seems to be placed entirely upon some proposed immunity, right, or privilege acquired from the state. But Congress, by its legislation, has assumed exclusive control over the whole subject of obstructions in navigable waters, and no obstruction hereafter made, with or without the permission of the state, can be considered lawful unless it have also the sanction of the National government.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 708, 43 L. ed. 1136, 1143, 19 Sup. Ct. Rep. 770; Union Bridge Co. v. United States, 204 U. S. 364, 400, 401, 51 L. ed. 523, 539, 540, 27 Sup. Ct. Rep. 367.

If the questions involved primarily be those of both fact and law, which respect, and the resolution of which must decide, the appellant's title under the laws of Pennsylvania, the suit as a suit to quiet title is local in character and must fail for that reason, and perhaps others (Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 639, 47 L. ed. 626, 631, 23 Sup. Ct. Rep. 434; Columbia National Sand Dredging Co. v. Morton, 28 App. D. C. 288, 7 L.R.A. (N.S.) 114, 8 Ann. Cas. 511), besides the reason that the suit could not possibly be other than a suit against the United States.

If, on the other hand, it be assumed, as appellant claims, that the bill but seeks to avoid the harbor line as a mere cloud, the invalidity of which cannot be established without parol proofs, but can be so made to appear without injecting any question of title, the suit is equally a proceeding against the government, because, unless the government, and not the defendant, be the claimant of the supposed adverse rights based upon or evidenced by the harbor line,

and so the only real party in interest in this litigation, the line is without any legal significance at all.

Properly understood, however, a harbor line, even if erroneously laid out, is not to be regarded as a cloud upon the title to the land over which it extends. *Prosser v. Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528, appears to be determinative of this proposition as well as of the whole case.

See *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; *Harbor Line Comrs. v. State*, 2 Wash. 530, 27 Pac. 550.

The suit is in effect a suit against the United States.

Minnesota v. Hitchcock, 185 U. S. 386, 46 L. ed. 962, 22 Sup. Ct. Rep. 650; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; *Harkrader v. Wadley*, 172 U. S. 148, 169, 43 L. ed. 399, 406, 19 Sup. Ct. Rep. 119; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

The case is also clearly not such a suit as ought to be entertained by the court as a court of equity. It is objectionable from this standpoint in the first place as a pure attempt to enjoin valid criminal proceedings.

Re *Sawyer*, 124 U. S. 200, 209, 210, 31 L. ed. 402, 405, 406, 8 Sup. Ct. Rep. 482; *Harkrader v. Wadley*, 172 U. S. 148, 170, 43 L. ed. 399, 406, 19 Sup. Ct. Rep. 119; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought in the supreme court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, Pennsylvania, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing criminal proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. The court of appeals of the District affirmed a decree sustaining a demurrer to the bill, and the complainant appeals.

The allegations of the bill, in substance, are as follows:

The complainant, a corporation of the commonwealth of Pennsylvania, is the owner in fee of "Brunot's island," formerly Chartier's or Hamilton's island, in the Ohio river, in Allegheny county, Pennsylvania. In 1858, a statute was enacted in Pennsylvania, providing for the appointment of commissioners to ascertain and

mark the "lines of ordinary high and low water in the Allegheny, Monongahela, and Ohio rivers in the vicinity of Pittsburgh. The act recited that the lines of land along the shores of the rivers had not been clearly ascertained, and it was important to all persons interested that their several rights and privileges should be defined. After the commissioners' surveys had been completed and the lines located, opportunity was to be afforded in the court by which they were appointed, for any needed corrections; and the map or plan finally determined upon was to be recorded. The statute declared that "the lines so approved shall forever after be deemed, adjudged, and taken firm and stable for the purposes aforesaid." Proceedings were had accordingly and the high- and low-water lines along the shore of Brunot's island were definitely fixed. In consequence the bill asserts that all the land, whether or not under water, inside of the commissioners' lines, became the property of the owners of Brunot's island; and that by virtue of the statute, and the action of the commissioners under it in fixing the high-water line as a permanent boundary, the right of the owners of the island to accretions beyond that line was taken away, while at the same time they were no longer subject to loss or diminution of their land by reason of its submergence "through the avulsion of floods or freshets or through gradual erosion."

Subsequent to the establishment, in 1865, of the state commissioners' line, a considerable portion of the shore of the island, "on the so-called back channel, within the said high-water mark," was washed away from time to time by heavy floods and freshets, so that a large part of the upland was slightly submerged, but not to an extent sufficient to permit of navigation. Some years ago, the United States government, in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio river a short distance below Brunot's island, known as the Davis island dam. And the effect of this dam, says the bill, [615] by the increase of the depth of water in the channel, was to submerge Brunot's island to a far greater extent, and to make the water over the complainant's land navigable "at certain times, and for certain purposes," where it was not navigable before.

In 1895, the Secretary of War, claiming to act under the authority of § 12 of the act of Congress of September 19, 1890 [26 Stat. at L. 455, chap. 907], and knowing that the shore of Brunot's island had been washed away by floods and freshets, es-

tablished a harbor line which ran across the complainant's land within the line of the state commissioners. It is further alleged that although the submerged land was generally covered by water, "it was not ordinarily navigable water," and "has never constituted, nor does it now constitute, a part of the public navigable waters of the United States;" that no authority was conferred by the act of Congress upon the Secretary of War to regulate or interfere with the use of the complainant's land by the establishment of harbor lines upon the same; and that, even if the water over this land was in fact part of the public navigable waters of the United States, without being rendered thus navigable by the construction of the dam, still the Secretary of War had no right so to run the harbor line over the land in question as to deprive the complainant of its use and enjoyment. It was the right of the complainant, the bill avers, to repair the damage caused by floods and freshets, and to reclaim the submerged portion by filling in or wharfing, "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

In 1907, the Secretary of War, claiming authority under § 11 of the act of Congress of March 3, 1899 [30 Stat. at L. 1151, chap. 425, U. S. Comp. Stat. 1901, p. 3541], against the complainant's protest, changed the harbor line. The report of the United States engineer at Pittsburg stated that the conditions of high and low water had not changed since 1895, but as, along a part of the shore of the island. 616]*the harbor line of 1895 ran several hundred feet outside high-water mark as it then existed, it seemed advisable to change it so as to coincide with the actual high-water mark. A copy of the report with the order of the Secretary of War, dated February 23, 1907, was annexed to the bill and made a part of it. In this it is stated that the location of the proposed harbor lines was within the bed of the stream as it existed as a physical fact.

The bill further shows that to facilitate the delivery of coal for the operation of its power house on the island, the complainant desired to reclaim a part of it which had been submerged by establishing a coal wharf on the back channel, where both the harbor line of 1895 and that of 1907 "ran some distance landward of the said state commissioners' high-water line." According to the proposed plans, the wharf or pier was to extend over the complainant's land and to cross both of the harbor lines to the state commissioners' line. While these plans were being perfected, the Secretary of War, through his representa-

tive, the United States engineer officer at Pittsburg, declared to the complainant that it had no right to build upon its land across either of the harbor lines, and he refused to permit the complainant to reclaim its land or to build its wharf thereon outside the harbor line of 1907. He threatened that if it undertook to do so, he would prevent it and cause the complainant and its employees "to be prosecuted and fined by the authorities of the Federal government" for violations of the acts of Congress of September 19, 1890, and March 3, 1899. It was further charged that if the Secretary of War had authority to fix the original harbor line of 1895, that his power was exhausted by what was then done, and that the harbor line of 1907 was wholly unauthorized.

In consequence of the severe penalties prescribed by the acts of Congress for the construction of building, *piers, or[617 wharves outside any harbor line established by the Secretary of War, and by reason of the defendant's threats of prosecution in case the complainant carried out its plan of reclamation and the construction of its wharf, the bill avers that the complainant is prevented from making use of its property; that the defendant's action constitutes a taking of its property for public use without just compensation; that it is subjected in its endeavor, so long as the harbor line remains unmodified, to a multiplicity of criminal prosecutions; and that the harbor line is a cloud upon its title.

The provisions of the acts of Congress, referred to in the bill, are set forth in the margin.†

*In demurring to the bill the defend-[618 ant asserted that it was bad in substance,

†Section 12 of the act of September 19, 1890 (chap. 907, 26 Stat. at L. 426, 455), provided:

"Sec. 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight [25 Stat. at L. 425, chap. 860, U. S. Comp. Stat. 1901, p. 3526], be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceed-

and also specially assigned the following grounds:

"1. This proceeding is virtually a suit against the United States.

"2. This court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

"3. This court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant.

"4. This court has no jurisdiction to declare or define harbor lines or boundary lines of land outside the District of Columbia and in the state of Pennsylvania.

619] "5. There is no jurisdiction in this court to base any decree removing cloud up-

on an alleged title of complainants in realty in the state of Pennsylvania, nor to accomplish the same by declaring the harbor lines referred to in the bill null and void."

First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully *invas- [620 ed. *Little v. Barreme*, 2 Cranch, 170, 2 L. ed. 243; *United States v. Lee*, 106 U. S. 196,

ing one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court, for each offense."

Sections 11, 12, and 17 of the act of March 3, 1899 (chap. 425, 30 Stat. at L. 1121, 1151-1153, U. S. Comp. Stat. 1901, pp. 3541, 3542, 3544), are as follows:

"Sec. 11. That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: Provided, That whenever the Secretary of War grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement, either by excavating in some part of the harbor, including tide-water channels between high- and low-water mark, to such an extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

"Sec. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions

of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

"Sec. 17. That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this act; and it shall be the duty of the district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this act, or who may violate any of the provisions of the same: Provided, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: And provided further, That whenever any arrest is made under the provisions of this act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States."

220, 221, 27 L. ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; *Belknap v. Schild*, 161 U. S. 10, 18, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Scranton v. Wheeler*, 179 U. S. 141, 152, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868, 6 L. ed. 204, 229, 235; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; *Scott v. Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ex parte Young*, 209 U. S. 123, 159, 160, 52 L. ed. 714, 728, 729, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union River Logging R. Co.* 147 U. S. 165, 171, 172, 37 L. ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

Second. The second and third grounds of demurrer, specially stated, raise the question as to the jurisdiction of the court to restrain the defendant from instituting criminal proceedings.

A court of equity, said this court in *Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482, "has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors.

. . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade

621]*the domain of the courts of common law, or of the executive and administrative

56 L. ed.

department of the government." *Harkrader v. Wadley*, 172 U. S. 148, 170, 43 L. ed. 399, 406, 19 Sup. Ct. Rep. 119; *Fitts v. McGhee*, 172 U. S. 516, 531, 43 L. ed. 535, 542, 19 Sup. Ct. Rep. 269; 2 Story, Eq. Jur. § 893. But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, 218, 47 L. ed. 778, 780, 781, 23 Sup. Ct. Rep. 498; *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; *Ex parte Young*, 209 U. S. 123, 161, 162, 52 L. ed. 714, 729, 730, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young*, 209 U. S. p. 159, 52 L. ed. 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully *assuming to exercise[622 the power of government against the individual owner, is guilty of an invasion of private property.

By § 12 of the act of March 3, 1899, it was provided that every person and every corporation which should violate any pro-

vision of § 11, relating to the observance of harbor lines, or any rule or regulation made by the Secretary of War in pursuance of that section, should be guilty of a misdemeanor and punished by fine or imprisonment. By § 17 it was made the duty of district attorneys of the United States to prosecute all offenders whenever requested by the Secretary of War. If the complainant's rights, as against the defendant, were as claimed, it was entitled to adequate protection. And, in such case, the remedy might properly embrace the restraining of unfounded prosecutions.

Third. The fourth and fifth special grounds of demurrer assert that the supreme court of the District of Columbia had no jurisdiction to define boundaries in the state of Pennsylvania, or to remove a cloud upon title to land in that state.

In dealing with these objections, it is important to observe the precise nature of the suit. It was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass. *Northern Indiana R. Co. v. Michigan C. R. Co.* 15 How. 233, 14 L. ed. 674; *Ellenwood v. Marietta Chair Co.* 158 U. S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771. It was not brought to try the naked question of the title to the land. *Massie v. Watts*, 6 Cranch, 148, 158, 3 L. ed. 181, 185. While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still, if its title to the land under water were established or admitted to be as alleged, the question would remain whether the defendant, in imposing restrictions upon the use of the property, was acting by virtue of authority validly conferred by a general act of 623]*Congress. This was the principal question which the complainant sought to have determined. The defendant is within the District, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the defendant and may compel obedience to its decree. *Phelps v. McDonald*, 99 U. S. 298, 308, 25 L. ed. 473, 476.

Fourth. Assuming that the court had jurisdiction, we are brought to a consideration of the equity of the bill.

It has been held that the establishment of a general system of harbor lines, for the protection of commerce and navigation, is not of itself an injury to property

and cannot be restrained. *Yesler v. Washington Harbor Line*, 146 U. S. 646, 656, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; *Prosser v. Northern P. R. Co.* 152 U. S. 59, 64, 65, 38 L. ed. 352, 355, 356, 14 Sup. Ct. Rep. 528. But it has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights, and thus to prevent him from enjoying what is asserted to be the lawful use of his property. *Prosser v. Northern P. R. Co. supra*.

The complainant starts with the lines as laid down, in 1865, by the state commissioners. These lines are averred to be "exactly in accordance with the then-existing actual ordinary high- and low-water marks." The argument is (1) that, independently of the effect of the statute of Pennsylvania, the washing away of the banks, and the submergence of a portion of the island, during the subsequent years, worked no loss of title, but that it remained absolute, including the right of reclamation and improvement of the submerged land inside the former line of high water; and (2) that, by virtue of the statute, the *boundary was permanently fixed by [624 the state commissioners' high-water line, and no subsequent encroachment of the water could affect the rights of the owner.

(1) It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line. *Rex v. Yarborough*, 3 Barn. & C. 91; *S. C.* 2 Bligh, N. R. 147, 4 Dowl. & R. 790, 27 Revised Rep. 292, 1 Dow. & C. 178, 1 Eng. Rul. Cas. 458, sub nom. *Gifford v. Yarborough*, 5 Bing. 163; *New Orleans v. United States*, 10 Pet. 662, 717, 9 L. ed. 573, 594; *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818; *St. Clair County v. Lovington*, 23 Wall. 46, 67, 68, 23 L. ed. 59, 63, 64; *Jefferys v. East Omaha Land Co.* 134 U. S. 178, 190-193, 33 L. ed. 872, 876-878, 10 Sup. Ct. Rep. 518; *St. Louis v. Rutz*, 138 U. S. 226, 245, 34 L. ed. 941, 949, 11 Sup. Ct. Rep. 337; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Shively v. Bowlby*, 152 U. S. 1, 35, 38 L. ed. 331, 344, 14 Sup. Ct. Rep. 548; *Hale, De Jure Maris*, chaps. 1, 4, 6; *Hargrave's Law Tracts*; *Mulry v. Norton*, 100 N. Y. 424,

53 Am. Rep. 206, 3 N. E. 581. The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits. It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *St. Clair County v. Lovington*, 23 Wall. 46, 67, 68, 23 L. ed. 59, 63, 64.

We are confined to the allegations of the 625]bill. We have *not the advantage of proof and findings, or even of a particularized description in the bill itself, as to the precise character of the alterations in the banks of Brunot's island which took place during the long period to which the bill refers. It is alleged "that subsequent to the establishment in 1865 by said commissioners of the line of high-water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's island on the so-called back channel, within the said high-water mark, was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is, the land above high-water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind thereover." There is no other statement on the point save that the bill asserts that the complainant was entitled to reclaim, "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

It is manifest that these allegations are inadequate to support the complainant's contention. The determining words are that the land was "washed away from time to time by heavy floods and freshets," and the reference is to what occurred in many years. This is far from a statement that at any particular time there was such a sudden, violent, and visible change as to justify a departure from the ordinary rule which governs accretion and diminution, albeit the stream suffer wide fluctuations in volume, the current be swift, and the banks afford slight resistance to encroachment.

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For example, the general principle of accretion, which has that of diminution as its correlative, applies to such rivers as the Mississippi and the Missouri, notwithstanding the extent and rapidity of the changes constantly effected. *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 190-193, 33 L. ed. 872, 876-878, 10 Sup. Ct. Rep. 518; *Jones v. Souldard*, 24 How. 41, 16 L. ed. 604; *Saulet v. Shepherd*, 4 Wall. 602, 18 L. ed. 442; *St. Clair *County* [626 v. *Lovington*, supra; *St. Louis v. Rutz*, 138 U. S. 226, 245, 34 L. ed. 941, 949, 11 Sup. Ct. Rep. 337. In *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396, the question concerned the boundary between the two states, which, by the acts of admission, was the middle of the main channel of the Missouri river. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. The opinion of the court describes in detail the physical conditions along the river. The court said (pp. 368-370): "The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. . . . The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto. Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and onto the other, the law of accretion controls on the Missouri river, as elsewhere; and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between states. The boundary, therefore, between Iowa and Nebraska, is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream." And, in the same case, the decision clearly points the distinction between the losses and gains thus described, and an abrupt, visible change where at one place, at a particular time, the river having "pursued a course in the nature of an ox-bow, suddenly *cut through the neck of the bow, and [627 made for itself a new channel." (P. 370.)

The present case falls within the category first mentioned, and according to general principles of law the owner would bear the losses caused by the washings of the river.

The bill also alleges that "some years ago the United States government, in the interest of navigation, and in order to increase the depth of water in the harbor of Pittsburg, caused a dam to be constructed across the Ohio river a short distance below said Brunot's island, known as the Davis island dam. The effect of this dam was to very decidedly increase the depth of the water in the channel back of Brunot's island, and to cause the water of the river to flow higher upon the land of your orator, and to submerge same to a far greater extent, and in fact to make said water which submerged your orator's land navigable at certain times, and for certain purposes, which was not navigable before the construction of said dam."

It will be observed that it is said that the United States caused the erection of the dam in the interest of navigation. The complainant purchased the island subsequently, in the year 1896. And we are not concerned here with the question whether there was any appropriation of land of the former owner by the United States, and a cause of action arose to recover its value. *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Bedford v. United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 583, 584, 50 L. ed. 596, 605, 606, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175. So far as the bill shows, the dam was lawfully built, and the allegations with respect to it wholly fail to state any case entitling the complainant to relief by reason of its construction.

(2) The complainant, however, insists that the effect of the Pennsylvania statute was to fix the boundary of the island permanently at the state commissioners' high-**628***water line, and hence that within that line it was entitled to make the desired reclamation and improvement.

This statute (act of 16th April, 1858) provided that the commissioners' lines approved by the court should "forever after be deemed, adjudged, and taken firm and stable for the purposes aforesaid." The supreme court of Pennsylvania has held that the purpose of the act was to regulate the rights of the public in respect to navigation, and to prevent private rights from being exercised to the prejudice of

the public interest. *Wainwright v. McCullough*, 63 Pa. 66; *Zug v. Com.* 70 Pa. 138, 142; *Poor v. McClure*, 77 Pa. 214, 219; *Allegheny City v. Moorehead*, 80 Pa. 118, 139, 140. In *Wainwright v. McCullough* (1869) *supra*, that court, holding that the statute was not applicable to disputed boundaries between private owners, considered the navigable character of the rivers to which it related, the extent of riparian rights under the law of the state, and the meaning of the act in the light of the mischief which it was intended to correct. The court said:

"In order to arrive at the legal effect of the lines established by the commissioners under that act, we must ascertain its true purpose; and to reach this, it becomes necessary to examine the navigable character of the rivers Allegheny, Monongahela, and Ohio, and the rights of the riparian proprietors upon their banks. These rivers are among the largest in the state; larger than the Schuylkill and Lehigh, recognized as navigable in the early history of the province, and have been repeatedly held by name to be rivers naturally navigable, and therefore classed with the Delaware and Susquehanna. *Carson v. Blazer*, 2 Binn. 478, 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 79, 80; *Hunter v. Howard*, 10 Serg. & R. 244. Many acts have been passed declaring tributaries of these rivers navigable. But an act perhaps most pertinent to this controversy is that of 8th April, 1785, 2 Smith, Laws, 317, *regulating the tak-[**629** ing up of lands within the new purchase, of which the 13th section expressly excepts islands in the Ohio, Allegheny, and Delaware.

"This being the navigable character of the stream, the rights of the riparian owners are settled by numerous decisions, a few of which may be referred to: *Carson v. Blazer*, 2 Binn. 478; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 79, 80; *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278; *Zimmerman v. Union Canal Co.* 1 Watts & S. 346; *Bailey v. Miltenberger*, 31 Pa. 37; *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597, opinion by Sharswood, J., decided last winter at Philadelphia. From these and other cases, it will appear that the absolute title of the riparian proprietor extends to high-water mark only, and that between ordinary high and ordinary low water mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation, or cause obstructions to be placed

upon the shore between these lines, without express authority of the state.

"The case of *Bailey v. Miltenberger*, 31 Pa. 37, decided in 1856, doubtless had something to do in turning public attention to the shores of the streams surrounding the city of Pittsburgh, which led to the passage of the act of 1858, for the purpose of defining the low- and high-water lines. It referred to the mistaken idea entertained by some proprietors of making ground for their mills by depositing cinders on the shore between low- and high-water marks. 'The Allegheny and many other navigable rivers' (says the opinion) 'do not, at the time of low water, occupy over one third of their bed; and it would be most disastrous to allow every owner to fill out his land to low-water mark.' This state of affairs, for these rivers had been seriously encroached upon at and opposite Pittsburgh, 630] no doubt led to the act of 16th April, 1858, Pamph. L. 326. It begins by a recital: 'Whereas, the lines of lands on and along the shores at the rivers at and near the city of Pittsburgh, in the county of Allegheny, have never yet been clearly ascertained, and as it is important to the owners of such lands, the persons navigating the waters of, and the corporations adjacent to, such rivers, and to all parties interested, to know and to have their several rights and privileges in extension and limitation ascertained and defined; therefore,' etc. The first impression arising from this language might seem to be that the law was intended to ascertain and fix these high-and low-water lines to end all controversies, *private* as well as public. But a careful consideration of its purpose and provisions shows that it is not applicable to disputed boundaries between private owners, but was intended to regulate the respective rights of the public and the land-owners, over whose property the right of navigation extends between high-and low-water lines.

"The effect of the lines as established is thus stated: 'The lines so approved shall forever after be deemed, adjudged, and taken, firm and stable for purposes aforesaid.' If we seek for the 'aforesaid' purposes, the act discloses none but those relating to the public interest and that of the riparian owner. Then if we advert to the power of the state over navigable streams, as stated in the authorities cited, we discover that it is plenary over the subject of navigation and the improvement of these natural channels of commerce, while the ownership of the riparian proprietor is qualified between the lines of low and high water. The legislature may, there-
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fore, with great propriety, define the bounds of high and low water, by means of a suitable commission, for the purpose of regulating the public right, so as not to conflict with private interests, and to prevent private rights from being exercised *to[631 the prejudice of public interests; for example, to prevent the shores from being filled up with great banks of cinders."

In *Allegheny City v. Moorehead* (1875) 80 Pa. 118, 139, 140, the question was presented whether, by the fixing of water lines under the act of 1858, title had been vested in the city of Allegheny or lot owners, so as to defeat the claim of the plaintiff Moorehead under a subsequent patent from the state. The court said: "Nor can the operation of the act of 1858 be extended by the act of the commissioners in running out the low-water line of the northern shore of the river to include a part of what was Killbuck island. It was not the purpose of the commissioners to transfer titles, but to mark the boundaries of *riparian* rights, so as to make them certain and permanent in their extent. So it was not the intention of the framers of the act of 1858 to pass titles to lands, or to ascertain boundaries between individuals; but it was their purpose to regulate the right of navigation along the shores of these rivers by establishing high-and low-water lines, which would definitely ascertain and fix the extent to which the right could be exercised; and the extent to which the owners of the land could exercise their own rights under the law of the state."

It is contended for the complainant that the effect of the statute was to secure to riparian owners complete protection against any loss of their land, or of the right to build upon it, by reason of the gradual washing away of the banks of the river; that the state chose to resign to the riparian proprietors its right to such additions from the moving landward of the low-water mark, and required the owner at the same time to surrender, in the interest of navigation, his right to alluvion. In support, the complainant cites the opinion of the court of common pleas No. 2 of Allegheny county in *Briggs v. Pheil* (1894) 42 Pittsb. L. J. p. 18, in which it is said with respect to the same statute: "At the passage of this act *the riparian own-[632 er owned absolutely to high-water mark, and had a qualified property to low-water mark, and outside of the low-water mark the title to the soil was in the state. It seems to us there can be no doubt that the state had power to enact that thereafter the legal limits of the property should remain unchanged, either by gradual accretions or by gradual cutting away. This, in our

opinion, was intended to be done and was done by the act of assembly and the proceedings thereunder. . . . It seems to us that the establishing of these lines, at least, as between the state and riparian owners, fixed the lines for the future. If the river washes in beyond the high-water line the owner may fill up and reclaim the lost land, and, on the other hand, accretions belong to the state or the municipalities."

The established doctrine is invoked that the title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the laws of the several states, subject to the authority of Congress under the Constitution of the United States. *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Packer v. Bird*, 137 U. S. 661, 669, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. ed. 941, 947, 11 Sup. Ct. Rep. 337; *Hardin v. Jordan*, 140 U. S. 371, 382, 402, 35 L. ed. 428, 433, 440, 11 Sup. Ct. Rep. 808, 838; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 435, 452, 36 L. ed. 1018, 1036, 1042, 13 Sup. Ct. Rep. 110; *Shively v. Bowlby*, 152 U. S. 1, 40, 47, 38 L. ed. 331, 346-348, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 365, 42 L. ed. 497, 503, 18 Sup. Ct. Rep. 157. Let it be assumed that the Pennsylvania statute, in its regulation of rights, established the commissioners' high-water line as the permanent boundary of the island, and conferred upon the riparian owner, so far as it was within the competency of the state to confer it, the right to fill in and to erect structures to the limit of this line, regardless of subsequent changes in the actual high-water line caused by the washing away of the banks of the river. What, then, was the power of Congress with **633***respect to the river, and what was the extent of the authority conferred upon the Secretary of War?

When the Secretary of War, in 1895, fixed harbor lines, he dealt with the stream as it then existed. Whatever right the owner of the island may have had under the state law to reclaim the submerged land within the former line of high water had not been exercised. The bill, in alleging that the new harbor line ran across the complainant's land, must be taken to refer to the submerged land already described. This is the import of its allegations, and is shown by the record of the War Department annexed to the bill. In

establishing this line, the Secretary of War followed quite closely the actual line of high water as it existed in 1895, except in the back channel of Brunot's island, where it ran several hundred feet outside the then high-water mark. The change of the harbor line at this point, in 1907, was for the purpose of making the line coincide with the actual high-water mark; and in the report of the United States engineer who advised the change it was said that the lines as previously established had "not been filled out to, and the river bed on the Brunot island side, and in the bend referred to," was in "essentially the same condition" as at the time the harbor lines of 1895 were fixed. He added:

"Pittsburg suffers annually from floods, and in my opinion any material contraction of the channel immediately below the city would result in general injury and would produce conditions detrimental to navigation and to harborage; and it is respectfully recommended that the changes in the established harbor lines shown and described on the map inclosed herewith be made, such changes being necessary in preserving and protecting the harbor of Pittsburg.

"The location of the proposed harbor lines recommended in this communication is within the bed of the stream as it exists as a physical fact."

*To this stream, as a highway of **634** commerce, the power of Congress extended,—a power which "acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The exercise of this power could not be fettered by any grant made by the state of the soil which formed the bed of the river, or by any authority conferred by the state for the creation of obstructions to its navigation. "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always ex-

isted in the Parliament in England." *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. ed. 96, 99.

Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the state in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream (*Rolle's Abr.* 390; *Carlisle v. Graham*, L. R. 4 Exch. 361, 367, 368, L. J. Exch. N. S. 226, 21 L. T. N. S. 133, 18 Week. Rep. 318), 635]*and the authority of Congress goes with it. When the state of Pennsylvania established harbor lines and thus undertook to regulate the rights of navigation, its action, however effective as between the state and the riparian proprietors, was necessarily subject to the paramount power of Congress. The state lines can be conceded no permanent force, as against the will of Congress, without substituting for its constitutional authority the supremacy of the state with respect to navigable waters.

It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435. And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters. The principles applicable to this case have been repeatedly stated in recent decisions of this court. *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603.

In *Gibson v. United States*, supra, the construction of a dyke in the Ohio river under the authority of the Secretary of War had substantially destroyed the landing on and in front of a farm owned by Mrs. Gibson "by preventing the free egress and in-

gress to and from said landing" to "the main or navigable channel" of the river. The court said (pp. 271, 272, 275): "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. **South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345. . . . The 5th Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

Again, in *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48, the question arose with respect to the riparian owner whose access from his land to navigability was permanently lost by reason of the construction by the United States of a pier resting on submerged lands in front of his upland. The court said in its opinion (p. 163): "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, the Secretary of War found a bridge to be an unreasonable obstruction to the free navigation of the Allegheny river, and required the bridge company to make certain changes which it was insisted it could not be compelled to make without compensation. The court, after reviewing the

*authorities, said (pp. 400, 401): "Al-[637

though the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon the principle, not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the government to make compensation to the company, if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a state, place unreasonable obstructions in the water ways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the government to secure the free and unobstructed navigation of the water ways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all water ways of the United States against unreasonable obstructions, even those created under the sanction of a state; and that an order to so alter a bridge over a water way of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of a private property for public use for which compensation need be made."

It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in

question for the protection of the harbor of Pittsburg. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. *Union Bridge Co. v. United States*, supra (pp. 385-388); *Monongahela Bridge Co. v. United States*, 216 U. S. (p. 192) 54 L. ed. 441, 30 Sup. Ct. Rep. 356. That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred.

The bill failed to show any ground upon which the complainant was entitled to relief, and it was properly dismissed.

Decree affirmed.

*RE MERCHANTS' STOCK & GRAIN COMPANY et al., Petitioners.

(See S. C. Reporter's ed. 639-642.)

Appealable judgments — contempt.

A judgment finding defendants in a pending suit in equity guilty of contempt of its authority in violating an interlocutory injunction previously granted in a suit for the benefit of the complainant, and ordering the payment of specified fines, three fourths of which when paid should go to the complainant "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," is punitive instead of remedial, and reviewable on writ of error without awaiting a final decree in the suit in equity.

[For other cases, see Appeal and Error, I. d. 21, in Digest Sup. Ct. 1908.]

[No. 10, Original.]

Submitted December 11, 1911. Decided March 4, 1912.

PETITION for a writ of mandamus to require the Circuit Court of Appeals for the Eighth Circuit to reinstate and take jurisdiction of a writ of error dismissed by it. Granted.

The facts are stated in the opinion.

NOTE.—As to whether proceeding for contempt for violation of injunction is civil or criminal—see notes to *Vilter Mfg. Co. v. Humphrey*, 13 L.R.A.(N.S.) 591, and *Gompers v. Buck's Stove & Range Co.* 34 L.R.A.(N.S.) 874.

As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

Messrs. **Chester H. Krum** and **Henry S. Priest** submitted the cause for petitioners:

The motion should prevail unless the court is prepared to reverse *Re Christensen Engineering Co.* 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729.

Accurately defined, a fine is the pecuniary punishment of an offense, inflicted by the sentence of a court in the exercise of criminal jurisdiction.

Hanscomb v. Russell, 11 Gray, 374.

Mr. **Henry S. Robbins** submitted the cause for respondents:

The decision of this court in *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492, seems a sufficient authority for the denial of this motion.

The most practical solution of the question under consideration would seem to be to make the main or dominating purpose of the contempt proceeding the test of its character. This will make a contempt proceeding arising out of the violation of an injunction, and instituted by the party in whose favor it is issued, civil rather than criminal, as in such proceeding the main or dominating purpose is to obtain for the plaintiff the benefit of the injunction; except, perhaps, when a second disobedience of the same injunction may make the vindication of the court's authority the main object.

O'Shea v. O'Shea, L. R. 15 Prob. Div. 59, 59 L. J. Prob. N. S. 47, 38 Week. Rep. 374, 62 L. T. N. S. 713, 17 Cox, C. C. 107; *Oswald*, Contempt of Court, 3d ed. 36, 230; *Bessette v. W. B. Conkey Co.* 194 U. S. 324, 329, 48 L. ed. 997, 1002, 24 Sup. Ct. Rep. 665; *Seaward v. Patterson*, L. R. 1 Ch. Div. 545, 66 L. J. Ch. N. S. 267, 76 L. T. N. S. 215, 45 Week. Rep. 610; *Re Evans* [1893] 1 Ch. 267.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a petition for a writ of mandamus commanding the circuit court of appeals for the eighth circuit to reinstate and take jurisdiction of a writ of error dismissed by it. The facts are these: During the pendency, in a circuit court of the United States, of a suit in equity to which the petitioners were parties defendant, they were charged by the complainant with having wilfully violated an interlocutory injunction theretofore granted in the suit at the instance and for the benefit of the complainant, and at the hearing upon that complaint were by the court adjudged guilty of contempt of its authority, and ordered unconditionally to pay into

its registry, within five days, fines of \$1,000, \$2,000, and \$500, respectively, each fine, when paid, to go three fourths to the complainant, "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," and one fourth to the United States. With the purpose of securing a review of the order, the petitioners sued out a writ of error from the circuit court of appeals, and when the writ came on for hearing, that court dismissed it, upon the ground that the order, rightly considered, was remedial, not punitive, and was merely interlocutory, and reviewable only upon an appeal from the final decree. 109 C. C. A. 230, 187 Fed. 398.

We are not now concerned with whether the proceedings resulting in the order were such as to admit of the imposition of punitive, as distinguished from compensatory, fines, or whether, if the proceedings were not of that character, the order was erroneous in its entirety, or only "as to so much" [641 of the fines as was to go to the United States; and therefore we pass what is said in that connection in the briefs and come at once to the only question presented for decision; which is, whether the order was open to review upon a writ of error. The answer turns upon the character of the order. If it was remedial, it was merely interlocutory, and reviewable only upon an appeal from the final decree; but, if it was punitive, it was a final judgment, criminal in its nature, and reviewable upon a writ of error, without awaiting the final decree. Such an order against an offending suitor is deemed remedial when its purpose is to indemnify the injured suitor, or coercively to secure obedience to a mandate in his behalf, and is deemed punitive when its purpose is to vindicate the authority of the court by punishing the act of disobedience as a public wrong. As was said in *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 441, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492: "It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases." And again, p. 448: "The classification, then, depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial, by way of a coercive imprisonment, or a compensatory fine, payable to the complainant."

Applications of this test are shown in several adjudged cases in this court, among them being *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814; *Doyle v. London Guarantee & Acci. Co.* 204 U. S. 599, 51 L. ed. 641, 27 Sup. Ct. Rep. 313; *Ex parte Heller*, 214 U. S. 501, 53 L. ed.

1060, 29 Sup. Ct. Rep. 698; *Gompers v. Buck's Stove & Range Co.* supra, and *Re Christensen Engineering Co.* 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729. In the last case the defendant in a suit in equity in a circuit court was found guilty of contempt in disobeying an interlocutory injunction, and ordered to pay a fine of \$1,000, one half to go to the complainant and the other half to the United States. A writ of error, whereby it was sought to have the order reviewed in the circuit court [642] of appeals for the second circuit, *was dismissed by that court for the same reason that was assigned for the dismissal in the present case. A petition for a writ of mandamus, commanding the reinstatement of the writ of error, was then presented to this court, and, upon full consideration of the prior cases, was held to be well grounded. In that connection it was said:

"These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree. In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified and the circuit court of appeals should have taken jurisdiction."

That case differs from this only in that the portion of the fine made punitive was there one half, while here it is one fourth; but this, in our opinion, does not take this case out of the principle applied in that, which is, that the punitive feature of the order is dominant, and fixes its character for purposes of review.

We accordingly hold that the writ of error should be reinstated; and, as it is evident from the return that this will be done on the expression of our opinion, our order will be, petitioners entitled to mandamus.

643]*J. M. GRAHAM and B. F. Hampton,
Plffs. in Err.,

v.

CHARLES H. GILL.

(See S. C. Reporter's ed. 643-645.)

Appeal — when Federal question presented.

1. A Federal question is presented and decided in ejectment for a tract of land derived by the parties from the United States

under two different surveys, by passing adversely on plaintiff's objection to the admission of all evidence bearing on the location of the tract in controversy other than the field notes of the survey under which plaintiffs claimed, and which they contended were the best and only evidence, as by such decision the court passed on the competency and legal effect of the evidence as bearing on the effect of the requirements of U. S. Rev. Stat. § 2396, U. S. Comp. Stat. 1901, p. 1473, as to the mode of surveying lands.

[For other cases, see Appeal and Error, 1825-1871, in Digest Sup. Ct. 1908.]

Evidence — admissibility — precise location of land derived from the United States.

2. The defendant in ejectment for a tract of land derived from the United States under different surveys is not debarred by U. S. Rev. Stat. § 2396, U. S. Comp. Stat. 1901, p. 1473, from introducing evidence other than the field notes, which have a legitimate tendency to identify the precise location of the tract occupied by him, although such evidence may tend to show a mistake in the field notes of the survey of the tract claimed by plaintiff.

[For other cases, see Evidence, 2248-2253, in Digest Sup. Ct. 1908.]

[No. 173.]

Submitted February 29, 1912. Decided March 11, 1912.

IN ERROR to the Supreme Court of the State of Florida to review a judgment affirming a judgment of the Circuit Court of Lee County, in that state, in favor of defendant in an action of ejectment for a tract of land derived by the parties from the United States under two different surveys. Affirmed.

See same case below, first appeal, 54

NOTE.—On the general subject of writs of error from United States Supreme Court to the state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On writs of error to state courts in cases involving land titles—see note to *O'Connor v. Texas*, 50 L. ed. U. S. 1120.

On review of questions of fact on writ of error to a state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

Fla. 259, 45 So. 845; second appeal, 56 Fla. 316, 47 So. 917.

The facts are stated in the opinion.

Messrs. **Hilary A. Herbert, Benjamin Micou, and Richard P. Whiteley** submitted the cause for plaintiffs in error. Mr. **Hilton S. Hampton** was on the brief:

Denying to plaintiffs the right to locate their lands according to the recognized government survey made in accordance with the requirements of U. S. Rev. Stat. § 2396, U. S. Comp. Stat. 1901, p. 1473, is a denial of a right under a Federal statute which would give this court jurisdiction to review the case.

Doe ex dem. Barbarie v. Eslava, 9 How. 443, 13 L. ed. 209; *Lavagnino v. Uhlig*, 198 U. S. 443, 451, 49 L. ed. 1119, 1122, 25 Sup. Ct. Rep. 716.

A Federal right is specially set up or claimed in a state court so as to confer jurisdiction on this court of a writ of error to such court, where a claim of such right sufficiently appears in a motion for a new trial and in the assignments of error in the state court, and was fully considered and the decision was adverse to the claim.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

Surveys of the public lands, made under authority of Congress, are conclusive as between individuals.

Miller v. White, 23 Fla. 307, 2 So. 614; *Stonewall Phosphate Co. v. Peyton*, 39 Fla. 726, 23 So. 440; *Whitaker v. McBride*, 197 U. S. 512, 49 L. ed. 860, 25 Sup. Ct. Rep. 530; *Russell v. Maxwell Land Grant Co.* 158 U. S. 258, 39 L. ed. 972, 15 Sup. Ct. Rep. 827; *Stoneroad v. Stoneroad*, 158 U. S. 251, 252, 39 L. ed. 969, 970, 15 Sup. Ct. Rep. 822; *Chapman v. Pollock*, 70 Cal. 487, 11 Pac. 764.

Mr. **John W. Burton** submitted the cause for defendant in error:

The supreme court of Florida did not deal with the question of evidence or instruction as presenting a Federal question.

Mallett v. North Carolina, 181 U. S. 589-601, 45 L. ed. 1015-1021, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The presentation of a Federal question in a petition for rehearing is insufficient to bring the question before this court, unless the state court entertained the petition and decided the Federal question there raised.

Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Sayward v. Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Mallett v. North Carolina*, 181 U. S. 589, 56 L. ed.

45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

What the supreme court held was that the evidence did not sustain the claim of the plaintiffs that the defendant was in possession of the premises described in the declaration, and it is obvious that in passing on this question of the sufficiency of the evidence no Federal question was involved; hence there is nothing on which to found jurisdiction for review by this court.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; *Moreland v. Page*, 20 How. 522, 15 L. ed. 1009; *Almonester v. Kenton*, 9 How. 1, 13 L. ed. 21; *Gleason v. White*, 199 U. S. 54, 50 L. ed. 87, 25 Sup. Ct. Rep. 782.

Where the state court may properly dispose of a case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

The defendant's homestead entry segregated the land from the public domain, and it was not subject to be thereafter selected as school indemnity land.

Hodges v. Colcord, 193 U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433; *Holt v. Murphy*, 207 U. S. 407, 52 L. ed. 271, 28 Sup. Ct. Rep. 212.

When the defendant received his patent it related back to the date of his entry, and it was also superior to the subsequently acquired claim arising from the state's selection and the approval thereof.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300; *Sjoli v. Dreschel*, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154.

Memorandum opinion by direction of the court. By Mr. Chief Justice **White**:

Plaintiffs in error were plaintiffs below. The action was in ejectment. In brief, the controversy was this: An island in Charlotte harbor, Florida, described on the plat of survey as lot 1, section 8, of a specified township and range, was certified in 1899 by the United States to the state of Florida as school indemnity lands, and on *Oc-[644]tober 23, 1900, was conveyed by the state board of education to the plaintiffs in error. The claim in the action was that the defendant wrongfully withheld possession of this tract. On the other hand, the defendant averred that the land of which he was in possession was lot 2, section 17, the same township and range, and that he made a homestead entry thereon in 1896 and received a patent therefor in 1901. A portion of the plat of survey showing the location of the respective tracts is contained in an opinion

of the supreme court of the state of Florida, reversing a judgment for the plaintiffs, entered on the first trial of the case, reported in 54 Fla. 259, 45 So. 845.

The tract sold to the plaintiffs in error was surveyed by continuing a survey made from land lying east of the tract. That of the defendant was surveyed by continuing a survey made from lands lying to west of the tract. By using the field notes of the respective surveys it would seem that the tract in possession of the defendant was the tract which had been conveyed to both parties.

On the second trial the defendant was allowed to introduce evidence of the physical location of his tract with reference to other land in the vicinity, shown on the plat of survey, and such testimony, in the opinion of the court below, conclusively established that the tract in the possession of the defendant was in fact lot 2 of section 17, as delineated on the plat, according to which the land was patented to the defendant. There was a verdict and judgment on the second trial for the defendant, which was affirmed by the supreme court of the state. 56 Fla. 316, 47 So. 917.

It is insisted that the writ of error should be dismissed because no Federal question is involved. The contention, however, is without merit, since repeatedly during the trial the plaintiffs objected to the admission of all evidence bearing upon the location of the tract in controversy other than the field notes of the survey under which the [645]*plaintiffs claimed, which it was contended were the best and only evidence. In passing adversely on these objections the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon a question of Federal law; viz., the effect of the requirements of § 2396, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1473), as to the mode of surveying public lands. Thus a Federal question was presented and decided. *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. See also *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 54, 46 L. ed. 803, 22 Sup. Ct. Rep. 563.

Although, however, the Federal question was necessarily involved and decided, we are of opinion that under the circumstances of this case it comes directly within the rule announced in *French-Glenn Live Stock Co. v. Springer*, supra, and therefore the state court was right in holding that the defendant was not debarred from introducing evidence other than the field notes which had a legitimate tendency to indemnify the precise location of the tract occupied by him, al-

though such evidence might tend to show a mistake in the field notes of the survey of the tract which the plaintiffs claimed. Indeed, considering the peculiar nature of the controversy, we think it is true to say that the effect of the extrinsic evidence was in substance to support, and not to contradict, the plat with reference to which the tract was patented to the defendant.

The only Federal question presented by the record having been correctly adjudicated, it results that the judgment must be and it is affirmed.

*CHARLES CLASON, Appt., [646
v.

NICK MATKO, Dan Seffer, John Lopizich,
J. Krilanovich, and Louis Visalia.

(See S. C. Reporter's ed. 646-655.)

Appeal — construction of stipulation — dispute between counsel as to.

1. A judgment for plaintiffs in an action to quiet title to a mining claim which defendant claims under a relocation after an alleged forfeiture for failure to do the necessary assessment work before resumption of work by plaintiffs, on the ground that defendant's relocation was void, because the location notice attached to his cross complaint did not state that the claim was located as forfeited or abandoned property, as required by *Ariz. Rev. Stat. § 3241*, and that a stipulation that the respective locations on which the parties based their rights were each "duly made," and that all acts required by the laws of the United States and the territory of Arizona necessary to vest good and valid titles in the locators had been duly performed at the time of the location, except that plaintiffs do not admit that at the time of defendant's location the ground was open to location, because of failure to do assessment work, was entered into only to take the place of evidence, and not to supplant the pleadings, and that the cross complaint was insufficient for failure to show a proper location notice, will not be disturbed on appeal, even though the stipulation might be regarded as admitting the sufficiency of defendant's notice, where both parties amended their pleadings after the filing of the stipulation, and defendant was not deprived of any right by the decision as to the nature of the stipulation.

[For other cases, see *Appeal and Error*, VIII. m, 1, in *Digest Sup. Ct. 1908*.]

NOTE.—On location of mining claim—see notes to *Dwinnell v. Dyer*, 7 L.R.A. (N.S.) 763; *Last Chance Min. Co. v. Tyler*, 39 L. ed. U. S. 859, and *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 42 L. ed. U. S. 96.

As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

Mines — location notice — relocation.

2. A notice of location of mining property forfeited for failure to do the necessary assessment work must state that the property has been forfeited or abandoned, under Ariz. Rev. Stat. § 3241, providing for the "relocation of forfeited or abandoned lode claims" in one of two specified methods, and that in either case a new location monument shall be erected and the location notice shall state if the whole or any part of the new location is "located as abandoned property," or it will be void.

[For other cases, see Mines, 37-42, in Digest Sup. Ct. 1908.]

Courts — construction of territorial statute — following decision of territorial court.

3. The Supreme Court of the United States, in construing the provisions of a territorial statute which is ambiguous, will lean to the construction given it by the territorial supreme court.

[For other cases, see Courts, VII. d, in Digest Sup. Ct. 1908.]

Mines — location notice — conflict of statutes.

4. The requirement of Arizona Rev. Stat. § 3241, that the location notice of relocation of a mining claim forfeited for failure to do the necessary assessment work shall state that the claim was located as forfeited or abandoned property, is not in conflict with U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1427, permitting miners to make regulations as to location notices not in conflict with the laws of the United States or of the state or territory in which the mining district is situated, subject to the requirement that not less than \$100 worth of work shall be performed or improvements made each year, and that, upon a failure to comply with such conditions, the claim or mine on which such failure occurred shall be "open to relocation in the same manner as if no location of the same had ever been made."

[For other cases, see Mines, 37-43, in Digest Sup. Ct. 1908.]

[No. 178.]

Submitted February 26, 1912. Decided March 11, 1912.

APPEAL from the Supreme Court of the Territory of Arizona, to review a judgment affirming a judgment of the District Court of Pima County, in that territory, quieting plaintiffs' title to a mining claim on the ground that defendant's location notice was insufficient in failing to state that any part of the ground included therein was located as abandoned property, as required by the statute of the territory. Affirmed.

See same case below, 12 Ariz. 213, 100 Pac. 773.

The facts are stated in the opinion.

56 L. ed.

Mr. Edward M. Cleary submitted the cause for appellant. Mr. Edward J. Flanagan was on the brief:

The stipulation should be fairly construed so as to effectuate the intentions of the parties thereto.

20 Enc. Pl. & Pr. 657.

Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights.

Re New York, L. & W. R. Co. 98 N. Y. 453; Brady v. Nally, 151 N. Y. 258, 45 N. E. 549; Van Horn v. Burlington, C. R. & N. R. Co. 69 Iowa, 239, 28 N. W. 547; McCann v. McLennan, 3 Neb. 28; Re Cullinan, 113 App. Div. 485, 99 N. Y. Supp. 374; 20 Enc. Pl. & Pr. 607; Bennett v. Bennett, 65 Neb. 441, 91 N. W. 409, 96 N. W. 994; Hine v. New York Elev. R. Co. 149 N. Y. 154, 43 N. E. 414; Water Supply & Storage Co. v. Larimer & W. Reservoir Co. 25 Colo. 87, 53 Pac. 386; Muir v. Preferred Acci. Ins. Co. 203 Pa. 338, 53 Atl. 158; Thompson v. Fort Worth & R. G. R. Co. 31 Tex. Civ. App. 583, 73 S. W. 29; Traey v. Reed, 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69; Sittig v. Birkenstack, 35 Md. 273; People v. Stephens, 52 N. Y. 306; Vail v. Stone, 13 Iowa, 285.

Unless the stipulation is expressly so limited by its own terms, it will bind upon all trials of the case; and the only remedy of the party claiming to be injuriously affected is to move to relieve him from its operation upon a proper showing made by him.

20 Enc. Pl. & Pr. 626; Clason v. Baldwin, 152 N. Y. 204, 46 N. E. 324; Brown v. Pechman, 55 S. C. 555, 33 S. E. 732; Lee v. Wharton, 11 Tex. 61; Prestwood v. Watson, 111 Ala. 604, 20 So. 600; Ex parte Hayes, 92 Ala. 120, 9 So. 156; Hinckley v. Beckwith, 23 Wis. 328; United States Exp. Co. v. Jenkins, 73 Wis. 474, 41 N. W. 957; Vattier v. Hinde, 7 Pet. 252, 8 L. ed. 675; Blankinship v. Oklahoma City Light & Water Power Co. 4 Okla. 242, 43 Pac. 1088; Consolidated Steel & Wire Co. v. Burnham, 8 Okla. 514, 58 Pac. 654.

Section 3241 of Arizona Revised Statutes 1901 is not properly to be construed as having any application to a mining claim relocated as for failure to do annual work.

National Mill. & Min. Co. v. Piceolo, 54 Wash. 617, 104 Pac. 128, 57 Wash. 572, 107 Pac. 353.

The meaning given to Ariz. Rev. Stat. § 3241, by the territorial supreme court, obliterates the well-recognized distinction between abandoned and forfeited claims.

Farrell v. Lockhart, 210 U. S. 142, 52 L.

ed. 994, 16 L.R.A.(N.S.) 162, 28 Sup. Ct. Rep. 681; *Black v. Elkhorn Min. Co.* 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; *McCarthy v. Speed*, 11 S. D. 362, 50 L.R.A. 184, 77 N. W. 591, 19 Mor. Min. Rep. 615; *Street v. Delta Min. Co.* 42 Mont. 371, 112 Pac. 705; *St. John v. Kidd*, 26 Cal. 271, 4 Mor. Min. Rep. 454; 27 Cyc. 596; *Cunningham v. Pirrung*, 9 Ariz. 288, 80 Pac. 329; *Lindley, Mines*, 2d ed. § 643, p. 1830.

An argument against these views may be thought to arise from the phrasing of the general rule that relocation in any event admits the validity of the original location.

Lindley, Mines, § 404; *Goldex v. Murphy*, 31 Nev. 395, 103 Pac. 398, 105 Pac. 99; *Zerres v. Vanina*, 80 C. C. A. 366, 150 Fed. 564; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; *Wills v. Blain*, 5 N. M. 238, 20 Pac. 798; *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641, 19 Mor. Min. Rep. 625; *Slothower v. Hunter*, 15 Wyo. 189, 88 Pac. 38.

In all these cases there was an express statement in the location notice that there was in fact a relocation. We have been unable to find any authority to the effect that such a status, existing at the time of location, is fixed by other means than such an express admission. The effect of these decisions, therefore, is to hold the locator to the position he voluntarily assumes. We think we are warranted in saying that the law, in the absence, at least, of any statute on the subject, leaves the locator free on the point.

Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26.

If the subsequent claimant must decide the status of the former claim at his peril, then years might elapse from the time the former claimant did any work whatever; but if location had been perfected in the first instance, he would be required to do this or suffer defeat if the first locator determined to contest the new location after the subsequent claimant had perhaps shown its great value by development.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 77, 43 L. ed. 81, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370; *Russell v. Brosseau*, 65 Cal. 608, 4 Pac. 643; *Du Prat v. James*, 65 Cal. 555, 4 Pac. 562, 15 Mor. Min. Rep. 341.

If the statute be susceptible of the construction placed upon it by the territorial supreme court, it is unconstitutional and in conflict with §§ 1851 and 2324 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1427).

Lindley, Mines, §§ 248-251, 361, 380, 408, 642-645; *Penn v. Oldhauber*, 24 Mont. 287, 61 Pac. 649; *DuPrat v. James*, 65 Cal. 555,

4 Pac. 562, 15 Mor. Min. Rep. 341; *Russell v. Brosseau*, 65 Cal. 608, 4 Pac. 643; *Carlin v. Freeman*, 19 Colo. App. 334, 75 Pac. 26.

The location notice is not void for uncertainty.

1 *Lindley, Mines*, 2d ed. §§ 381, 383; *Tal-madge v. St. John*, 129 Cal. 430, 62 Pac. 79, 21 Mor. Min. Rep. 13; *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896; *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723, 20 Mor. Min. Rep. 13; *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 833; *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 362; *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 956, 22 Mor. Min. Rep. 69; *Fissure Min. Co. v. Old Susan Min. Co.* 22 Utah, 438, 63 Pac. 587, 21 Mor. Min. Rep. 125; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869, 20 Mor. Min. Rep. 103; *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 299, 32 L. ed. 967, 9 Sup. Ct. Rep. 348, 16 Mor. Min. Rep. 125.

Mr. A. R. Serven submitted the cause for appellees. Mr. John McGowan was on the brief:

Appellant was not a "co-owner" under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1427, and hence could not "advertise out" Daley, and for all these reasons the "advertising out," by which alone he claims, is absolutely void, and appellant is thus shown to be now a party without interest or standing herein.

Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192, 17 Mor. Min. Rep. 683.

This class of forfeitures has always been held by the courts to be odious and requires strict proof in every particular.

Hammer v. Garfield Min. & Mill. Co. 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548, 16 Mor. Min. Rep. 125; *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641, 19 Mor. Min. Rep. 625.

The stipulation is not available to appellant.

Walker v. Felt, 54 Cal. 386; *Holman v. Bank of Norfolk*, 12 Ala. 369; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

The supreme court of Arizona has frequently sustained the provision of our statute making every relocation notice void that failed to state whether any of the ground was relocated as abandoned or forfeited land, and held that the words "abandoned" and "forfeited" are used interchangeably therein.

Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329; *Score v. Griffin*, 9 Ariz. 295, 80 Pac. 331; *Matko v. Daley*, 10 Ariz. 175, 85

Pac. 721; *Clason v. Matko*, 12 Ariz. 213, 100 Pac. 773.

This provision is but an enactment of a common miners' rule that has always been held valid.

Rush v. French, 1 Ariz. 99, 25 Pac. 816, *Johnson v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036, 21 Mor. Min. Rep. 470; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. Rep. 411; *Flaherty v. Gwinn*, 1 Dak. 509, 12 Mor. Min. Rep. 605.

The contention that the stipulation fixes the legal effect of the relocation notice and answer is untenable.

Graves v. Alsap, 1 Ariz. 274, 25 Pac. 836; *Holms v. Johnston*, 12 Heisk. 158; 20 Enc. Pl. & Pr. 613, 614; *Tombstone v. Reilly*, 4 Ariz. 102, 33 Pac. 823.

This "relocator" claims no width, hence he is entitled to none, even as against the United States, and his location is void. This notice thus failing to contain what the statute requires, and a copy of which notice is to be recorded, is universally held to be void.

Deeney v. Mineral Creek Mill Co. 11 N. M. 279, 67 Pac. 724, 22 Mor. Min. Rep. 47; *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153.

By counting on a forfeiture, appellant conclusively admits the validity of appellees' location.

Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641, 19 Mor. Min. Rep. 625.

647] *Mr. Justice McKenna delivered the opinion of the court:

Action to quiet title to a mining claim called the "Bangor." The action was brought in the district court of the first judicial district, county of Pima, Arizona, by appellees as plaintiffs against August Daley, Clason, appellant here, subsequently being made a party. It will be convenient to refer to appellees as plaintiffs, and, except where necessary to expressly distinguish appellant, to include him with Daley under the designation of defendants.

The amended complaint alleged the location of the claim by one Scott Turner and the recording of the notice thereof, a copy of which was annexed to the complaint. There was an allegation of a claim of interest in the defendants, and a prayer for judgment "establishing a plaintiffs' estate in and exclusive possession" of the claim, and "debaring and forever estopping defendants, and each of them, from claiming any right or title" thereto.

The fourth amended answer of the de-

fendants denied the allegations of the complaint, except that Scott Turner filed a notice of location, and alleged that the claim of the plaintiffs had become forfeited on account of their failure to do the necessary assessment work, and that August Daley entered upon and relocated the claim.

As a further defense it was alleged that the action had been originally commenced against Daley as the sole defendant, and that in the first trial of the action a stipulation was entered into as follows:

"That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

"That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff and defendant base their rights to the 'Bangor' mining claim, were *each duly made, and that all[648 acts required by the laws of the United States, and the laws of the territory of Arizona, necessary to vest in the parties so locating good and valid titles so far as valid location could vest the same, such as mineral discovery, monumenting of claim, and recording of location notices, etc., were each duly done and performed at the time of said locations, except that plaintiffs do not admit that at the time of said location of defendant Daley the ground was open to such location, by reason of failure to do assessment work for the years 1901 and 1902, or to resume work prior to the date of said location."

The case went to trial, it is alleged, on the single issue whether the claim was open to location, and resulted in a judgment against Daley. A new trial was granted, which took place, and the agreement was recognized by counsel and the parties to be still in force and effect, and the same issue was submitted to a jury as in the first trial to the court, and a verdict and judgment went for defendant Daley. The judgment was reversed by the supreme court and the cause remanded for a new trial (10 Ariz. 175, 85 Pac. 721), the court saying: "Under the allegations in the defendant's cross complaint with respect to the relocation by the defendant of the claim as a forfeited claim, the location notice of the defendant would seem to be void, in failing to state that the claim was located as forfeited or abandoned property, as required by the statute, and would seem to afford the defendant no ground for the relief claimed. *Cunningham v. Pirrung*, 9 Ariz. 288, 80 Pac. 329."

The defendants, ever since the making and filing of the agreement, have relied on it as establishing the doing of assessment work on the claims and the validity of

the claims by reason thereof, the agreement never having been rescinded or withdrawn.

As a further defense it was urged that the decision of the supreme court of the territory in *Cunningham v. *Pirrung*, in so far as it holds or construes paragraph 3241 of the Revised Statutes of Arizona (Revision of 1901) as it existed prior to the amendment of 1907, to provide that the relocation of a forfeited mining claim shall be void or voidable when the relocation notice does not state that the "whole or any part of the ground covered by such relocation is relocated or located as forfeited ground," and that said statute, in so far as it justifies such interpretation, is contrary to the provisions of § 2324 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1427) in its general terms, and specifically to that portion thereof which provides that, upon failure to do assessment work therein required, such claim "shall be open to relocation in the same manner as if no location of the same had ever been made," and also contravenes the provisions of § 1851 of the Revised Statutes of the United States, and the defendants specially rely upon said provisions of the laws of the United States.

The defendants also filed a cross complaint, which asserted title in them, derived from a location of the claim, a notice of which was attached.

The cross complaint further alleged that the title of the plaintiffs was derived from Scott Turner, but that plaintiffs had no title, by reason of the fact that the annual assessment work had not been performed, that the ground was open to relocation, that before work was resumed Daley entered upon the land and duly located it as a mining claim, and performed all acts required to perfect the location prior to any attempt of the plaintiffs to resume work thereon. All of the separate defenses pleaded were made part of the cross complaint.

The location notice attached to the cross complaint did not state that the claim was located as forfeited or abandoned property.

There was attached to the cross complaint an amended location notice signed by August Daley and Charles Clason. It refers to the location by Daley, and states **650** *that such location was made as a relocation of forfeited ground for the failure to do assessment work. It further states that the amended notice of location was made, without waiving any previous rights, to secure all of the benefits of paragraph 3238 of the Revised Statutes of Arizona

(1901), and without waiving, but especially relying upon, the rights conferred upon Daley by his original location by the laws of the United States. It also states that Charles Clason was the owner of an undivided one-half interest under Daley.

A demurrer was sustained to the cross complaint, and, defendants declining to amend, judgment was entered for plaintiffs in accordance with the prayer of their complaint upon the stipulation of facts which has been set out above. The case was taken by Clason to the supreme court of the territory, where the judgment was affirmed.

The first question in the case is the effect of the stipulation. Appellant contends that all questions were "formally and expressly" admitted by it "pertaining to the validity of the respective locations except the single question, which was: Was the ground open to relocation on May 1, 1903, for plaintiffs' [appellees'] default in performing the work required by law? It covered, therefore, it is further contended, all acts necessary to be done under the laws of Arizona; that is, to come to the specific controversy in the case, the stipulation contained an admission that the location notice complied with the laws of Arizona, which necessarily includes compliance, it is contended, "with paragraph 3241 in any construction thereof."

The enumeration, it is urged, in the stipulation, of certain acts, cannot be considered "to have been intended to be exhaustive, but merely illustrative of what the parties considered necessary to make a valid location or relocation," and there was left open only the failure of plaintiffs to do the assessment work. And this, it is insisted further, was the construction of the parties through two trials, *and **651** that its insufficiency is now urged in the face of that fact, and that defendants have expended money upon the faith of the waiver of the defect in the location notice.

The trial court and the supreme court took a different view of the stipulation, and considered it as but a substitute for evidence, not waiving or supplying the defects of the pleadings, and that, therefore, as the cross complaint contained no allegation of compliance with law, it was insufficient. And both courts held further that the stipulation, as evidence, did not establish such compliance.

The supreme court explicitly, and the trial court impliedly, from its action in sustaining the demurrer to the cross complaint, took a different view of the stipulation as indicated by the conduct of the parties. The "obvious purpose of the parties in filing the stipulation," the supreme court

said, "was manifestly to have it take the place of testimony or other evidence upon the trial, and not to supplant the pleadings in the case." The court recognized that the parties could, under the laws of the territory, have agreed upon a statement of the case which would have been a substitute for formal pleadings, but, said the court, "such was not the attempt in this case, as appears from the stipulation itself and the conduct of the parties in the proceedings subsequent to the entry of the stipulation," both parties amending their pleadings after the filing of the stipulation. The court concluded, therefore, that it was not an agreed case under paragraph 1390 of the Revised Statutes of the territory, "but a stipulation appertaining merely to the matter of evidence upon the trial."

The record seems to support this view. It is true that it appears from the answer of the defendants that the stipulation was filed before the trial of the action, and that the case was submitted and decided against defendants on the single issue as to whether the claim was open to relocation by Daley.

652] *A new trial was granted, upon what ground does not appear. It does appear, however, that the case was again submitted on the same issue, a judgment resulting for Daley. It was reversed by the supreme court, the court intimating that the defect in the cross complaint in not stating that the relocation by Daley was upon forfeited or abandoned property, as required by the statute, would seem to make the relocation void, and the intimation was made to control or have effect in the new trial which was ordered. It was after this decision that the fourth amended answer and cross complaint were filed and the demurrer which attacked the cross complaint.

But if it be granted that the stipulation is ambiguous, we should not be disposed to reverse the lower court on its construction. It pertained simply to the conduct of the trial and a dispute between counsel as to the effect of an agreement between them, and its decision deprived the defendants in the action of no right which they possessed. We do not consider it necessary to review the cases cited by appellant, in which stipulations have been sustained and the power of the parties recognized to waive legal or even constitutional rights.

The construction of the supreme court of paragraph 3241 of the Revised Statutes of the territory is attacked. That section required, before its amendment in 1907, that in case of a relocation of a claim, the location notice should state if the whole or

any part of the new location was located as abandoned property, else it should be void. The section is inserted in the margin.†

*The contention is that this section, [653 properly considered, applied only to "abandoned property," and did not apply to forfeited property, and it is insisted that the distinction between forfeited and abandoned property is well recognized and is "obliterated" by the court's construction.

Of course, there may be a distinction between the abandonment of a claim and its forfeiture, but the question does not turn upon that distinction only, but upon what the statute means, considering all of its words; and, considering them all, we think they show quite clearly that no distinction was intended. Paragraph 3241 provides for "the relocation of forfeited or abandoned lode claims,"—in other words, claims which have once been located,—and "the new locator's right is based upon the loss of the possessory right acquired by the former locator," to quote from *Cunningham v. Pirrung*, 9 Ariz. 288, 80 Pac. 329, where the rule is announced. The same rule is repeated in subsequent cases, including that at bar. *Score v. Griffin*, 9 Ariz. 295, 80 Pac. 331; *Kinney v. Lundy*, 11 Ariz. 75, 89 Pac. 496.

Even if we should concede that the statute is ambiguous, we should certainly lean to agreement with the supreme court of the territory. *Fox v. Haarstick*, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; *Armijo v. Armijo*, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 707; *English v. Arizona*, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; *Santa Fe County v. New Mexico*, 215 U. S. 296, 305, 54 L. ed. 202, 207, 30 Sup. Ct. Rep. 111; *Albright*

†3241. (Sec. 11.) Such affidavit, when so recorded, shall be prima facie evidence of the performance of such labor or the making of such improvements, and said original affidavit, after it has been recorded, or a certified copy of record of same, or the record of same, shall be received as evidence accordingly by the courts of this territory. The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing the boundary in the same manner and to the same extent as is required in making an original location; or the relocater may sink the original discovery shaft 10 feet deeper than it was at the date of the commencement of such location, and shall erect new or make the old monuments the same as originally required. In either case a new location monument shall be erected, and the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be void.

v. Sandoval, 216 U. S. 331, 54 L. ed. 502, 30 Sup. Ct. Rep. 318.

The next contention of appellant is that if the statute admits of the construction 654] put upon it by the supreme *court of the territory it is unconstitutional and in conflict with §§ 1857 and 2324 of the Revised Statutes of the United States.

Upon what ground the statute is unconstitutional is not stated, and we can put that objection aside and pass to the asserted conflict with the Revised Statutes of the United States. It is only necessary to consider § 2324. Section 1857 expresses a general limitation of the powers of the territory by the Constitution and laws of the United States. The other section directly concerns locations of mining ground.

The section permits the miners to make regulations in regard to mining locations not in conflict with the laws of the United States or of the state or territory in which the mining district is situated, "governing the location, . . . subject to the following requirements: . . . On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

Appellant contends "that the spirit and intention of this enactment" is that, upon the failure of the original locator to comply with the provisions of the law, "the ground is open to relocation in the same manner as if no location had ever been made;" and that therefore neither a state nor a territory can impose conditions or burdens upon the exercise of the right.

That cannot be said to be a burden upon a right to which the right when taken is subject. The section gives to the miners of a mining district and the state or territory in which the district is situated the power to make regulations "governing the 655] location" of a mining claim, *subject to certain requirements. Those requirements may not be dispensed with, but they may be supplemented, certainly to the extent (and we need go no farther in this case) prescribed by the Arizona statute. It is a provision strictly "governing the location," and is not repugnant either to the spirit or the letter of the mining laws of the United States. Butte City Water Co. v.

Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211.

Judgment affirmed.

CEDAR RAPIDS GAS LIGHT COMPANY,
Plff. in Err.,

v.

CITY OF CEDAR RAPIDS, George S. Lightner, Mayor, et al.

(See S. C. Reporter's ed. 655-670.)

Constitutional law — what constitutes a contract.

1. A provision in an ordinance granting a renewal of its franchise to a gas company that, in consideration of the privileges granted, it shall furnish gas at a price not to exceed \$1.80 per thousand cubic feet, and 20 cents per thousand feet for discount to consumers paying before the 10th of each month after consumption, is not a contract by the city that the price shall be kept high enough to allow a discount for prompt payment, the agreement being that of the company alone, and subject to the city's power to regulate rates.

[For other cases, see Constitutional Law, 1246, in Digest Sup. Ct. 1908.]

Appeal — examination of evidence.

2. The evidence in an equity case will be examined by the Supreme Court of the United States in proceedings in error to the state court, in so far as such examination is necessary to answer questions properly saved, coming within the appellate jurisdiction of the Supreme Court of the United States, where the findings to be reviewed depend on questions which are re-examinable in such court.

[For other cases, see Appeal and Error, 2206, 2207, in Digest Sup. Ct. 1908.]

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On legislative regulation of rates, tolls, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On contract exemptions from legislative power to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

As to the power of a municipality, apart from contract, to regulate the rates to be charged by public-service corporations—see note to Bluefield Waterworks & Improv. Co. v. Bluefield, 33 L.R.A. (N.S.) 759.

Appeal — grounds for reversal — reduction in gas rates.

3. A judgment of a state court, dismissing a bill to restrain the enforcement of an ordinance fixing 90 cents per thousand cubic feet as a maximum gas rate, without prejudice to a later suit after the ordinance, which had not been enforced before the commencement of the suit, had been given a fair test, the court estimating on a value fixed by it for the plant considerably in excess of its cost, that the return under the ordinance would be over 6 per cent, will not be disturbed on review by the Supreme Court of the United States. [For other cases, see Appeal and Error, VIII. m, 7, in Digest Sup. Ct. 1908.]

[No. 163.]

Argued February 29, 1912. Decided March 11, 1912.

IN ERROR to the Supreme Court of the State of Iowa to review a decree which, modifying a decree of the District Court of Linn County, in that state, dismissed a bill to restrain the enforcement of an ordinance fixing 90 cents per thousand cubic feet as a maximum charge for gas, without prejudice to a later suit after the ordinance should have been given a fair test. Affirmed.

See same case below, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966.

The facts are stated in the opinion.

Mr. James H. Trewin argued the cause, and, with Mr. John N. Hughes, filed a brief for plaintiff in error:

The ordinance granting the plaintiff in error a franchise is a contract.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Sinking Fund Cases, 99 U. S. 700, 719, 25 L. ed. 496, 501; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 681, 29 L. ed. 525, 527, 6 Sup. Ct. Rep. 273; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

The power to pass ordinances regulating rates having been conferred on the city by the legislature, an ordinance fixing the 90-cent rate is a law within the meaning of the Constitution.

United States v. New Orleans, 98 U. S. 381, 382, 25 L. ed. 225; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Prentiss v. Southern R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; Wisconsin, M. & P. R. Co. v. Jacobson, 179 56 L. ed.

U. S. 297, 45 L. ed. 199, 21 Sup. Ct. Rep. 115.

A legislative enactment in the ordinary form of a statute may contain provisions which, when accepted and acted upon by individuals, become contracts between them and the state, within the protection of § 10 of art. 1 of the Federal Constitution.

New Jersey v. Yard, 95 U. S. 104-113, 24 L. ed. 352-354; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Public utility corporations are entitled to exercise their franchises during the terms thereof, and the obligations of such contracts are protected by the Constitution.

Fisk v. Jefferson, 116 U. S. 135, 29 L. ed. 588, 6 Sup. Ct. Rep. 329; Burton v. Koshkonong, 4 Fed. 377; Cary Library v. Bliss, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 92; Capital City Gaslight Co. v. Des Moines, 72 Fed. 831; Central Trust Co. v. Citizens' Street R. Co. 82 Fed. 13; Reagan v. Farmers' Loan & T. Co. 154 U. S. 392, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The plaintiff, having invested a large sum of money in the construction and maintenance of its gas plant, on the faith of the franchise, has vested rights to continue to enjoy the franchise during its term, including the discount provision, and to charge remunerative rates for gas, and these rights cannot be impaired or destroyed by the city under the guise of its reserved power to fix rates.

Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 756; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275; Com. v. Essex Co. 13 Gray, 239; Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496.

Grants of franchises to operate public utilities, when embodying the terms of a contract, are protected by the Federal Constitution from impairment by subsequent legislation, and notwithstanding the principle of strict construction, whatever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. Statutes and ordinances of this character are not to be extended by construction, nor should they be deprived of their meaning if it is plainly and clearly expressed.

Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The discount provision in effect grants to the company the right to impose a penalty for failure to make prompt payment on or before the 10th of the succeeding month,

and is of the very essence of the contract. Ibid.

Under § 1619 of the Code, the legislature of Iowa reserved the power to repeal, alter, or amend the charters of corporations, but the legislature of Iowa never exercised this power itself, nor did it ever confer this power on the defendant in error, either directly or by implication. Therefore, this case does not come within the rule laid down in the case of *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The basis of all calculations as to the reasonableness of the rates to be charged by a corporation furnishing gas to the public is the fair value of the property being so used, at the time of fixing the rate.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 438, 47 L. ed. 892, 23 Sup. Ct. Rep. 571, affirming 110 Fed. 702; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 82, 46 L. ed. 815, 22 Sup. Ct. Rep. 585; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Smyth v. Ames*, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; *Covington & L. Turnp. Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 363, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 261; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Lewis, Em. Dom.* § 462.

The value at the time the property is being used is to be ascertained.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *San Diego Land & Town Co. v. National City*, 174 U. S. 753, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lewis, Em. Dom.* last ed. 477;

Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

And it is the market value that is to be ascertained and considered as the fair value of the property.

Lewis, Em. Dom. last ed. 478; *Henry v. Dubuque & P. R. Co.* 2 Iowa, 300; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 715; *Beale & W. Railroad Rate Regulation*, § 355.

The owner of property devoted to a public use is entitled to the benefit of any appreciation in value above the original cost and cost of improvements, which is due to good management, or any natural causes.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275.

The value of the plant for which compensation must be made is obviously the fair value for which it might be sold to any other corporation or investor.

Smyth v. Ames, 169 U. S. 524, 42 L. ed. 841, 18 Sup. Ct. Rep. 418.

The question is not what the plant originally cost, or what amount of capital stock it has issued, but what it will cost to reproduce the plant in its present condition.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Ames v. Union P. R. Co.* 64 Fed. 165; *Beale & W. Railroad Rate Regulation*, § 255; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 715.

It is immaterial in what way the property was lawfully acquired, whether by labor, gift, or by making profitable use of a franchise previously granted; it is enough if it has become private property.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *Metropolitan Trust Co. v. Houston & T. C. R. Co.* 90 Fed. 683; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 540.

Good will or going value should be considered, in arriving at the value of plaintiff's property, upon which it is entitled to earn dividends.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Monongahela Nav. Co. v. United States*, 148 U. S. 313, 37 L. ed. 463,

13 Sup. Ct. Rep. 622; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; *Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615.

The plaintiff, in its contract with the city, assumed certain obligations and acquired certain rights. In the performance of these obligations and the exercise of these rights it invested capital and established its business. Has this business a value in addition to its tangible assets? The mere fact that the franchise was granted does not necessarily give it value, but the fact that plaintiff acted on it, invested money, organized and built up a business, gives it value as an established and going concern, in addition to the value of the tangible assets.

People v. O'Brien, 111 N. Y. 41, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

The franchise or going value is property, taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested with all the attributes of property generally.

Monongahela Nav. Co. v. United States, 148 U. S. 313, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *People v. O'Brien*, supra.

In rate cases, values of property and franchise should be taken into account. The court has recognized that the same principle is involved in rate regulation as in the exercise of the right of eminent domain.

Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 410, 38 L. ed. 1014, 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Ames v. Union P. R. Co.* 64 Fed. 165.

The question as to rate of income is, What rate of dividends would induce prudent men to invest in stock of the company representing the real value of the property as a going business? Certainly not less than an assured annual income of 6 per cent.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The value of all franchises, rights, and privileges should be taken at their value, not to the taker, but to the seller.

Fairbank v. United States, 181 U. S. 300, 45 L. ed. 869, 15 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; *Monongahela Nav. Co.* 56 L. ed.

v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

In fixing the value of the companies' franchises, the appraisers may give such regard as is demanded by ample and fair policy to the past investment, risks, and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing. The franchises must be valued as living franchises, not as dead or moribund.

Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

Allowance should be made, in addition to the value as otherwise established, that the gas company is a going concern, with a profitable business already established, and with a present income assured and now being earned.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974.

If the plaintiff's property were condemned and taken as an entirety, the franchise or going value would unquestionably be allowed. Under the present proceedings the owner has no option but to continue to own the property and receive the reduced rates, with the results that if no allowance is made for the going value, it would be in a worse position when regulated than when the property is taken outright.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Ames v. Union P. R. Co.* 64 Fed. 178.

The going value or franchise should not be discarded because of difficulty in ascertaining its amount.

Howe Mach. Co. v. Bryson, 44 Iowa, 166, 24 Am. Rep. 735; *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 272; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

The franchise is an easement or right of way in the streets, and hence is real property.

Milhau v. Sharp, 27 N. Y. 620, 84 Am. Dec. 314; *People v. O'Brien*, 111 N. Y. 40, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Ghee v. Northern Union Gas Co.* 158 N. Y. 510, 53 N. E. 692; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 435, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; *Water Comrs. v. Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348; *Kronsbein v. Rochester*, 76 App. Div. 494, 78 N. Y. Supp. 813; *Re East River Gas Co.* 122 App.

Div. 890, 106 N. Y. Supp. 1125; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 643; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Chicago v. Baer*, 41 Ill. 306; *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 5 L.R.A.(N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; *Rex v. Brighton Gas-light & Coke Co.* 5 Barn. & C. 466, 8 Dowl. & R. 308, 4 L. J. K. B. 213, 29 Revised Rep. 290.

A corporation cannot be deprived of its franchises except under the power of eminent domain, and upon payment of their full value.

Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; *Water Comrs. v. Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 44 N. Y. Supp. 825; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The power of the Federal government to regulate commerce does not authorize it to destroy a franchise of this kind without making just compensation for it.

United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Plaintiff's franchise is entitled to the same protection as any other property.

Parker v. Elmira, C. & N. R. Co. 165 N. Y. 274, 59 N. E. 81.

As the plaintiff in error cannot be deprived of its franchise granted by the city to operate its plant, except under the power of eminent domain and upon payment of value, it certainly cannot be deprived of its franchise indirectly, through the exercise of the legislative power regulating rates. The exercise of this power amounts to a taking of private property for public use.

Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191.

This court has never decided that, in fixing a rate, the going value or value of the franchise, or right to be a going concern, shall not be included, but in passing upon rate questions, it has been stated or assumed that the going value is to be included.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed.

1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Ames v. Union P. R. Co.* 64 Fed. 176; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The plant is not to be a public-service property to-day and something else to-morrow, and the company has a right to look to the future in making its permanent improvements.

San Diego Land & Town Co. v. National City, 174 U. S. 740, 43 L. ed. 1155, 19 Sup. Ct. Rep. 804.

It is the present value of the plant that should be taken into consideration.

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 540; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The elements entering into a fair rate to be charged for gas are:

1. The actual cost of all labor, materials, and immediate repairs necessary to manufacture the gas and place it at the disposal of the consumer.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Union P. R. Co. v. United States*, 99 U. S. 700, 25 L. ed. 496; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 265; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952; *Clyde v. Richmond & D. R. Co.* 57 Fed. 436.

2. A reasonable earning on account of depreciation of the plant.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Milwaukee Electric R. & Light Co. v. Milwaukee*, 87 Fed. 577; *Brymer v. Butler Water Co.* 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

Depreciation is due to three general factors, to wit:

(a) Inadequacy. Where, by reason of in-

creased demand, the machinery or mains, or some parts of them, become too small.

(b) Obsolescence. Where, by reason of new invention and advancement in the art, the machinery in use can no longer be economically operated.

(c) Physical decay. Where the apparatus and mains rust or wear out and have to be renewed.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 577; Southern P. Co. v. Railroad Comrs. 78 Fed. 265.

No ordinance fixing prices charged for a public service is reasonable which, in addition to the foregoing elements, does not allow to the investors a fair return on the money invested in the enterprise, with due regard to the nature and hazards of the business.

Des Moines v. Des Moines Waterworks Co. 95 Iowa, 348, 64 N. W. 269; Southern P. Co. v. Railroad Comrs. 78 Fed. 261; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

The special hazards incident to the business must be taken into consideration in determining the income which the company should receive over and above the fixed charges.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 272, 50 Pac. 633; Des Moines v. Des Moines Waterworks Co. 95 Iowa, 363, 64 N. W. 269.

The earlier leaning of the courts toward the doctrine that the legislative power to fix rates stops only at confiscation has been supplanted by the rule that rates must be reasonable; that is, such as to earn a fair, just, and adequate income on the investment.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; San Diego Land & Town Co. v. National City, 174 U. S. 753, 754, 43 L. ed. 1159, 1160, 19 Sup. Ct. Rep. 804; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 56 L. ed.

4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Munn v. Illinois, 94 U. S. 141, 24 L. ed. 89; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Central R. Co. v. Railroad Commission, 161 Fed. 995; Southern P. Co. v. Railroad Comrs. 78 Fed. 265; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482; Ames v. Union P. R. Co. 64 Fed. 165; Des Moines v. Des Moines Waterworks Co. 95 Iowa, 348, 64 N. W. 269; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Brymer v. Butler Water Co. 179 Pa. 251, 36 L.R.A. 260, 36 Atl. 249; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 115, 15 L.R.A.(N.S.) 108, 68 Atl. 676; Chicago Union Traction Co. v. State Board, 114 Fed. 561; Louisville & N. R. Co. v. Brown, 123 Fed. 951; Central R. Co. v. Railroad Commission, 161 Fed. 925; Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 585; Southern P. Co. v. Railroad Comrs. 78 Fed. 261; People ex rel. Jamaica Water Supply Co. v. State Tax Comrs. 128 App. Div. 13, 112 N. Y. Supp. 392; Spring Valley Waterworks v. San Francisco, 124 Fed. 598; International Bridge Co. v. Canada Southern R. Co. 7 Ont. App. Rep. 226, affirmed in L. R. 8 App. Cas. 723.

It is not enough that something is earned for the stockholders. They are entitled to fair compensation.

Smyth v. Ames, 169 U. S. 534, 547, 42 L. ed. 844, 849, 18 Sup. Ct. Rep. 418; Southern P. Co. v. Railroad Comrs. 78 Fed. 261; Des Moines v. Des Moines Waterworks Co. 95 Iowa, 363, 64 N. W. 269; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 236, 91 N. W. 1081.

To deprive the plaintiff of a fair and reasonable earning capacity, such as the citizen enjoys as to his money and as to all types of his property, is to deprive it of the equal protection of the laws.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The state may be said to have appropriated the gas plant to public use. For the appropriation it is bound to make a just, fair, and reasonable compensation.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

The question as to rate of income is what rate of dividends would induce prudent men to invest in stock of the company representing the real value of the property as a going business.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

It is proper to apply the prescribed rate to the past experience of the company, taking into consideration the increased cost of operation after the time when the new rate is applied.

Seaboard Air Line R. Co. v. Railroad Commission, 155 Fed. 792.

An annual income of 4.41 per cent on value of property, or 3.30 per cent on stock, after deducting fixed charges, is unreasonably low.

Spring Valley Waterworks v. San Francisco, 124 Fed. 574.

The compensation should be for the real, substantial value employed, and no legislation can diminish by one jot the rotund expression of the Constitution.

Virginia & T. R. Co. v. Henry, 8 Nev. 170; Spring Valley Waterworks v. San Francisco, supra.

The power to regulate is not the power to destroy, and limitation is not equivalent to confiscation.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Southern P. Co. v. Railroad Comrs. 78 Fed. 236.

Whatever the state may do, even with the creation of its own will, it must be in subordination to the inhibition of the Federal Constitution.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 7, 8 Ann. Cas. 614; Omaha Water Co. v. Omaha, 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615; Railroad Tax Cases, 13 Fed. 754.

When just compensation is determined, the least infraction of it is confiscation, and is a violation of the 14th Amendment to the Constitution of the United States and § 13 of art. 1 of the Constitution of Iowa, because it is a taking of private property for public use without just compensation.

Spring Valley Waterworks v. San Francisco, supra.

The plaintiff must have just compensation. Any schedule of rates is forbidden which produces injustice. The quantum of injustice is immaterial. There must be no injustice. Justice must be applied.

Southern P. Co. v. Railroad Comrs. 78 Fed. 261.

The company is entitled to earn not only a fair return upon all the money expended by it in the service, but also on obligations incurred for such loans.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952.

The question as to the competency and legal effect of evidence as bearing upon a question of Federal law is a Federal question.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038; Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381.

The refusal of the state court to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

It is not necessary that the express language of the opinion should recite that a Federal question has been decided, but it is sufficient for the purpose of the jurisdiction of this court, that the state court, by its decisions, necessarily adjudicates the defense under the Federal Constitution.

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 90, 54 L. ed. 108, 30 Sup. Ct. Rep. 21; Wabash R. Co. v. Adelbert College, 208 U. S. 38-44, 52 L. ed. 379-381, 28 Sup. Ct. Rep. 182; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 179-181, 47 L. ed. 766-769, 23 Sup. Ct. Rep. 487; Fire Asso. of Philadelphia v. New York, 119 U. S. 110-120, 30 L. ed. 342-347, 7 Sup. Ct. Rep. 108; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Mallett v. North Carolina, 181 U. S. 589, 590, 45 L. ed. 1015, 1016, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The judgment and decree of the supreme court of Iowa could not have been given, affirming the decision of the district court of Linn county, Iowa, without deciding Federal questions adversely to the plaintiff in error.

California Power Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965.

A decision of the Federal question in terms is not essential. If a decision of such question was necessarily involved in

the judgment rendered, it is not a matter of importance that the state court avoids all reference to the question.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The record in this case not only discloses that the rights of the plaintiff in error under the Constitution were set up and were expressly denied, but such was the necessary effect in law of the judgment of the supreme court of Iowa.

Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Sayward v. Denny, 158 U. S. 181, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Illinois 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220.

This is a suit in equity in which a trial was had *de novo* in the supreme court of Iowa, and the complaint here made against the decision of the supreme court of Iowa is not merely that its decision was erroneous as to the weight and sufficiency of the evidence to prove the facts, but that the court erred in its decision as to the competency and legal effect of the evidence as bearing upon the questions arising under the Federal Constitution, and in such cases the decision and the facts will be reviewed by this court.

Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038; Almonester v. Kenton, 9 How. 1-7, 13 L. ed. 21-23; Moreland v. Page, 20 How. 522, 15 L. ed. 1009; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515.

The question of reasonableness of rates is not merely one of fact, but involves one of constitutional law.

Hastings v. Ames, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 728.

The reasons for examining into the facts set forth in the case of Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, have full application to the case at bar.

Implied obligations of contracts come within the protection of § 10, art. 1, of the Constitution of the United States.

Stewart v. Jefferson, 116 U. S. 135, 29 L. 56 L. ed.

ed. 588, 6 Sup. Ct. Rep. 332; Burton v. Koshkonong, 4 Fed. 377; Cary Library v. Bliss, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 92.

The state can no more impair the obligation of its own contracts than it can the contracts of individuals.

Woodruff v. Trapnall, 10 How. 207, 13 L. ed. 390; Providence Bank v. Billings, 4 Pet. 560, 7 L. ed. 955; Green v. Biddle, 8 Wheat. 92, 5 L. ed. 570; Fletcher v. Peek, 6 Cranch, 127, 3 L. ed. 175.

A valid contract of a municipal corporation is just as sacred from legislative interference or construction as one of individual citizens.

Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941; People ex rel. Seeley v. Hall, 8 Colo. 485, 9 Pac. 34; Erie v. Griswold, 184 Pa. 435, 39 Atl. 231; Atkins v. Randolph, 31 Vt. 226.

The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state and to those of its agents, acting under its authority, as well as to contracts between individuals; and that obligation is impaired in the sense of the Constitution when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means.

Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403.

The discount provision is the language of the city. It grants a valuable right, and there is an obligation on the part of the city not to deprive the plaintiff in error thereof.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Greenwood v. Union Freight R. Co. 105 U. S. 20, 26 L. ed. 964; New Jersey v. Yard, 95 U. S. 113, 24 L. ed. 354.

The granting of a franchise to a corporation is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 18 L. ed. 137; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535

Messrs. James W. Jamison and William Chamberlain argued the cause and filed a brief for defendants in error:

The Supreme Court of the United States will determine for itself whether the record presents a Federal question conferring jurisdiction of this court to review the opinion of the supreme court of a state on writ of error.

Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 193.

No Federal question is raised by the contention that the 90-cent ordinance impairs the discount provision of plaintiff in error's ordinance 427, and thus impairs the obligation of the contract.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23.

The solution of the immunity or privilege, and the only immunity or privilege specially set up by the plaintiff, depends upon the evidence. This evidence cannot be re-examined by the Supreme Court of the United States on a writ of error to the state supreme court of Iowa, but the finding of facts by that court is conclusive.

Quimby v. Boyd, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 288; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; E. Bement & Sons v. National Harrow Co. 186 U. S. 83, 46 L. ed. 1064, 22 Sup. Ct. Rep. 747; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679.

Assuming that this court will accept the conclusions of the supreme court of the state of Iowa as to the facts found by it from the evidence, the Federal question of immunity or privilege thus raised and presented is not the subject of review, and does not present a Federal question so as to invoke the jurisdiction of this court on a writ of error, as provided in U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, but in order that this court may review a Federal question thus raised, it must be made

affirmatively to appear from the record that the immunity or privilege set up and claimed must have been passed upon by the supreme court of the state of Iowa, and the immunity or privilege denied by that court as a matter of law, and not denied because of a finding of facts.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 258, 41 L. ed. 994, 17 Sup. Ct. Rep. 992; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

Messrs. James W. Jamison and John M. Redmond filed a brief on the motion to dismiss or affirm:

Plaintiff in error was not denied the due process of law guaranteed to it under the Federal Constitution.

Mason v. Messenger, 17 Iowa, 261; Foule v. Mann, 53 Iowa, 42, 3 N. W. 814; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

A state legislature may limit the amount of charges or rates which individuals or corporations who have devoted their property to a use in which the public have an interest may charge, provided that the rates imposed are reasonable.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Goddard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857.

The legislature of the state of Iowa may delegate the power to regulate and limit the rates which individuals or corporations may charge for furnishing gas, water, and light to the inhabitants of a municipal corporation.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

The exercise of this right is presumed to have been in the proper exercise of the power conferred.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 871, 29 Sup. Ct. Rep. 148.

There was no allegation in the pleading that any statute of the state of Iowa conferring power upon municipal councils to regulate the price of gas deprived the plaintiff in error of the right to have the rate thus fixed by municipal council reviewed by the courts of the state of Iowa. An ordinance of a municipal council in pursuance of legislative power conferred upon it to regulate the price of gas, water, or light is subject to review by the courts as to whether the rate thus fixed is reasonable or not.

Des Moines v. Des Moines Waterworks Co. 95 Iowa, 348, 64 N. W. 269.

The question of whether a rate or rent fixed in pursuance of legislative authority is so low as to operate to deprive a corporation or individual of his property is a subject of judicial inquiry.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The only question of Federal jurisdiction attempted to be raised is fictitious and frivolous and colorable only.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *St. Louis, G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; *Wabash R. Co. v. Flannigan*, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Millingar v. Hartuppee*, 6 Wall. 258, 18 L. ed. 829; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

A court of equity ought not to interfere by injunction with state legislation fixing the gas rate before a fair trial has been made by continuing the business under such rates where the rates complained of show a very narrow line of division between possible confiscation and proper regulation as based upon the finding as to the value of the property, and the division depends upon variant opinions as to value, and upon results in the future from operating under such rates.

New York v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

56 L. ed.

Messrs. John N. Hughes, James H. Trewin, and John M. Grimm filed a brief in opposition to the motion to dismiss or affirm.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the plaintiff in error to restrain the enforcement of an ordinance fixing 90 cents per thousand cubic feet as the highest price to be charged in Cedar Rapids for gas. As the ordinance was passed in 1906, and had not yet been enforced, the supreme court of the state dismissed the bill without prejudice to a later suit after it should have been given a fair test. 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966. *The plain-[667 tiff, having specially set up that the ordinance violated the contract clause of the Constitution (article 1, § 10) and the 14th Amendment, brings the case here. There is a motion to dismiss, but the constitutional questions appear upon the record, and are not so frivolous as to warrant that summary course.

The supposed contract arises from a term in the ordinance under which the plaintiff was granted a renewal of its franchise in 1896. By § 3, "In consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed \$1.80 per thousand feet, and 20 cents per thousand cubic feet discount if consumers pay on or before the 10th of each month after consumption," etc. It is admitted that under the laws of Iowa the rate could be changed by the city, but it is argued that the quoted words import a contract that it shall not be changed to such an extent as to make impossible the offer of a discount for prompt payment,—that being the cheapest and most efficient way of collecting the price of the gas. The state court assumed that there was no contract in the case, and in discussing what it treated as the sole question, whether the plaintiff would be deprived of a fair compensation for its services, pointed out that the company could secure payment by requiring a deposit in advance or by making other reasonable rules.

We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the 14th Amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted,—not a promise by the city. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 437, 47 L. ed. 887, 891, 23 Sup. Ct. Rep.

531. It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract, to be accepted, and it was accepted *by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution, or contract. Code of 1897, § 725, 22 G. A. (1888) chap. 16.

Upon the issue under the 14th Amendment, the plaintiff argues on the strength of Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, that the facts are open to re-examination here. By that section it is provided that a writ of error to a state court "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States" It is argued that, as the decree of a state court can be reviewed only by writ of error, the foregoing words give to a writ of error in a chancery case the effect of an appeal, and open the evidence to re-examination to the same extent as upon an appeal. A suggestion to that effect was made in *Republican River Bridge Co. v. Kansas P. R. Co.* 92 U. S. 315, 317, 23 L. ed. 515, 516, but the practice and decisions from an early date have been the other way. *Egan v. Hart*, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; *Almonester v. Kenton*, 9 How. 1, 7, 13 L. ed. 21, 23; *Dower v. Richards*, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; *Gardner v. Bonesteel*, 180 U. S. 362, 365, 370, 45 L. ed. 574, 577, 21 Sup. Ct. Rep. 399; *Thayer v. Spratt*, 189 U. S. 346, 353, 47 L. ed. 845, 849, 23 Sup. Ct. Rep. 576; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 129, 48 L. ed. 373, 376, 24 Sup. Ct. Rep. 221; *Adams v. Church*, 193 U. S. 510, 513, 48 L. ed. 769, 770, 24 Sup. Ct. Rep. 512.

But, of course, findings, either at law or in equity, may depend upon questions that are re-examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions, properly saved, must be answered, and, so far as it is necessary to examine *the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined. *Kansas City Southern R. Co. v. C. H. Albers*

Commission Co. Feb. 26, 1912. [223 U. S. 573, ante, 556, 32 Sup. Ct. Rep. 316.] For instance, in this case the finding of the court that it was not prepared to say that a 90-cent rate was confiscatory may perhaps be taken to have been made subject to the admission that the rate was too low to permit a discount for prompt payment, and, if so, opens the question whether it was not confiscatory on that account, as matter of law. The plaintiff presents a number of such objections to the decision of the court below, although confused with arguments on pure matter of fact.

It would require a very clear case to warrant the reversal of the decree of a state court, which, though final in form, merely postpones a decision upon the merits for further experience. The present one is far from being such a case. To refer in the first instance to the point just mentioned, we cannot say as matter of law that at 90 cents a thousand feet the company will be unable to collect payment without losses that will amount to a taking of its property. Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 52, 53 L. ed. 382, 399, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the 14th Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property *is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit.

In this case the court fixed a value on the plant that considerably exceeded its cost, and estimated that, under the ordinance, the return would be over 6 per cent. Its attitude was fair, and we do not feel called upon to follow the plaintiff into a nice discussion of details. We perhaps should have adopted a rule as to depreciation somewhat more favorable to the plaintiff, or, it may be, might have allowed this or that item that the state court struck out, but there is nothing of which we can

take notice in the case that could warrant us in changing the result, or in saying that the plaintiff did not get as much as it could expect when leave was reserved for it to try again.

Decree affirmed.

LEWIS P. WINGERT, Appt.,

v.

FIRST NATIONAL BANK OF HAGERS-TOWN et al.

(See S. C. Reporter's ed. 670-672.)

National banks — construction of new building — recovery of damages by stockholder.

1. A stockholder in a national bank cannot recover damages or make any claim against the bank for tearing down its old building and constructing a new one during the pendency of an action by him to restrain it from doing so, whether such action by the bank was lawful or unlawful.

[For other cases, see Banks, IV. d, 1, in Digest Sup. Ct. 1908.]

Appeal — taken for costs only — dismissal.

2. An appeal from a decree refusing to enjoin the construction of a new building by a national bank, which is prosecuted as one for costs only, because of the completion of the new building pending the litigation, will be dismissed.

[For other cases, See Appeal and Error, VII. i, 1, in Digest Sup. Ct. 1908.]

[No. 176.]

Argued February 29, 1912. Decided March 11, 1912.

A PPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree affirming a decree of the Circuit Court for the District of Maryland, dismissing a bill by a stockholder to restrain a national bank from pulling down its bank building and erecting a new building in its place, the upper floors to be let for offices. Appeal dismissed.

See same case below, 99 C. C. A. 315, 175 Fed. 739.

The facts are stated in the opinion.

Mr. Henry F. Wingert argued the cause, and, with Mr. Miller Wingert, filed a brief for appellant.

Messrs. Charles A. Little and George R. Gaither argued the cause and filed a brief for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain the defendants,

a national bank, its directors and a contractor employed by them, from pulling down the bank building and erecting a six-story building in its place,—the first floor to be used for banking purposes, the other floors to be let for offices. The plaintiff is a holder of stock in the bank, and alleges that the intended construction is *ultra vires* and commercially unwise. The circuit court dismissed the bill on the ground that, in the absence of bad faith, it would not revise the judgment of the majority of the directors on the question of policy, and that a national bank lawfully might turn its building to the best account by adding upper stories for offices to let. The circuit court of appeals affirmed the decree on the opinion below. 99 C. C. A. 315, 175 Fed. 739. Pending the litigation the new structure has been built.

Objections are interposed on both sides,—on the part of the defendants, to the right of a stockholder to prevent by injunction acts beyond the power of the corporation; on that of the plaintiff, to the reception of the bank's answer, because it was adopted at a meeting of which the plaintiff's brother, a protesting director, was not notified. Without giving the slightest countenance to either, it is enough to say that the whole case is disposed of by the erection of the new bank. No doubt, after the filing of a bill for an injunction defendants proceed at their peril, even though no injunction is issued; and, if they go on to inflict an actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the court by their own act. In such a case the bill will be retained for the assessment of damages. *Milkman v. Ordway*, 106 Mass. 232, 253; *Lewis v. North Kingston*, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173. But in the present matter the only ground for further prosecution of the case is costs. There are no damages for which the plaintiff could make any claim against the corporation for doing as it saw fit with its own, lawfully or unlawfully. Furthermore, a recovery would be futile. It would cost the plaintiff as much as it brought in. To transmute the cause of action into a demand for damages against the directors alone would be an essential change, and probably would do the plaintiff no good, as it has been held in well-considered cases that that action also would not lie. *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *Allen v. Curtis*, 26 Conn. 456. As the appeal really is prosecuted only for costs, it must be dismissed. *Nixon v. Union Paper-Bag Mach. Co.* 105 U. S. 766, 26 L. ed. 959. See *Richardson v. McChesney*, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But we

are far from intimating that the plaintiff loses anything by this disposition of the case. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981.

Appeal dismissed.

673]*TANG TUN and Leung Kum Wui,
Petitioners,
v.

HARRY EDSSELL, Chinese Inspector in
Charge at the Port of Sumas, Washing-
ton, for the United States Government.

(See S. C. Reporter's ed. 673-682.)

Courts — exclusion of Chinese — conclusiveness of decision of Department of Commerce and Labor.

1. The decision of the Secretary of Commerce and Labor, affirming the denial by the inspector in charge of the right of a person of Chinese descent to admission into the United States, is, under the acts of Congress of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), and of February 14, 1903. (32 Stat. at L. 825, 828, chap. 552, U. S. Comp. Stat. Supp. 1909, p. 87), making the decision of the appropriate immigration officer final unless reversed on appeal to the Secretary of Commerce and Labor, conclusive, and not subject to review by the court, unless it affirmatively appears that they acted improperly or abused their discretion.

[For other cases, see *Courts*, 243-245, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — acts of inspector.

2. The rights of an applicant of Chinese descent for admission to the United States, who presents papers bearing apparent indorsement of the collector, showing the applicant's admission on a former arrival from China, are not violated by the acts of the inspector in examining the records of the customhouse, which contain a statement over the apparent signature of the same collector that the applicant had been rejected on his previous application, and in asking for an explanation of such apparent rejection, nor by his communicating with immigration officers after an order rejecting such applicant, to the end that the matter should be sifted, and that witnesses who had made affidavits in support of the applicant's appeal should be carefully examined.

[For other cases, see *Aliens*, VI. b, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — acts of inspector.

3. An inspector who has rejected the application of a person of Chinese descent for admission into the United States cannot,

on appeal from a writ of habeas corpus by such applicant, be held guilty of unfair or improper conduct in inserting in the record transmitted by him to the Secretary of Commerce and Labor statements as to the result of investigations made by him as to arrivals and clearings of vessels at the time of an application for admission by the same applicant on a previous return from China, comments on the practice which had obtained in dealing with Chinese applicants for admission, and references to entries in the official records, where such matters were called to the attention of the witnesses for the applicant, are not shown to have been false, or made with any attempt to deceive the Secretary, and on the hearing of the writ of habeas corpus it was stipulated that the matter should be heard on the record, including such statements, comments, and references, and that the writ should be dismissed if the court should find that there had been no abuse of discretion.

[For other cases, see *Aliens*, VI. b, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — acts of inspector.

4. An inspector who had rejected the application of a person of Chinese descent for admission into the United States cannot be held guilty of bad faith or improper conduct in forwarding to the Secretary of Commerce and Labor papers found by examination of the records in the cases of other Chinese persons who arrived on the same steamer with the applicant at the time of an application for admission on a previous return from China, which records show his rejection at such time, although the papers presented by him on the later application show an apparent admission.

[For other cases, see *Aliens*, VI. b, 1, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — fairness of hearing.

5. The refusal to admit a person of Chinese descent into the United States, on the ground that he was not born in the United States, does not show a denial of a fair hearing, where all but one of the witnesses except himself to testify on such point were shown to be unworthy of belief, and that one relied upon his identification of him at eighteen, as the same person he had last seen as a boy of five years old.

[For other cases, see *Aliens*, VI. b, 1, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — decision of appeal.

6. The decision of an appeal from the rejection of the application of a person of Chinese descent for admission into the United States is none the less that of the Secretary of Commerce and Labor, because communicated by a telegram from the Assistant Secretary.

[For other cases, see *Aliens*, VI. b, in Digest Sup. Ct. 1908.]

Aliens — Chinese exclusion — finality of decision on appeal.

7. The finality of the decision by the Secretary of Commerce and Labor of an appeal from the decision of an inspector

NOTE.—As to what Chinese persons are excluded from United States—see note to *Wong You v. United States*, 104 C. C. A. 538.

rejecting the application of a person of Chinese descent for admission into the United States is not affected by the fact that the Department held the case under consideration for less than two days, where the issue was a narrow one and permitted of speedy disposition.

[For other cases, see *Aliens*, VI. b, 1, in Digest Sup. Ct. 1908.]

Appeal — Chinese exclusion — taking entire case to the circuit court of appeals.

8. The entire case may be taken to the circuit court of appeals for review where the district court took jurisdiction of a writ of habeas corpus by a person of Chinese descent, whose application for admission into the United States had been rejected, and then proceeded to determine the merits, sustaining his claim of citizenship.

[For other cases, see *Appeal and Error*, 888-894, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued and submitted November 7, 1911.
Decided March 11, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, reversing the judgment of the District Court for the Western District of Washington, Northern Division, held that there was no ground for intervention by the courts to reverse the decision of the Secretary of Commerce and Labor, affirming the decision of an inspector of customs, refusing admission into the United States of a person of Chinese descent. Affirmed.

See same case below, 93 C. C. A. 644, 168 Fed. 488.

The facts are stated in the opinion.

Mr. James A. Kerr submitted the cause for petitioners.

Assistant Attorney General Harr argued the cause and filed a brief for respondent.

674] *Mr. Justice Hughes delivered the opinion of the court:

On June 22, 1906, Tang Tun and Leung Kum Wui, his wife, Chinese persons, sought entry to the United States at the port of Sumas, state of Washington, and were denied admission by the inspector in charge, whose order was affirmed by the Secretary of Commerce and Labor. Application was then made to the district court of the United States for a writ of habeas corpus.

It was alleged in the petition that Tang Tun was a citizen of the United States, born in 1879, at Seattle, of parents there domiciled; that, in 1884, he went to China, where he remained thirteen years; that, in 56 L. ed.

1897, he returned to the United States, was admitted by the collector of customs after examination, entered the employ of Wa Chong & Company, in Seattle, and continued with that firm until 1905, when he returned to China for the purpose of marrying; that he was married to Leung Kum Wui in accordance with the laws of China and the consular requirements of the United States; that the officers concerned had improperly conducted the inquiry and had abused their discretion in refusing admission; and that the petitioners were restrained of their liberty without due process of law.

The writ was granted, and the case having been submitted to the district court upon the record of the proceedings on the application for entry and the appeal to the Secretary of Commerce and Labor, it was held that the petitioners had been denied the hearing for which the act of Congress provided, that Tang Tun had established his citizenship, and that he and his wife were entitled to remain in this country. Accordingly, both were discharged from custody. 161 Fed. 618. This decision was reversed by the circuit court of appeals, which reached the conclusion that the requirements of the law had been satisfied and that there was no ground for judicial intervention. 93 C. C. A. 644, 168 Fed. 488. This court issued a writ of certiorari.

The acts of August 18, 1894, chap. 301 (28 Stat. at L. 372, 390, U. S. Comp. Stat. 1901, p. 1303), and of February 14, 1903, chap. 552 (32 Stat. at L. 825, 828, U. S. Comp. Stat. Supp. 1909, p. 87), make the decision of the appropriate immigration officer final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive, and is not subject to review by the court. *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

It appears from the record that on his arrival, Tang Tun was promptly examined by the inspector at Sumas. The examination was careful and fair. He testified on June 23, 1906, again on June 27, 1906, and still further on July 5, 1906. He had presented, in support of his application, affidavits which he had taken with him for the purpose of identification when he left the United States in 1905. These affidavits described his parentage, his place of birth, and his residence in this country, sub-

stantially as set forth in his petition; and they bore the indorsement of the inspector under date of October 1, 1905. The two white witnesses who had joined in one of the affidavits were examined at Seattle on July 2, 1906, and in the report of the inspector at that place, it is stated that the Chinese witness who made the remaining affidavit of identification had been notified to appear and had informed the inspector that he did not care to testify.

As already noted, the applicant asserted that he had been admitted to the United States in 1897, after examination, by the collector of customs, and a copy of the identification papers he then had was produced, bearing what purported to be the indorsement of the collector as to the fact of admission. The inspector found, however, *that in the records of the customs office at Port Townsend, Washington, the port at which he had arrived in 1897, it was stated that he had been rejected. On his re-examination, Tang Tun was questioned as to the discrepancy. He was also told that the witnesses who had made the identification affidavits in 1905 had been examined and that their testimony was not satisfactory; and he was asked whether he could furnish any additional testimony as to his nativity. Apparently he had nothing further to submit, and the inspector made an order on July 5, 1906, rejecting his application.

On the same day Tang Tun was informed of the inspector's decision and of his right to appeal to the Secretary of Commerce and Labor. An appeal was taken and on July 7, 1906, the applicant's attorney notified the inspector that he intended to take additional testimony. An extension of time was granted for this purpose. Several affidavits were presented on behalf of the applicants, and these were forwarded to the office at Seattle, where the witnesses as to disputed points were examined by the inspector. On August 28, 1906, the record of the proceedings, with the exhibits to which we shall presently refer, was forwarded to the Secretary of Commerce and Labor, and a brief discussing the evidence and the course of the proceedings was also submitted on behalf of the applicants under date of August 25, 1906. The record was received by the Secretary of Commerce and Labor on the morning of September 5, 1906, and on the afternoon of the following day a telegram was sent from the Department to the inspector at Sumas, as follows: "Appeal Tang Tun and Leung Gum Wui dismissed. Murray;" and this was confirmed by a letter from the Department. Then followed the habeas corpus proceedings.

It is clear that the applicants had full opportunity to present their evidence and to produce witnesses on their behalf. But it is charged that the inspector who conducted *the inquiry was biased, and [677 that his unfairness is shown by the manner in which he dealt with the question whether Tang Tun had been admitted by the collector in 1897. We do not find this charge to be justified. When it was ascertained that Tang Tun had papers bearing, apparently, the indorsement of the collector, and showing that he had been admitted on his former arrival, it was certainly permissible for the inspector, if indeed it was not his duty, to examine the official records of the customs office to ascertain whatever they might disclose as to the disposition of the case. On finding that these records contained the statement, over what appeared to be the signature of the same collector, that Tang Tun had been rejected, the inspector properly brought this fact to the latter's attention, and asked whether he had any explanation to give. No right of the applicants was violated by the inspector, either in his own action preliminary to the order of rejection, or in his subsequent communication with the Seattle officers to the end that the matter should be sifted and the witnesses who had made affidavits in support of the appeal should be carefully examined.

It is urged, however, that, without the knowledge of the petitioners, and to their serious prejudice, incompetent statements were injected into the record which was submitted to the Secretary of Commerce and Labor. The statements, to which objection was made, had relation to the evidence presented by Tang Tun to support his assertion that the collector had permitted him to enter in 1897. From Tang Tun's identification papers it appeared that he had arrived at Tacoma on April 10, 1897, on the steamer "Tacoma," and had been admitted April 20, 1897. In the customs records it was noted that he had been held at Vancouver, British Columbia, and rejected on May 25, 1897. In his additional evidence he presented affidavits of a special deputy and an inspector of customs under the collector at the time, in which it was stated by both that it was the *prac-[678 tice not to permit Chinese persons to leave the steamer in which they had arrived until after a decision had been made allowing them to enter the United States, and that if the decision was adverse they were returned to China on the same steamer; and that at no time did they recall any steamer remaining in port from April 10 to May 25. In transmitting the record to the Secretary of Commerce and Labor, the inspector reviewed

the case; and, referring to the affidavits submitted for the applicants and the impeachment of the office records, he stated that he had "made a careful examination of the customs records showing the arrivals and clearings of vessels in the district of Puget sound in April and May, 1897," that "the steamer 'Tacoma' was shown to have arrived at Tacoma on April 10, 1897, and to have cleared for the Orient on April 16," and that furthermore "the said records showed that no other vessel of the same company was in the harbor at the time of the 'Tacoma's' departure, nor until five days" thereafter. The inspector added that in his examination of the Port Townsend customs records "in order to verify or refute the statements" of the witnesses, he had learned that there were two plans, as a rule, for disposing of the cases of Chinese persons; that is, they were either held on the ship until admitted or rejected, or, if their cases were not disposed of while the ships were in port, they were landed at Victoria, British Columbia, on the outward trips of the vessels, and remained there until notified of the decision. If this were favorable they would be forwarded on local steamers and admitted, and if adverse, they would be informed accordingly and entries would be made to that effect in the record. He added that his information on this point being at first somewhat uncertain, he had verified it by conversations with the members of a Chinese firm who for many years were agents for all oriental steamship lines touching at Seattle, by an investigation conducted at Tacoma, and finally by the testimony (which appeared 679] in the record) of *the witnesses for the applicants; that is, the testimony taken by the inspector after their affidavits had been submitted. In addition, "he found further verification" in the fact that "the Chinese passenger manifests of the Port Townsend office showed that Chinese whose names appeared on arriving manifests of oriental steamers subsequently appear on manifests of local vessels arriving from Victoria and Vancouver," and that a careful examination "of all such local steamer manifests from April 10 to May 25, 1897, fail to reveal the name of Tang Tun on any of them." The inspector also directed the attention of the Secretary to a typewritten list (presented as an exhibit) of the Chinese who had arrived on the steamer "Tacoma" on April 10, 1897, which had been prepared according to the custom prevailing in the office of the collector at that time, and had been found in the Port Townsend records. On this list was the name of Tang Tun, identified by reference to his father, with the word "rejected."

Neither the nature of these statements, nor the manner of their introduction, affords ground for invalidating the proceeding. On the examination of the applicants's witnesses—the former customs official—reference was made in the questions of the examiner to the date of the departure of the steamer "Tacoma," and the inquiry was explicitly directed to the practice of holding Chinese persons at Victoria whose right to enter had not been determined. The point of the inquiry was clearly understood, and not only was there no denial of the practice of detention at Victoria, but the statements of the inspector as to its existence found confirmation in the testimony of the special deputy collector. The list of passengers arriving on the "Tacoma" on April 10, 1897 (being the exhibit to which the inspector referred in his report) was shown to this witness, and he identified the word "rejected" after the name Tang Tun on this list, as being in the collector's handwriting. Both the special deputy and the customs *inspector stated that the [680 signature of the collector on the original identification papers, below the indorsement "Rejected May 25/97," was genuine, as they had also testified that the signature was genuine upon the copy which Tang Tun had, purporting to show his admission.

And it will be observed that it is not shown that the statements of the inspector, of which complaint is made, were false, or that there was any attempt to deceive the Secretary. The writ of habeas corpus was granted in September, 1906. For some reason which the record does not disclose, the case was not brought on for hearing until January 20, 1908, when an order was made for the taking of testimony. Then, instead of adducing evidence to show that these statements of the inspector were false or misleading, it was stipulated (on February 26, 1908) that the matter should be heard upon the record, including the papers which were submitted to the Secretary, and that the writ should be dismissed if the court, upon this record, should find that there had been no abuse of discretion. Had there been ground for saying that the inspector had misled the Secretary by misrepresenting the records to which he referred, or by false assertions as to the matters of fact disclosed by his inquiries, it cannot be doubted that this would have been shown, as there was abundant time for full consideration and inquiry. In these circumstances, it cannot be said that the inspector, in stating the result of his investigations, in commenting upon the practice which had obtained in dealing with Chinese applicants for admission, and in referring to the entries in the official rec-

ords, was guilty of unfair or improper conduct.

Complaint is also made of the action of the inspector in forwarding to the Secretary the papers in the cases of other Chinese persons who arrived on the steamer "Tacoma" with Tang Tun on April 10, 1897, some of whom had identification papers similar to those of Tang Tun, with the indorsement of the collector, purporting to 681]show their admission, *in conflict with the office records. The inspector called attention to the fact that, in certain cases, after inquiry before the United States Commissioner, and despite the possession of such identification papers, deportation had been ordered, and also that it appeared that all the applicants described in the papers forwarded to the Secretary had been held in British Columbia pending decision. The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records, or acquainted themselves with former official action.

But it is said that the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration of their case to which they were entitled. This contention is not supported. It was proved that Tang Tun had lived at Seattle for several years before he left for China in 1905. The question, however, was whether he was born in the United States. Of the witnesses who professed to testify on this point—other than Tang Tun himself—all save one were shown by their examination to be unworthy of credit; and the knowledge of the one trustworthy witness—a police officer of Seattle—was plainly insufficient to make his testimony controlling. This witness relied upon his identification of the youth of about eighteen years of age, who arrived in 1897, as the same person whom he had last seen as a child some thirteen years before. There remained the testimony of Tang Tun himself, but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision. The record fails to show that their authority was not fairly exercised, 682]that is, consistently with *the fundamental principles of justice embraced within the conception of due process of law. And, this being so, the merits of the case were not open to judicial examination.

The decision of the appeal was not the

less that of the Secretary of Commerce and Labor because communicated by the telegram of Mr. Murray, the Assistant Secretary (Hannibal Bridge Co. v. United States, 221 U. S. 194, 206, 55 L. ed. 699, 703, 31 Sup. Ct. Rep. 603), later verified by letter from the Department. The statement of the dismissal of the appeal described the decision against the applicants upon the merits, in accordance with the Department's usage. Nor does the fact that the case was held under consideration by the Department less than two days affect the finality of its determination. Although the proceeding had been long pending, the issue was a narrow one and permitted of speedy disposition; and the circumstance that it received immediate attention and the decision was promptly announced is not a basis for attack.

As the District Court took jurisdiction and then proceeded to determine the merits, sustaining Tang Tun's claim of citizenship, the respondent was entitled to carry the entire case to the Circuit Court of Appeals. United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376; United States v. Ju Toy, 198 U. S. 253, 259, 49 L. ed. 1040, 1042, 25 Sup. Ct. Rep. 644. And the judgment of that court, reversing the decision of the District Court, and directing the dismissal of the proceedings, was right.

Judgment affirmed.

*UNITED STATES EX REL. MARY[683
S. NESS, Plff. in Err.,
v.

WALTER L. FISHER,† Secretary of the Interior.

(See S. C. Reporter's ed. 683-694.)

Mandamus — review of the decision of the Secretary of the Interior.

The decision of the Secretary of the In-

†Resignation of Richard A. Ballinger as Secretary of the Interior suggested, and Walter L. Fisher, his successor in office, substituted October 23, 1911, as the party defendant in error herein.

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

terior that an application for the purchase of land under the timber and stone act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), must disclose that the applicant has personally examined the land, and that her statement that it is unfit for cultivation, valuable chiefly for timber, uninhabited, and contains no mining or other improvements, cannot be made on information and belief, under § 2 of such act, requiring the statement setting forth such facts to be "verified" by the oath of the applicant, and therefore rejecting the application, is not arbitrary, capricious, or merely discretionary, so as to be controllable by mandamus, where the view taken by him has long prevailed in the Land Department, and been approved by the courts, although some later decisions have adopted the opposite construction.

[For other cases, see *Mandamus*, II. d. 4; *Public Lands*, 631-633, in *Digest Sup. Ct.* 1908.]

[No. 66.]

Argued November 15, 1911. Decided March 11, 1912.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of the District, sustained the right of the Secretary of the Interior to require that the statement of an applicant for the purchase of land under the timber and stone act of January 3, 1878, that the land is unfit for cultivation, valuable chiefly for its timber, is uninhabited, and contains no mining or other improvements, shall be verified on personal knowledge. Affirmed.

See same case below, 33 App. D. C. 302. The facts are stated in the opinion.

Mr. Samuel Herrick argued the cause, and, with Mr. S. P. Ness, filed a brief for plaintiff in error:

The Interior Department regulation here involved is unauthorized and illegal.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

Such regulation is destructive of rights conferred by act of Congress.

Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

The ruling of the Department has completely disregarded the decision of the United States circuit court of appeals for the seventh circuit, and the more recent decision of the circuit court of appeals for the ninth circuit.

Hoover v. Salling, 49 C. C. A. 26, 110 Fed. 43; *Robnett v. United States*, 95 C. C. A. 244, 169 Fed. 778.

56 L. ed.

Assistant Attorney General Knaebel argued the cause and filed a brief for defendant in error:

A continuous administrative construction, unless clearly erroneous, should be adopted, even though in its absence the courts might be disposed to construe the statute differently.

United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; *United States v. Hammers*, 221 U. S. 220, 228, 55 L. ed. 710, 715, 31 Sup. Ct. Rep. 593.

Mandamus does not lie in this case.

Roberts v. United States, 13 App. D. C. 46; *Roberts v. United States*, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; *Merrill, Mandamus*, § 57; *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. ed. 160, 163, 15 Sup. Ct. Rep. 97; *Ex parte Cutting*, 94 U. S. 14, 19, 24 L. ed. 49, 50; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 644, 34 L. ed. 811, 814, 11 Sup. Ct. Rep. 197; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; *Kimberlin v. Commission*, 44 C. C. A. 109, 104 Fed. 653; *Brown v. Hitchcock*, 173 U. S. 473, 476, 43 L. ed. 772, 773, 19 Sup. Ct. Rep. 485; *Oregon v. Hitchcock*, 202 U. S. 60, 68, 50 L. ed. 935, 938, 26 Sup. Ct. Rep. 568.

The Department is a special tribunal constituted by law for the express purpose of administering the statutes relating to the disposition of the lands and of deciding all questions and controversies arising under them.

Knight v. United Land Asso. 142 U. S. 161, 181, 35 L. ed. 974, 981, 12 Sup. Ct. Rep. 258; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698.

An action of this kind approaches closely, if indeed it be not clearly in principle, an action against the United States.

Oregon v. Hitchcock, 202 U. S. 60, 68, 50 L. ed. 935, 938, 26 Sup. Ct. Rep. 568; *Louisiana v. Garfield*, 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31; *Conley v. Ballinger*, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a petition, in the supreme court of the District of Columbia, for a writ of mandamus to compel the Secretary of the Interior to accept, as conforming to

the timber and stone act of June 3, 1878, 20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545, an application to purchase under that act 160 acres of public land in the Roseberg, Oregon, land district. The respondent answered, but the answer was held insufficient upon demurrer, and judgment was entered awarding the writ as prayed. An appeal to the court of appeals resulted in a reversal of the judgment, with a direction that the petition be dismissed (33 App. D. C. 302), and that ruling is now here for review. Briefly stated, the material facts are these: Being desirous of purchasing the land under the timber and stone act, the relator, Mary S. Ness, filed in the proper local land office a written application which fully conformed to the statutory requirements, unless it was objectionable in that it disclosed that she had not personally examined the land, and that her statement that it was unfit for cultivation, valuable chiefly for its timber, uninhabited and contained no mining or other improvements, was made upon information and belief, and not upon personal knowledge. The register and receiver ruled that the application was objectionable in that regard, and therefore rejected it, subject to her right to appeal. Successive appeals by her to the Commissioner of the General Land Office and the Secretary of the Interior resulted in an affirmation of the ruling of the local officers, the decision of the Secretary being adhered to upon a motion for review. Soon after the act was passed it was construed by the Land Department as requiring that in applications thereunder the statement respecting the character and condition of the land be made upon the personal knowledge of the applicant, save in the particulars which the act declares may be stated upon belief, and it was because of this construction, disclosed in repeated decisions of the Secretary of the Interior and in the regulations issued under the act (see 6 Land Dec. 690]114; Re Walker, 11 Land *Dec. 599; Re Featherstone, 32 Land Dec. 631), that this application was rejected. After its final rejection, that is, after the decision of the Secretary on the motion for review, one William A. Taylor made application at the local land office to purchase the land under the same act, and his application, which appeared to be in conformity with the statutory requirements, was accepted by the local officers and was being carried to final entry when this petition and the answer were filed.

The answer concluded by alleging, in substance, that the respondent was the head of the Land Department, to which the law committed the administration of the tim-

ber and stone act and other public land laws; that the duty of determining whether the relator's application conformed to the statutory requirements was not merely ministerial, but involved the exercise of judgment and discretion; that to compel him to accept that application would be to control his judgment and discretion, and to require him to disregard his own decision, in a matter falling within his lawful authority, and that a writ of mandamus could not be used to that end.

Section 2 of the act reads as follows:

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district *a written statement* in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, *setting forth* that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, *as deponent verily believes*, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, *but[691 in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly, or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified *by the oath of the applicant* before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The Secretary's decision, rejecting the relator's application, was not arbitrary or capricious, but was based upon a construction of § 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States v. Wood*, 70 Fed. 485, and *Hoover v. Salling*, 102 Fed. 716, and has since been sustained by the court of appeals in the present case. True, a different construc-

tion had been adopted in *Hoover v. Salling*, 49 C. C. A. 26, 110 Fed. 43, and has since been followed in *Robnett v. United States*, 95 C. C. A. 244, 169 Fed. 778, but this, instead of indicating that the Secretary's decision was arbitrary or capricious; illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.

So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and 692] involving the *exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur v. Paulding*, 14 Pet. 497, 515, 10 L. ed. 559, 568; *United States ex rel. Tueker v. Seaman*, 17 How. 225, 230, 15 L. ed. 226, 227; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *Litchfield v. Register* (*Litchfield v. Richards*) 9 Wall. 575, 19 L. ed. 681; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 48, 32 L. ed. 354, 357, 9 Sup. Ct. Rep. 12; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698. Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the *Decatur* Case it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction, the court saying: "The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. . . . If a suit should come before this court which involved the construction of any of these

laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his construction to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in *which they have jurisdiction, and[693 in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them." And in the *Riverside Oil Co. Case*, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his, to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was nonmineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said: "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. . . . Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to *repudiate and disaffirm a decision[694 which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Man-

damus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts."

The relator seems to believe that *Roberts v. United States*, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376, and *Garfield v. United States*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62, in some way qualify the rule so stated; but this is a mistaken belief. Both cases expressly recognize that rule, and neither discloses any purpose to qualify it. In the former the duty directed to be performed was declared to be "at once plain, imperative, and entirely ministerial." And in the latter the writ was awarded to compel the respondent to erase and disregard a notation which he arbitrarily and unwarrantably had caused to be made upon a public record, and which beclouded the relator's right to an Indian allotment.

We conclude that the decision of the respondent in the present case was not arbitrary or merely ministerial, but made in the exercise of judgment and discretion conferred by law, and not controllable by mandamus, and therefore that the Court of Appeals rightly directed that the petition be dismissed.

Judgment affirmed.

695] *HENRY C. RIPLEY, Appt.,
v.

UNITED STATES. (No. 498.)

UNITED STATES, Appt.,
v.

HENRY C. RIPLEY. (No. 499.)

(See S. C. Reporter's ed. 695-704.)

Public contracts — conclusiveness of agent's judgment.

1. One having a contract with the United States to build a jetty in a harbor, with a provision that crest blocks should be put in place on the jetty as the work progressed, when, "in the judgment of the United States agent in charge," the core or mound of riprap had sufficiently consolidated, is not entitled to relief because of any delay, however great, by the refusal of such agent to permit the laying of the

blocks, unless such refusal is the result of fraud, or such gross mistake as would imply fraud, but is entitled to recover damages when the refusal was a gross mistake and an act of bad faith.

[For other cases, see *Contracts*, V. e, in *Digest Sup. Ct.* 1908.]

Public contracts — conclusiveness of agent's judgment.

2. A contractor with the United States for the construction of a jetty in a harbor, under a contract providing that crest blocks should be put in place on the jetty as the work progressed, when, "in the judgment of the United States agent in charge, the core or mound of riprap had sufficiently consolidated, does not, by submitting to the wrongful refusal of such agent to permit the laying of the blocks, on the ground that the mound or core had not sufficiently consolidated, without taking an appeal to the engineer in charge, lose his right to recover damages from such refusal because of another provision for rigid inspection by an inspector appointed on the part of the government before acceptance of "material" furnished, and the rejection of such as does not conform to the specifications, and making the decision of the "engineer officer" in charge as to "quality and quantity" final.

[For other cases, see *Contracts*, V. e, in *Digest Sup. Ct.* 1908.]

Evidence — burden of proof.

3. A contractor with the United States for the construction of a jetty in a harbor, who claims to have been damaged by a wrongful refusal of the government agent to permit the laying of crest blocks on the jetty when the core or mound had sufficiently settled, under a provision of the contract for such laying when, "in the judgment of the United States agent in charge," the mound had sufficiently settled, has the burden of showing the number of working days between the first wrongful refusal and the first permission to lay blocks, and on how many such days he was unable to do labor of another character on the jetty.

[For other cases, see *Evidence*, II. k, 6, in *Digest Sup. Ct.* 1908.]

Public contracts — decision of agent in charge.

4. A strict construction by the inspector under a contract for the construction of a jetty in a harbor for the United States, providing for a rigid inspection of material and the rejection of such as does not conform to specifications, so as to reject stones which do not measure up to requirements at the narrowest, thinnest, and shortest points, instead of accepting mean or average measures, does not entitle the contractor to damages resulting from such rejection and the use of the rejected material in a place where inferior material was called for, although a supplementary agreement is subsequently made for the acceptance of stones not conforming strictly to the letter of the specifications, where their use would make the work equally stable with those conforming strictly to specifications.

[For other cases, see *Contracts*, V. e, in *Digest Sup. Ct.* 1908.]

Public contracts — conclusiveness of engineer's decision.

5. The decision of the Chief of Engineers in allowing or disallowing items for expenses of inspection in the construction of a jetty in a harbor for the United States during the suspension of work because of a yellow fever epidemic is conclusive on the court, in the absence of fraud, or gross mistake implying fraud, where the contract authorized the remission of charges for such expenses for so much time as, in the engineer's judgment, may have been actually lost by epidemic.

[For other cases, see Contracts, 577-580, in Digest Sup. Ct. 1908.]

[Nos. 498 and 499.]

Submitted March 10, 1911. Decided March 11, 1912.

A PPEAL AND CROSS APPEAL from the Court of Claims to review a judgment sustaining the right of a contractor for the construction for the United States of a jetty in a harbor to recover for damages from delay in permitting the laying of crest blocks on riprap, for the rejection of certain materials, and for the disallowance of expenses of inspection during a suspension of work because of a yellow fever epidemic. Modified so as to disallow all claims except those proved to have been caused by delay, and, as modified, affirmed.

Statement by Mr. Justice Lamar:

Appeal and cross appeal from a judgment by the court of claims for \$14,732.05 in favor of Henry C. Ripley against the United States, in a suit for the recovery of damages in connection with the construction of a public work, consequent upon the action of the agent in charge.

By the act of June 13, 1902 (32 Stat. at L. 340, chap. 1079), Congress appropriated \$250,000 for the completion of the work of improving the harbor of Aransas Pass, Texas. The contract was awarded to Henry 696]C. Ripley. It provided for *the completion of a jetty, having a brush foundation, to be covered with a layer of stone, on which was to be built a superstructure, with sloping sides and a top width of 10 feet. This superstructure was to be formed of a core or mound of riprap, "and when, in the judgment of the United States agent in charge, this mound has become sufficiently consolidated, its gaps shall be filled and its crest leveled; . . . large blocks shall then be bedded in the crest of the mound."

It was provided that—

"Where the contract contemplates the placing of the materials in the work, the material shall be placed securely and carefully where directed by the U. S. agent in charge. . . .

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"All material furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final."

The contract also provided that the work should be executed under the supervision of the engineer officer in charge or his duly authorized agent. The United States was to employ one or more inspectors, and the contractor, without additional compensation, was bound to furnish facilities for the inspection of work and material. The contractor was to furnish extra labor at cost prices, as determined by the engineer, and should furnish board and lodging to government employees at reasonable rates satisfactory to the engineer. If the work was not diligently prosecuted, the contract might be annulled, or the engineer in charge, "with the prior sanction of the Chief of Engineers, may waive for a reasonable period the limit originally set for the completion of the work, and remit the charges for the expenses of superintendence and inspection *for so much time[697 as, in the judgment of the engineer officer in charge, may actually have been lost on account of . . . violence of the elements, or by epidemic, or local or state quarantine restrictions, or other unforeseeable causes of delay arising from no fault of the contractor, and which actually prevented him from commencing or completing the work within the period required by the contract.

Claimant entered upon the performance of the contract August 18, 1903, and completed 2,100 feet of jetty when operations ceased about September 17, 1904, owing to the exhaustion of the appropriation.

About the time work began, without fault on the part of the contractor or of the United States, there was a delay of about thirty days, due to the fact that the contractor's tug, while in charge of a licensed pilot, was grounded on a sand bar. The government apparently incurred expenses for inspection during this period and deducted that amount from Ripley's account.

Owing to an epidemic of yellow fever the force of the contractor was disorganized, and work was necessarily suspended for thirty days. The government did not charge him with inspection expenses during the fifteen days the quarantine was in force, in a city through which the cars hauling the material were prevented from passing. And the court held also that

Ripley was not chargeable with the inspection expenses for the other fifteen days, during which his force was scattered as a result of the epidemic.

During the progress of the work, a large number of blocks were rejected by the inspector as not conforming to specifications. "Many of those so rejected were afterwards accepted, but ninety of the stones offered as crest blocks were rejected as such, and were accepted and used as riprap and paid for as such. The difference in the amount paid claimant for said 698]stones used as riprap and *the amount he would have received if they had been used as crest blocks" was allowed him by the court of claims. It found that "he was compelled to furnish other crest blocks to take the place of those rejected, which caused a delay of ten days to claimant in the completion of the work."

It appears that the rejection of these blocks was due to a difference in the method of measurement, the inspector insisting that the blocks should be measured at the narrowest, thinnest, and shortest points. The contractor contended that mean or average measurements should be taken, claiming that this was the understanding of himself and the officer who drew the specifications. The engineer at Galveston thereupon suggested that the matter should be referred to the Chief of Engineers in Washington; and later a supplementary agreement was drawn, which permitted the use of blocks "which would make the work as stable, or more stable, than if the dimensions conformed strictly to the letter of the specifications. In consideration of which change the contractor agrees to accept \$5 per ton for all blocks received under the supplementary agreement which would have been rejected under the original specification."

The plaintiff's claim for additional compensation for extra labor furnished the government and for board and lodging furnished its employees was rejected by the court, as also his claim for damages for double handling caused by the inspector's refusal to permit him to unload certain material on the jetty.

The contractor's principal claim, however, was for damage caused by the delay resulting from the refusal of the inspector in charge to permit crest blocks to be laid after the core had fully consolidated. As long as the jetty was uncovered by these blocks it was subject to the rough action of the waves, and the plaintiff's employees were deprived of the advantage of working 699]in still water on the *lee side of the jetty. The work began August 18, 1903, and the court found as a fact "that in Decem-

ber, when plaintiff had completed 200 feet of the core, he requested permission to lay the blocks. This was refused, on the ground that the core had not been consolidated. By the end of December he had completed 500 feet, and again requested permission to lay the blocks. The inspector refused and continued to refuse permission to lay the blocks until May 1, 1904, at which time 1,500 feet of the core had been repaired and completed."

"Commencing in October, 1903, the contractor began to lay the slope stones, and from December, 1903, until May, 1904, it was manifest that large parts of the work done by him were fully settled and consolidated. If the claimant had been permitted to lay the crest blocks from that time on, as the work progressed, there would have resulted an additional protection, which would have enabled him to work sixty days more within the period between that time and May 7, 1904, when the first crest block was laid."

"The total cost to claimant of performing the contract, exclusive of the cost of the granite and the cost of transport and fitting up and repairs to barges, was \$63,-780. The total number of days from the beginning to the completion of said work was three hundred and ninety-two, making an average daily cost to the contractor of \$162.70. The work was completed on September 17, 1904. The number of days of actual work performed was one hundred and thirty-one, of which fifty-eight was subsequent to the 30th day of April, 1904." "Claimant, under the requirements of the specification, personally superintended the work for the whole time. The value of his personal services while so doing was \$750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment."

The court entered judgment for plaintiff for \$14,732.05,—made up of damage for difference between price of *large blocks[700 and riprap, delay caused by such rejection, value of ten days' services of plaintiff during the delay, remission of expenses for additional fifteen days during yellow fever epidemic, remission of expenses while tug was grounded on a sand bar, value of contractor's time during sixty days' delay occasioned by refusal to permit crest blocks to be laid, \$1,500, and average daily expense, \$162.70, and remission of inspection charges during the sixty days' delay.

After the case was argued here it was twice remanded (220 U. S. 491, 55 L. ed. 557, 31 Sup. Ct. Rep. 478, 222 U. S. 144, ante, 131, 32 Sup. Ct. Rep. 60), and the court

of claims made the following additional findings of fact:

"When denying permission to the claimant to lay the crest blocks, as stated in finding 7, the assistant engineer, who was an experienced officer of the government in such work, and who was acting as inspector in immediate charge of the work, knew that large parts of the core theretofore completed by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

"2. The refusal of said assistant engineer, as inspector in immediate charge of the work, to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated as aforesaid, was gross error and an act of bad faith on his part.

"3. There was no protest made to the engineer in charge, whose office was in Galveston, or to the Chief Engineer, whose office was in Washington, respecting the refusal of said assistant engineer to permit the laying of crest blocks as aforesaid. The claimant made frequent complaints to said assistant engineer about the delays so caused by his refusal to permit the laying of crest blocks.

"Claimant visited the office of the engineer in charge at Galveston about once a month, and while there complained generally that said assistant engineer, as inspector in immediate charge of the work, was too strict with him in construing the specifications and contract. No appeal, *either written or otherwise, was taken or asked by the claimant to either the engineer in charge or to the Chief of Engineers, because of the said refusal to permit the laying of crest blocks."

Messrs. William H. Robeson, Benjamin Carter, and F. Carter Pope submitted the cause for Ripley:

This claimant was entitled to the benefit of the honest judgment of the engineer in charge over him, and, if he did not get that honest judgment, he is entitled to recover his damages.

Kihlberg v. United States, 97 U. S. 402, 24 L. ed. 1108; United States v. Barlow, 184 U. S. 123, 46 L. ed. 463, 22 Sup. Ct. Rep. 468; Martinsburg & P. R. Co. v. March, 114 U. S. 555, 29 L. ed. 257, 5 Sup. Ct. Rep. 1035; Bowe v. United States, 42 Fed. 761; Fletcher v. New Orleans & N. E. R. Co. 19 Fed. 731.

Where one party to a contract unlawfully interferes with the other's performance, the latter may recover the value of his lost time; especially where there is no allowance for the loss of prospective profits.

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Kelly v. United States, 31 Ct. Cl. 375; United States v. Behan, 110 U. S. 338, 345, 28 L. ed. 168, 170, 4 Sup. Ct. Rep. 81.

Assistant Attorney General Thompson and Mr. Philip M. Ashford submitted the cause for the United States:

The decision of the engineer officer in charge as to "quality"—that is, the dimensions and other requirements as to the shape of the stones—was to be final, under the contract. Under these circumstances, the action of the officers and agents of the United States in the premises will not be disturbed by the court.

United States v. Barlow, 184 U. S. 123, 133, 46 L. ed. 463, 468, 22 Sup. Ct. Rep. 468; United States v. Gleason, 175 U. S. 588, 607, 44 L. ed. 284, 291, 20 Sup. Ct. Rep. 228; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 195, 34 L. ed. 917, 919, 11 Sup. Ct. Rep. 290; Martinsburg & P. R. Co. v. Marsh, 114 U. S. 549, 553, 29 L. ed. 255, 256, 5 Sup. Ct. Rep. 1035; Kihlberg v. United States, 97 U. S. 398, 401, 24 L. ed. 1106, 1107; McLaughlin v. United States, 37 Ct. Cl. 188; Electric Fire Proofing Co. v. United States, 39 Ct. Cl. 307; Zimmerman v. United States, 43 Ct. Cl. 564; Bowe v. United States, 42 Fed. 778; Ogden v. United States, 9 C. C. A. 251, 13 U. S. App. 615, 60 Fed. 725; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 220, 57 Am. Rep. 318, 3 Atl. 306; Gilmore v. Courtney, 158 Ill. 437, 41 N. E. 1023; Sanders v. Hutchinson, 26 Ill. App. 638.

There was no mutual mistake made in reducing this contract to writing, consequently there was nothing to reform.

United States v. Milliken Imprinting Co. 202 U. S. 168, 177, 50 L. ed. 980, 984, 26 Sup. Ct. Rep. 572; South Boston Iron Works v. United States, 34 Ct. Cl. 174; Cullinane v. District of Columbia, 18 Ct. Cl. 577; Harvey v. United States, 13 Ct. Cl. 322; Ellicott Mach. Co. v. United States, 44 Ct. Cl. 130.

The terms of the specifications are plain and unambiguous. It is impossible to find anything therein, or anywhere in the contract, from which it can be inferred that any other meaning than that conveyed by the exact words and figures used was intended. If the contract did not express the agreement of the parties and the true intent or understanding of the claimant, it was "his folly to have signed it."

Brawley v. United States, 96 U. S. 168, 24 L. ed. 622.

There is no finding of fact by the court that the refusal of the inspector was ever appealed from, or that any attempt was

made in any form whatever to have the engineer in charge overrule him in the matter. The absence of such a finding is conclusive of the fact that no objection, protest, or appeal was presented to the engineer in charge or to the chief of engineers.

Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 500, 27 L. ed. 337, 342, 1 Sup. Ct. Rep. 582.

Failure to protest or to seek in any way to have the inspector overruled in the matter was an acquiescence in his conduct.

Lewman v. United States, 41 Ct. Cl. 475; *Hawkins v. United States*, 96 U. S. 689, 24 L. ed. 607; *Bowe v. United States*, 42 Fed. 778; *Bray v. United States*, 46 Ct. Cl. 132.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The plaintiff sued the United States in the court of claims for damages sustained by him while carrying out a contract to build a jetty in the harbor of Aransas Pass, Texas. There were nine items in his claim, which aggregated \$45,950. The court rendered judgment in his favor for \$14,732.05. Both parties appealed,—the contractor on the ground that he was awarded too little, and the United States on the ground that he was not entitled to recover anything whatever. The principal contention related to the right of the plaintiff to recover damages occasioned by the refusal of the inspector to permit blocks to be laid on the jetty as the work progressed. The contract provided that these blocks should be put in place when, "in the judgment of the United States agent in charge," the core or mound had sufficiently consolidated. Until the agent determined that the core had settled, the contractor had no right to do this part of the work. No matter how long the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of "fraud, or of such gross mistake as would imply a fraud." *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *United States v. Mueller*, 113 U. S. 153, 28 L. ed. 946, 5 Sup. Ct. Rep. 380.

But the very extent of the power and the conclusive character of his decision 702] raised a corresponding duty that *the agent's judgment should be exercised not capriciously or fraudulently, but reasonably, and with due regard to the rights of both the contracting parties. The finding by the court that the inspector's refusal was a gross mistake and an act of bad faith necessarily, therefore, leads to the

conclusion that the contractor was entitled to recover the damages caused thereby.

The defendant claims that the plaintiff lost his right to recover because he failed to appeal to the engineer in charge, at Galveston, or to the Chief of Engineers, in Washington. But there was no requirement or provision for appeal in the contract. The clause relied on by the government relates to the duty of inspection and acceptance, making the decision of the engineer in charge conclusive as to the quality and quantity of work and material. That part of the agreement had no reference to the settlement of the core. Whether it had sufficiently consolidated involved the determination of a matter of fact, varying from day to day. The contractor had to act or refrain from acting when the decision was made. That matter was expressly left to "the judgment of the United States agent in charge." The contractor, in submitting to his decision, did not lose his right to recover damages occasioned by the refusal to permit the crest blocks to be laid, when, as found by the court, this refusal was gross error and an act of bad faith.

The court, therefore, declared in plaintiff's favor on this issue. He appeals, however, on the ground that the court only allowed him \$11,908.90, being for expenses and loss of time for sixty days, insisting that he was entitled to recover \$28,953 as damages directly caused by this delay.

This claim is based on the fact that there were three hundred and ninety-two days between the beginning and the completion of the work. But on account of Sundays, holidays, and storms, there were only one hundred and thirty-one working days. Of these, fifty-eight were after April 30, 1904, when, for the first time, the inspector permitted *the crest blocks to [703 be laid. The contractor contends that as it only took him fifty-eight days after May 1, when the permission was given, to complete the work, and as the court finds that he was delayed for sixty days before the permission was given, it is evident that he could have finished the work before May 1, and is therefore entitled to recover the value of his own time and all the expenses for inspection and labor which were incurred after that date.

The findings of fact do not require any such conclusion. Prior to May 1 the contractor worked seventy-three days out of two hundred and forty-seven. But it does not appear how many of these working days there were between August 18, 1903, when he began construction, and December, 1903, when he first applied for permission to lay the crest blocks. Neither is it shown how many working days there

were between the date of the first refusal and the first permission to lay the blocks; nor on how many of such working days the contractor was able to do labor of another character on the jetty. In the absence of such data it is impossible to verify plaintiff's calculations. The burden was on the contractor. If the evidence would have sustained his present claim, he was bound to have applied, in due season, for additional findings of fact by the court. Our decision must be predicated on what appears in the present record. Inasmuch as the court found that \$162.70 was the average daily expense, and assessed plaintiff's damage at sixty times that amount, it is evident that it considered that the contractor had been delayed for sixty average days, and not for sixty working days. He is therefore entitled to judgment for \$9,762 expenses, \$646.92 inspection charges, and \$1,500 found to have been the value of his own time for that period of sixty days.

The other findings in his favor for items aggregating \$2,822 must be reversed, and the cross appeal of the government sustained.

The greater part of this sum was for loss and delay arising from the inspector's 704] rejection of ninety large blocks *as not complying with the specifications. The fact that the court gave judgment in Ripley's favor indicates that it was of opinion that the agent had made an improper decision. But so far as appears, his only error was in construing the contract strictly, according to its terms, instead of adopting a method of mean or average measurement for which the contractor contended. The supplemental agreement was not retroact-

ive, so as to give the plaintiff a cause of action for the prior rejection, even though thereafter a different method of measurement was permitted.

The balance of the amount allowed the plaintiff was by way of returning the expenses of inspection which had been charged against him, during the suspension of the work while the tug was grounded on the bar and the contractor's force disorganized on account of the yellow fever epidemic. The contract provided that the expenses of inspection might in some cases be remitted, but this could only be with the prior consent of the Chief of Engineers. There is no finding that such consent was given.

But the error in entering judgment in Ripley's favor as to any of these items, and the propriety of disallowing the others for which he sued, arises from the fact that the officer's decision was binding. All these claims relate to matters which, under the contract, were submitted to the engineer. There is no finding that he acted in bad faith. Indeed, it is not even found that the decisions were erroneous, though that is implied. But the contract did not contemplate that the opinion of the court should be substituted for that of the engineer. In the absence of fraud, or gross mistake implying fraud, his decision on all these matters was conclusive.

On the findings of fact the plaintiff is entitled to recover \$11,908.90, with interest as provided in Rev. Stat. § 1090. The judgment of the Court of Claims must be so modified and affirmed.

Motion to modify judgment denied April 1, 1912.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

705] *QUINCY, OMAHA, & KANSAS CITY RAILROAD COMPANY, Plaintiff in Error, v. ORA T. SHOHONEY. [No. 497.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State of Missouri to review a judgment which, on a second appeal, affirmed a judgment of the Grundy Circuit Court in favor of an employee in a suit for personal injuries.

See same case below, 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912 A, p. 1143.

Mr. John A. Eaton for plaintiff in error.

Mr. I. N. Watson for defendant in error.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 117, 53 L. ed. 431, 433, 434, 29 Sup. Ct. Rep. 227; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

YEUNG How, Sometimes Known as Yeung Chow, Appellant, v. Hart H. North, United States Commissioner of Immigration, etc., et al. [No. 524.]

Appeal—from circuit court—Federal question.

Appeal from the Circuit Court of the United States for the Northern District of California to review an order refusing relief by habeas corpus to an alien in custody under a warrant of deportation.

Messrs. Carroll Cook, Arthur A. Birney, and Henry F. Woodard for appellant.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for appellees.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30

Sup. Ct. Rep. 419; Fong Yue Ting v. United States, 149 U. S. 698, 716, 37 L. ed. 905, 914, 13 Sup. Ct. Rep. 1016; § 14 of act of May 6, 1882 (22 Stat. at L. 61, chap. 126, U. S. Comp. Stat. 1901, p. 1333).

W. S. BRYAN, Appellant, v. BLISS-COOK OAK COMPANY et al. [No. 635.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth *Cir-[706] to review a decree which affirmed a decree of the Circuit Court for the Western Division of the Eastern District of Arkansas in favor of defendants in a suit to quiet title.

See same case below, 101 C. C. A. 577, 178 Fed. 217.

Mr. Julian Laughlin for appellant.

Messrs. John B. Jones and George B. Rose for appellees.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

W. S. BRYAN, Appellant, v. EDWIN S. LAYMAN. [No. 636.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western Division of the Eastern District of Arkansas in favor of defendants in a suit to quiet title.

See same case below, 101 C. C. A. 577, 178 Fed. 217.

Mr. Julian Laughlin for appellant.

Messrs. U. M. Rose, W. E. Hemingway, George B. Rose, J. F. Loughborough, and E. H. Adams for appellee.

October 23, 1911. *Per Curiam*: Dis-

missed for the want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

W. S. BRYAN, Appellant, v. WILLIAM BAGNELL. [No. 637.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western Division of the Eastern District of Arkansas in favor of defendants in a suit to quiet title.

See same case below, 101 C. C. A. 577, 178 Fed. 217.

Mr. Julian Laughlin for appellant.

Messrs. U. M. Rose, W. E. Hemingway, George B. Rose, and J. F. Loughborough for appellee.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

MARCUS G. RIDER, Appellant, v. BLISS-COOK OAK COMPANY et al. [No. 638.]

Appeal—from circuit court of appeals—Federal question.

707] Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western Division of the Eastern District of Arkansas in favor of defendants in a suit to quiet title.

See same case below, 101 C. C. A. 577, 178 Fed. 217.

Mr. Julian Laughlin for appellant.

Messrs. John B. Jones and George B. Rose for appellees.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

S. L. MOSER, Appellant, v. EDWIN S. LAYMAN. [No. 639.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western Division of the Eastern District of Arkansas in favor of defendants in a suit to quiet title.

See same case below, 101 C. C. A. 577, 178 Fed. 217.

Mr. Julian Laughlin for appellant.

Messrs. U. M. Rose, W. E. Hemingway, George B. Rose, J. F. Loughborough, and E. H. Adams for appellee.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

ELIZABETH CASSIDY et al., Plaintiffs in Error, v. PEOPLE OF THE STATE OF COLORADO ON THE RELATION OF THE ATTORNEY GENERAL OF COLORADO. [No. 713.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Colorado to review a judgment of ouster in quo warranto proceedings.

See same case below, 50 Colo. 503, 117 Pac. 357.

Mr. Henry J. Hersey for plaintiffs in error.

Messrs. George Q. Richmond, Benjamin Griffith, Henry A. Lindsley, and Frederic D. McKenney for defendants in error.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Elder v. Colorado, 204 U. S. 85, 51 L. ed. 381, 27 Sup. Ct. Rep. 223.

*J. A. SCRIVEN COMPANY, Appellant, [708 v. RICE-STIX DRY GOODS COMPANY. [No. 299.]

Appeal—from circuit court of appeals—diverse citizenship—trademark case.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern Division of the Eastern District of Missouri in favor of complainant, suing for infringement of a trademark, and for unfair competition, with directions to dismiss the bill.

See same case below, 91 C. C. A. 475, 165 Fed. 639.

Messrs. Arthur v. Briesen and Hans v. Briesen for appellant.

Messrs. Frederick W. Lehmann and S. L. Swarts for appellee.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; section 6 of act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549). And

see *Hutchinson P. & Co. v. Loewy*, 217 U. S. 457, 54 L. ed. 838, 30 Sup. Ct. Rep. 613.

MIKE BEECHAM, Plaintiff in Error, v. UNITED STATES. [No. 413.]

Error—to supreme court of Philippine Islands—frivolousness of Federal questions—criminal case.

In Error to the Supreme Court of the Philippine Islands to review a judgment which, on an appeal taken by the accused from a sentence to life imprisonment imposed by the Court of First Instance of the Province of Pampanga upon a conviction of murder, reversed the judgment and imposed sentence of death.

See same case below, 15 Philippine, 272.

Mr. William J. Rhode for plaintiff in error.

Attorney General Wickersham and Assistant General Harr for defendant in error.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; *Rasmussen v. United States*, 197 U. S. 520, 49 L. ed. 863, 25 Sup. Ct. Rep. 514; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697; *Grafton v. United States*, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773.

MIKE BEECHAM, Plaintiff in Error, v. UNITED STATES. [No. 414.]

Error—to supreme court of Philippine Islands—frivolousness of Federal questions—criminal case.

In Error to the Supreme Court of the Philippine Islands to review a judgment which, on an appeal taken by the accused from a sentence to life imprisonment imposed by the Court of First Instance of the Province of Pampanga upon a conviction of murder, reversed the judgment and imposed sentence of death.

See same case below, 15 Philippine, 336.

Mr. William J. Rhode for plaintiff in error.

The Attorney General Wickersham and Assistant Attorney General Harr for defendant in error.

October 23, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; *Rasmussen v. United States*, 197 U. S. 520, 49 L. ed. 863, 25 Sup. Ct. Rep. 514; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697; *Grafton v. United States*, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773.

missed for the want of jurisdiction. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; *Rasmussen v. United States*, 197 U. S. 520, 49 L. ed. 863, 25 Sup. Ct. Rep. 514; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697; *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773; *Grafton v. United States*, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640.

ROBERT GILLAND, Plaintiff in Error, v. UNITED STATES. [No. 361.]

In Error to the Circuit Court of the United States for the District of South Dakota.

Messrs. Louis W. Crofoot and Melvin Grigsby for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

October 24, 1911. *Per Curiam*: Judgment reversed upon confession of error by counsel for defendant in error, and cause remanded for further proceedings in conformity to law.

EX PARTE: IN THE MATTER OF J. WESLEY GLASGOW, Petitioner. [No. —, Original.]

Habeas corpus—in Federal Supreme Court—substitute for writ of error.

Motion for leave to file a petition for a writ of habeas corpus on behalf of a person held in custody to answer to an indictment found in the District Court of the United States for the District of Delaware, charging an offense against the postal laws.

Mr. John C. Fay for petitioner.

October 30, 1911. *Per Curiam*: Denied. *Ex parte Mirzan*, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341; *Riggins v. United States*, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; *Re Lincoln*, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602.

JOSEPH R. MOORE et al., Plaintiffs in Error, v. STATE OF NEW JERSEY. [No. 14.]

Error to state court—Federal question.

In Error to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of

the Supreme Court of that state, affirming a conviction for keeping a disorderly house.

See same case below, 75 N. J. L. 619, 68 Atl. 165.

Mr. Thomas P. Fay for plaintiffs in error.

Mr. Edmund Wilson for defendant in error.

710] *October 30, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Twining v. New Jersey, 211 U. S. 111, 53 L. ed. 111, 29 Sup. Ct. Rep. 14; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366.

DAVID A. COLLIER et al., Plaintiffs in Error, v. J. G. SMALTZ and Iowa Railroad Land Company. [No. 571.]

Error to state court—frivolousness of Federal question.

In Error to the Supreme Court of the State of Iowa to review a decree which dismissed the petition in one suit to quiet title, and granted the relief sought in another such suit.

See same case below, 149 Iowa, 230, 128 N. W. 396.

Mr. F. T. Hughes for plaintiffs in error.

Messrs. Charles A. Clark and T. M. Zink for defendants in error.

October 30, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Hanis Distilling Co. v. Baltimore, 216 U. S. 285, 288, 54 L. ed. 482, 483, 30 Sup. Ct. Rep. 326, and cases cited; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365.

MERCANTILE TRUST COMPANY et al., Appellants, v. TEXAS & PACIFIC RAILWAY COMPANY et al. [No. 12.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. Murphy J. Foster and William W. Green for appellants.

Messrs. John F. Dillon, Charles E. Fenner, W. B. Spencer, and Charles Payne Fenner for appellees.

Mr. Walter Guion as *amicus curiæ*.

October 30, 1911. *Per Curiam*: Decree affirmed with costs. Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 158, 54 L. ed. 970, 978, 30 Sup. Ct. Rep. 633, and cases cited.

*ROGER SHERMAN,† Successor in Trust, [711 and D. H. Pinney, Plaintiffs in Error, v. LIBBIE GOODWIN. [No. 23.]

Appeal—from territorial supreme court—mode of review—facts.

In Error to the Supreme Court of the Territory of Arizona to review a decree which, on rehearing, affirmed a decree of the District Court of Maricopa County in favor of defendant in an action to foreclose a mortgage.

See same case below, 12 Ariz. 42, 95 Pac. 121.

Messrs. Walter Bennett and D. H. Pinney for plaintiffs in error.

Mr. J. F. Wilson for defendant in error.

November 6, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 513, 33 L. ed. 433, 436, 10 Sup. Ct. Rep. 177; Garzot v. Rios de Rubio, 209 U. S. 284, 52 L. ed. 794, 28 Sup. Ct. Rep. 548.

W. H. TOLLIVER ET UX., Appellants, v. GREAT NORTHERN RAILWAY COMPANY. [No. 762.]

Appeal—from circuit court of appeals—jurisdiction below.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern Division of the Eastern District of Washington in favor of complainant in a suit to enjoin interference with a water right.

See same case below, 109 C. C. A. 643, 187 Fed. 795.

Messrs. Miles Poindexter and O. C. Moore for appellants.

Mr. E. C. Lindley for appellee.

November 6, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418 and cases cited.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. C. W. BRADBURY. [No. 555.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Iowa to review a judgment which modified, and, as modified, affirmed a judgment of the District Court of Emmet County in favor of a railway employee in an action for personal injuries.

See same case below, 149 Iowa, 51, — L.R.A.(N.S.) —, 128 N. W. 1.

†Appearance of Roger Sherman, as successor in trust of P. L. Sherman, deceased, filed and entered October 9, 1911.

Mr. Carroll Wright for plaintiff in error.
Messrs. Horatio F. Dale and John G. Myerly for defendant in error.

November 13, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Southern R. Co. v. United States, 222 U. S. 20, ante, 72, 32 Sup. Ct. Rep. 2; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, and 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561.

712]*CONRAD T. STRUCKMAN and Ernst C. H. W. Waage, Appellants, v. UNITED STATES. [No. 57.]

Duties—ratification of illegal collection.

Appeal from the Court of Claims to review a judgment dismissing a petition for the recovery of duties alleged to have been illegally collected upon imports to the Philippine Islands.

See same case below, 44 Ct. Cl. 202.

Messrs. Edward S. Hatch, Vincent P. Donihee, and Walter F. Welch for appellants.

Attorney General Wickersham and Solicitor General Lehmann for appellee.

December 4, 1911. *Per Curiam*: Judgment affirmed. United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688.

WILLIAM BAIRD, Plaintiff in Error, v. ALLEN P. HOWISON et al. [No. 148.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Alabama to review a decree which affirmed a decree of the Chancery Court for Jefferson County, dismissing the bill in a suit to establish a trust.

See same case below, 154 Ala. 359, 45 So. 668.

Mr. Alexander M. Garber for plaintiff in error.

Mr. John P. Tillman for defendants in error.

December 11, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Dewey v. Des Moines, 173 U. S. 193, 198, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; 56 L. ed.

Montana ex rel. Haire v. Rice, 204 U. S. 291, 301, 51 L. ed. 490, 491, 27 Sup. Ct. Rep. 281; Thomas v. Iowa, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580.

C. L. VAN SICE, Appellant, v. IBEX MINING COMPANY. [No. 306.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Colorado, enjoining the prosecution of an action in ejectment.

See same case below, 97 C. C. A. 587, 173 Fed. 895.

Mr. Edwin H. Park for appellant.

Messrs. Charles Cavender and Gerald Hughes for appellee.

December 18, 1911. *Per Curiam*: Dismissed for the want of jurisdiction. Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Macfadden v. United States, 213 U. S. 288, 293, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 577, 43 L. ed. 814, 816, 19 Sup. Ct. Rep. 500 and cases cited.

***WILSON-MOLINE BUGGY COMPANY, [713] Plaintiff in Error, v. C. B. E. HAWKINS [No. 106.]**

Interstate commerce—state regulation—foreign corporations.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the Lyon District Court, denying the right of a foreign corporation to maintain an action upon a promissory note given in part payment of the purchase price of a buggy, because it had not first obtained a certificate from the Secretary of State.

See same case below, 80 Kan. 117, 101 Pac. 1009.

Messrs. Almon W. Bulkley and C. E. More for plaintiff in error.

No appearance for defendant in error.

December 18, 1911. *Per Curiam*: Judgment reversed. International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 A. & E. Ann. Cas. 1103.

PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, v. STATE OF INDIANA. [No. 114.] Commerce—constitutional law—state regulation—full train crew.

In Error to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Criminal Court of Marion County, convicting a railway company of violating the full train crew act.

See same case below, 172 Ind. 147, 87 N. E. 1034.

Messrs. Lawrence Maxwell and Samuel O. Pickens for plaintiff in error.

Messrs. Thomas M. Honan, James Bingham, and Martin M. Hugg for defendant in error.

December 18, 1911. *Per Curiam*: Judgment affirmed with costs. Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

EX PARTE: IN THE MATTER OF LOUIS CELLA et al., Petitioners. [No. —, Original.]

Motion for leave to file petition for Writ of Prohibition.

Messrs. A. S. Worthington, Charles L. Frailey, and Howard Taylor for petitioners.

Attorney General Wickersham, Solicitor General Lehmann, and Messrs. Clarence R. Wilson, and Henry S. Robbins, opposed. January 9, 1912. Denied.

BOERN HAT COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 574.]

Witnesses—privilege—corporation.

714] In Error to the Circuit *Court of the United States for the Southern District of New York to review an order granting an application for subpoena duces tecum to compel a corporation to produce its books for the inspection of the grand jury.

See same case below, 184 Fed. 506.

Mr. Abram I. Elkus for plaintiff in error.

Attorney General Wickersham and Solicitor General Lehmann for defendant in error.

January 15, 1912. *Per Curiam*: Judgment affirmed on the authority of Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538; Dreier v. United States, 221 U. S. 394, 55 L. ed. 784, 31 Sup. Ct. Rep. 550; American Tobacco Co.

v. Werckmeister, 207 U. S. 284, 302, 52 L. ed. 208, 218, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, and cause remanded to the District Court of the United States for the Southern District of New York.

WILLIAM ANDERSON and Robert Barry, Partners, etc., Plaintiffs in Error, v. INHABITANTS OF THE CITY OF BORDENTOWN, New Jersey. [No. 803.]

Error to state court—Federal question—impairing contract obligation.

In Error to the Supreme Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that State, affirming a judgment of the Burlington County Circuit Court in favor of a municipality in an action for water rents.

See same case below, 81 N. J. L. 434, 79 Atl. 281.

Mr. E. A. Armstrong for plaintiffs in error.

Mr. Frederic D. McKenney, Mr. J. Spalding Flannery, and Mr. William Hitz for defendants in error.

January 15, 1912. *Per Curiam*: Writ of error dismissed for the want of jurisdiction. St. Paul M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691; and cases cited; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 226, 54 L. ed. 736, 744, 30 Sup. Ct. Rep. 452.

EUGENE M. THAYER, Plaintiff in Error, v. ELIZA M. SCHABEN et al. [No. 65.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Ness District Court in favor of the defendant in an action in ejectment involving title to school lands.

See same case below, 79 Kan. 856, 98 Pac. 1134.

Messrs. Arthur J. Eddy, Emil C. Wetten, and Charles H. Pegler, for plaintiff in error.

Mr. Fred S. Jackson for defendants in error.

715] January 22, 1912. *Per *Curiam*: Writ of error dismissed for want of jurisdiction. California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. ed. 231, 19 Sup. Ct. Rep. 4; Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699.

HORACE CHASE, Individually and as Administrator, etc., Plaintiff in Error, v. LEONARD H. PHILLIPS and Samuel C. Lawrence, Trustees. [No. 554.]

Error to state court—Federal question.

In Error to the Supreme Judicial Court of the State of Massachusetts to review a judgment which, on final hearing, dismissed, on the ground of *res judicata*, a bill seeking to revoke a decree of adoption.

See same case below, 208 Mass. 245, 94 N. E. 266.

Mr. Richard Y. Fitzgerald for plaintiff in error.

Messrs. J. L. Thorndike and E. R. Thayer for defendants in error.

February 19, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 235, 236, 51 L. ed. 779, 783, 784, 27 Sup. Ct. Rep. 476; Chase v. Phillips, 216 U. S. 616, 54 L. ed. 639, 30 Sup. Ct. Rep. 577.

EX PARTE MATTHIAS RADIN, Petitioner. [No. —Original.]

Motion for leave to file a petition for a Writ of Habeas Corpus.

Mr. Harry Levor for petitioner.

March 11, 1912. Denied.

WALTER E. MEYERS, Trustee, etc., Plaintiff in Error, v. A. SAMUELS et al. [No. 198.]

Error to state court—finality of judgment.

In Error to the Supreme Court of the State of Ohio to review a judgment which 56 L. ed.

affirmed a judgment of the Circuit Court of Cuyahoga County, reversing a judgment of the Court of Common Pleas of said County, which had overruled demurrers to the petition in a suit for the recovery of money.

See same case below, 81 Ohio St. 535, 91 N. E. 1135.

Messrs. John G. White, Amos Burt Thompson, and W. B. Sanders for plaintiff in error.

Messrs. Francis J. Wing and Nathan Loeser for defendants in error.

March 11, 1912. *Per Curiam*: Dismissed for want of jurisdiction. Missouri & K. I. *R. Co. v. Olathe, 222 U. S. [716 185, 187, ante, 155, 156, 32 Sup. Ct. Rep. 46, 47, December 4, 1911, and cases cited.

BENJAMIN F. ROSELLE, Plaintiff in Error, v. COMMONWEALTH OF VIRGINIA. [No. 185.]

Commerce—state regulation—peddlers and drummers.

In Error to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a conviction in the Corporation Court of the City of Charlottesville for peddling without a license picture frames made by an Illinois corporation.

See same case below, 110 Va. 235, 65 S. E. 526.

Messrs. Daniel Harmon, H. W. Walsh, and J. T. Evans for plaintiff in error.

Mr. Samuel W. Williams for defendant in error.

March 18, 1912. Judgment affirmed with costs by a divided court.

WARREN OZRO KYLE et al., Appellants, v. JOHN C. HAMMOND. See *post*, p. —.

ÆTNA LIFE INSURANCE COMPANY, Petitioner, v. JOHN T. MOORE, Administrator, etc. [No. 619.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. George S. Jones and Malcolm D. Jones *for petitioner. [717

Messrs. Minter Wimberly, Jesse C. Harris, and Alexander Akerman for respondent.

October 23, 1911. Granted.

RUBBER TIRE WHEEL COMPANY et al., Petitioners, v. **GOODYEAR TIRE & RUBBER COMPANY.** [No. 633.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Lawrence Maxwell, Chas. W. Stapleton, F. P. Fish, Paul A. Staley, and Border Bowman for petitioners.

Mr. H. A. Toulmin for respondent.

October 23, 1911. Granted.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER, v. **JOHN T. MOORE,** Administrator, etc. [No. 670.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Edward D. Duffield for petitioner.

Messrs. Minter Wimberly, Jesse C. Harris, and Alexander Akerman for respondent.

October 23, 1911. Granted.

GEORGE N. PIERCE COMPANY, Petitioner, v. **WELLS-FARGO & COMPANY.** [No. 802.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. George E. Hamilton, John W. Yerkes, and John J. Hamilton for petitioner.

Messrs. Chas. W. Pierson and William W. Green for respondent.

October 23, 1911. Granted.

HAW MOY, Petitioner, v. **HART H. NORTH,** Commissioner of Immigration, etc. [No. 603.]

Petition for a Writ of Certiorari to the 718]United States Circuit *Court of Appeals for the Ninth Circuit.

See same case below, 105 C. C. A. 381, 183 Fed. 89.

Mr. Corry M. Stadden for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

HOO CHOY, Petitioner, v. **HART H. NORTH,** Commissioner of Immigration, etc. [No. 604.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 105 C. C. A. 384, 183 Fed. 92.

Mr. Corry M. Stadden for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

CHARLES D. HENDERSON, Petitioner, v. **PENNSYLVANIA RAILROAD COMPANY.** [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

Mr. James F. Campbell for petitioner.

Messrs. Frederic D. McKenney, J. Spalding Flannery, and William Hitz for respondent.

October 23, 1911. Denied.

JESSE WATSON, as Trustee, etc., Petitioner, v. **EUROPEAN AMERICAN BANK.** [No. 610.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 108 C. C. A. 196, 186 Fed. 84.

Mr. Clayton J. Heermance for petitioner.

Messrs. Philip Ashton Rollins and Alfred Adams Wheat for respondent.

October 23, 1911. Denied.

JOHNSON EDUCATOR FOOD COMPANY, Petitioner, v. **SYLVANUS SMITH & COMPANY (INCORPORATED).** [No. 620.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 37 App. D. C. 107.

Messrs. William A. Macleod and Henry Calver for petitioner.

No appearance for respondent.

*October 23, 1911. Denied.

FRANK C. MARRIN v. UNITED STATES. [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 93 C. C. A. 351, 167 Fed. 951.

Messrs. J. H. Ralston, F. L. Siddons, and William E. Richardson for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

JOHN I. McDUFFEE, Trustee, et al., Petitioners, v. HESTONVILLE, MANTUA, & FAIRMOUNT PASSENGER RAILWAY COMPANY et al. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 109 C. C. A. 606, 185 Fed. 798.

Messrs. Thomas F. Sheridan, Clifton V. Edwards, and Joseph C. Fraley for petitioners.

Messrs. F. P. Fish and Charles Neave for respondents.

October 23, 1911. Denied.

EDWARD ENDERS, Petitioner, v. UNITED STATES. [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 109 C. C. A. 502, 187 Fed. 754.

Messrs. Frank R. Reid and John T. Evans for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

720] *HENRY HINN, Petitioner, v. UNITED STATES. [No. 630.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 109 C. C. A. 502, 187 Fed. 754.

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Messrs. Frank R. Reid and John T. Evans for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

JAMES N. ALSOP, Petitioner, v. JOHN CONWAY et al. [No. 634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 110 C. C. A. 366, 188 Fed. 568.

Mr. George W. Jolly for petitioner.

Mr. William T. Ellis for respondents.

October 23, 1911. Denied.

CHARLES E. HAMILTON, as Receiver, etc., Petitioner, v. FERDINAND L. LOEB. [No. 643.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 108 C. C. A. 109, 186 Fed. 7.

Mr. Frederick L. Siddons for petitioner.

Messrs. John G. Johnson and Abraham Israel for respondent.

October 23, 1911. Denied.

TITLE GUARANTY & SURETY COMPANY, Petitioner, v. UNITED STATES TO USE OF GENERAL ELECTRIC COMPANY. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 109 C. C. A. 106, 187 Fed. 98.

Messrs. James Russell Soley and Russell H. Robbins for petitioner.

Mr. H. B. Gill for respondent.

October 23, 1911. Denied.

*PEOPLE OF THE STATE OF NEW YORK, [721] Petitioners, v. CENTRAL TRUST COMPANY OF NEW YORK et al. [No. 706.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 1, 186 Fed. 291.

Mr. William A. McQuaid for petitioners.

Messrs. William D. Guthrie and John M. Bowers for respondents.

October 23, 1911. Denied.

EDWARD RIMMERMAN et al., Petitioners, v. UNITED STATES OF AMERICA. [No. 709.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 108 C. C. A. 385, 186 Fed. 307.

Mr. Nathan A. Gibson for petitioners.

Attorney General Wickersham, and Solicitor General Lehmann for respondent.

October 23, 1911. Denied.

PRESSED STEEL CAR COMPANY, Petitioner, v. SIMPLEX RAILWAY APPLIANCE COMPANY. [No. 717:]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 634, 189 Fed. 70.

Messrs. Alfred W. Kiddle and Clarence P. Byrnes for petitioner.

Messrs. Charles C. Linthicum and J. Edgar Bull for respondent.

October 23, 1911. Denied.

WILLIAM J. HAGADORN et al., Petitioners, v. STREET GRADING DISTRICT No. 60 OF LITTLE ROCK, ARKANSAS. [No. 752.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 108 C. C. A. 429, 186 Fed. 451.

Messrs. U. M. Rose, W. E. Hemingway, G. B. Rose, and J. F. Loughborough for petitioners.

No appearance for respondent.

October 23, 1911. Denied.

722] *JACOB YUNGBLUTH, Petitioner, v. JOHN H. SLIPPER et al. [No. 781.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 108 C. C. A. 106, 185 Fed. 773.

Mr. E. C. Million for petitioner.

Mr. Alfred L. Black for respondents.

October 23, 1911. Denied.

CITY OF NEW YORK, Petitioner, v. UNITED STATES. [No. 789.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 184, 188 Fed. 46.

Messrs. Terence Farley and W. J. O'Sullivan for petitioner.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

October 23, 1911. Denied.

F. A. GARRAMONE et al., Petitioners, v. UNITED STATES. [No. 790.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals. Mr. James L. Gerry for petitioners.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

October 23, 1911. Denied.

HENRY HEIDE, Petitioner, v. PANAYIOTIS PANOULIAS. [No. 792.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 656, 188 Fed. 914.

Mr. George Whitefield Betts, Jr., for petitioner.

Mr. Ferdinand E. M. Bullowa for respondent.

October 23, 1911. Denied.

PENNSYLVANIA STEEL COMPANY, Petitioner, v. HENRY M. SUSSWEIN. [No. 793.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 108 C. C. A. 569, 186 Fed. 1023.

Mr. H. Snowden Marshall for petitioner.

Messrs. Roger Lewis and Bronson Winthrop for respondent.

October 23, 1911. Denied.

MARTHA BRION, Petitioner, v. UNITED STATES. [No. 804.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 192 Fed. 117.

Mr. Elijah N. Zoline for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

RAYMONDE CHOMEL, Petitioner, v. UNITED STATES. [No. 805.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 192 Fed. 117.

Mr. Elijah N. Zoline for petitioner.

The Attorney General Wickersham and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

OCEANIC STEAM NAVIGATION COMPANY, Petitioner, v. EDITH WATKINS. [No. 808.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 543, 188 Fed. 909.

Mr. Charles C. Burlingham for petitioner.

No appearance for respondent.

October 23, 1911. Denied.

JOHN M. STONE GOTTON MILLS, Petitioner, v. F. T. FLEITMANN et al., etc. [No. 810.]

Petition for a Writ of Certiorari to the 724] United States Circuit *Court of Appeals for the Fifth Circuit.

See same case below, 108 C. C. A. 444, 186 Fed. 466.

Messrs. Charlton H. Alexander and William W. Magruder for petitioner.

Messrs. Marcellus Green and Arthur C. Rounds for respondents.

October 23, 1911. Denied.

RUBBER TIRE WHEEL COMPANY et al., Petitioners, v. GOODYEAR TIRE & RUBBER COMPANY et al. [No. 811.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 53 C. C. A. 583, 116 Fed. 363.

Messrs. Lawrence Maxwell, F. P. Fish, Chas. W. Stapleton, Paul A. Staley, and Border Bowman for petitioners.

Mr. H. A. Toulmin for respondents.

October 23, 1911. Denied.

ATLANTIC TRANSPORT COMPANY, Petitioner, v. UNITED STATES. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 110 C. C. A. 420, 186 Fed. 42.

Mr. William S. Montgomery for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

October 23, 1911. Denied.

WASHINGTON, ALEXANDRIA, & MOUNT VERNON RAILWAY COMPANY, Petitioner, v. REAL ESTATE TRUST COMPANY OF PHILADELPHIA. [No. 831.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 191 Fed. 566.

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Messrs. R. Walton Moore, John S. Barbour, George W. Pepper, and W. B. Bodine, Jr., for petitioner.

Messrs. Joseph de F. Junkin and John G. Johnson for respondent.

October 30, 1911. Denied.

*ELKINS ELECTRIC RAILWAY COMPANY, Petitioner, v. WESTERN MARYLAND RAILWAY COMPANY. [No. 834.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 108 C. C. A. 557, 186 Fed. 1022.

Messrs. W. B. Maxwell and Fred Beall for petitioner.

Messrs. George R. Gaither and Leon E. Greenbaum for respondent.

October 30, 1911. Denied.

WARNER-JENKINSON COMPANY, Petitioner, v. UNITED STATES. [No. 812.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Charles Ray Dean for petitioner.

Attorney General Wickersham and Assistant Attorney General Denison for respondent.

November 6, 1911. Denied.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Owner, etc., Petitioner, v. PHILADELPHIA & READING COMPANY, Charterer, etc. [No. 842.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 108 C. C. A. 217, 186 Fed. 105.

Messrs. James J. Macklin and De Laguel Berier for petitioner.

Mr. James F. Campbell for respondent.

November 6, 1911. Denied.

CHARLES L. SMITH, Owner, etc., Petitioner, v. CORNELIUS A. DAVIS, Claimant, etc. [No. 827]; and CHARLES L. SMITH et al., Petitioners, v. CORNELIUS A. DAVIS et al. [No. 828].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 109 C. C. A. 94, 187 Fed. 40.

Messrs. Edward E. Blodgett and F. M. Brown for petitioners.

Mr. Edward S. Dodge for respondents.

November 13, 1911. Denied.

726] *ALLESANDRA BOLOGNESI et al., Petitioners, v. UNITED STATES. [No. 839.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 36 L.R.A.(N.S.) 143, 111 C. C. A. 67, 189 Fed. 335.

Mr. A. S. Gilbert for petitioners.

Attorney General Wickersham and Assistant Attorney General Harr for respondent. November 20, 1911. Denied.

WALTER BAKER & COMPANY, LIMITED, Petitioner, v. NESTLE & ANGLO-SWISS CONDENSED MILK COMPANY. [No. 840.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 37 App. D. C. 148.

Messrs. George Putnam, Horace A. Dodge, and Jas. L. Putnam for petitioner.

Mr. James Hamilton for respondent.

November 20, 1911. Denied.

S. C. LILLIS, Petitioner, v. UNITED STATES. [No. 843.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 111 C. C. A. 362, 190 Fed. 530.

Messrs. P. F. Dunne and Charles H. Bates for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and B. D. Townsend for respondent.

November 20, 1911. Denied.

COLTS PATENT FIRE ARMS MANUFACTURING COMPANY et al., Petitioners, v. NEW YORK SPORTING GOODS COMPANY. [No. 845.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 111 C. C. A. 405, 190 Fed. 553.

Mr. W. K. Richardson for petitioners.

Messrs. Edmund Wetmore and H. S. Knight for respondent.

November 20, 1911. Denied.

PEROLIN COMPANY OF AMERICA, Petitioner, **727]**v. *COTTO-WAXO CHEMICAL COMPANY. [No. 848.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 107 C. C. A. 373, 185 Fed. 267.

Messrs. Hugh K. Wagner and John W. Hill for petitioner.

Mr. Paul Bakewell for respondent.

November 20, 1911. Denied.

AMERICAN TRUST COMPANY, Trustee, Petitioner, v. METROPOLITAN STEAMSHIP COMPANY et al. [No. 861.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 111 C. C. A. 376, 190 Fed. 113.

Mr. J. Markham Marshall for petitioner. Messrs. Clarence A. Hight and William Hall Best for respondents.

December 4, 1911. Denied.

EXCELSIOR SUPPLY COMPANY et al., Petitioners, v. WEED CHAIN TIRE GRIP COMPANY et al. [No. 862.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 192 Fed. 35.

Mr. Thomas F. Sheridan for petitioners. Messrs. Edward Rector and Frederick S. Duncan for respondents.

December 4, 1911. Denied.

SECOND POOL COAL COMPANY, Petitioner, v. PEOPLE'S COAL COMPANY. [No. 873.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 110 C. C. A. 526, 188 Fed. 892.

Mr. Lowrie C. Barton for petitioner.

Mr. George E. Shaw for respondent.

December 11, 1911. Denied.

CITY BANK & TRUST COMPANY, Trustee, *Petitioner, v. F. W. WILLIAMS et al. [No. 850.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 108 C. C. A. 341, 186 Fed. 419.

Mr. Watson B. Robinson for petitioner.

Mr. G. Q. Hall for respondents.

December 18, 1911. Denied.

JACOB MAKI, as Administrator, etc., Petitioner, v. UNION PACIFIC COAL COMPANY. [No. 886.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 109 C. C. A. 221, 187 Fed. 389.

Mr. Wayne C. Williams for petitioner.

Messrs. Maxwell Evarts, N. H. Loomis, and C. C. Dorsey for respondent.

December 18, 1911. Denied.

THOMAS E. IRETON et al., Petitioners, v. PENNSYLVANIA COMPANY. [No. 756.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 107 C. C. A. 304, 185 Fed. 84.

Mr. Orville S. Brumback for petitioners. No appearance for respondent.

January 9, 1912. Denied.

LOUIS CELLA et al., Petitioners, v. UNITED STATES. [Nos. 891 and 892.]

Petition for Writs of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, in 891, 37 App. D. C. 423; in 892, 37 App. D. C. 433.

Messrs. A. S. Worthington, Charles L. Frailey, and Howard Taylor for petitioners.

Attorney General Wickersham, Solicitor General Lehmann, and Messrs. Clarence R. Wilson, and Henry S. Robbins for respondent.

January 9, 1912. Denied.

FRIED. KRUPP AKTIEN GESELLSCHAFT, Petitioner, v. *MIDVALE STEEL COMPANY. [No. 901.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 191 Fed. 588.

Mr. James R. Sheffield for petitioner.

Mr. A. H. Wintersteen for respondent.

January 15, 1912. Denied.

DIETRICH E. LOEWE et al., Petitioners, v. MARTIN LAWLER et al. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 109 C. C. A. 288, 187 Fed. 522.

Messrs. Daniel Davenport and Walter Gordon Merritt for petitioners.

Messrs. Alton B. Parker, John K. Beach, and F. L. Mulholland for respondents.

January 15, 1912. Denied.

JACOB MEURER, Petitioner, v. GEORGE STURGISS et al. [No. 919.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 111 C. C. A. 551, 191 Fed. 9.

Mr. William Mason Smith for petitioner.

Mr. B. M. Ambler for respondents.

January 15, 1912. Denied.

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OLCOTT C. COLT, Petitioner, v. UNITED STATES. [No. 932.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 111 C. C. A. 205, 190 Fed. 305.

Mr. Edward S. Duvall, Jr., for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

January 22, 1912. Denied.

ALBERT B. CAMERON, Petitioner, v. *UNITED STATES. [No. 931.] [730

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Howard S. Gans for petitioner.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

January 29, 1912. Granted.

MCCRUM-HOWELL COMPANY, Petitioner, v. POPE AUTOMATIC MERCHANDISING COMPANY et al. [No. 938.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, — L.R.A.(N.S.) —, 191 Fed. 979.

Mr. Hillary C. Messimer for petitioner.

No appearance for respondents.

January 29, 1912. Denied.

CHARLES R. HEIKE, Petitioner, v. UNITED STATES. [No. 936.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John B. Stanchfield for petitioner.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

February 19, 1912. Granted.

ERNEST W. GERBRACHT, Petitioner, v. UNITED STATES. [No. 937.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 192 Fed. 83.

Mr. George M. Mackellar for petitioner.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

February 19, 1912. Denied.

GOULD STORAGE BATTERY COMPANY, Petitioner, v. *ELECTRIC STORAGE BATTERY COMPANY. [No. 942.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 192 Fed. 28.

Mr. William Houston Kenyon for petitioner.

Messrs. Augustus B. Stoughton and George S. Graham for respondent.

February 19, 1912. Denied.

HYMAN EPSTEIN, Petitioner, v. UNITED STATES. [No. 945.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Benjamin C. Bachrach for petitioner.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

February 19, 1912. Denied.

FRANK N. THOMAS, Petitioner, v. CONRAD H. MATTHIESSEN. [No. 948.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Alfred A. Wheat and Philip A. Rollins for petitioner.

Mr. Arthur C. Rounds for respondent.

February 26, 1912. Granted.

BEN BLANCHARD et al., Petitioners, v. G. W. AMMONS et al. [No. 867.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 106 C. C. A. 102, 183 Fed. 556.

Mr. Elias S. Clark for petitioners.

Messrs. John W. Griggs and Martin Convo for respondents.

February 26, 1912. Denied.

CHARLES BECKER, Petitioner, v. D. T. 732] *HUMPHREY et al. [No. 951.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 111 C. C. A. 666, 190 Fed. 1018.

Mr. Joseph N. Schultz for petitioner.

No appearance for respondents.

February 26, 1912. Denied.

ALPHONSE DUFAUR and Eva Dufaur, Petitioners, v. UNITED STATES. [No. 961.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 109 C. C. A. 572, 187 Fed. 812.

Messrs. A. B. Browne, Burton Hanson, Otis H. Waldo, and T. J. Fell for petitioners.

Attorney General Wickersham and Solicitor General Lehmann for respondent.

February 26, 1912. Denied.

WALTER BAKER & COMPANY, LIMITED, Petitioner, v. SIDNEY C. GRAY et al. [No. 963.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 192 Fed. 921.

Messrs. Frank F. Reed, J. L. Putnam, and E. S. Rogers for petitioner.

Mr. Dorr Raymond Cobb for respondents.

February 26, 1912. Denied.

MODEL BOTTLING MACHINERY COMPANY, Petitioner, v. ANHEUSER-BUSCH BREWING ASSOCIATION. [No. 975.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 111 C. C. A. 389, 190 Fed. 573.

Mr. Hugh K. Wagner for petitioner.

Mr. Charles C. Linthicum for respondent.

February 26, 1912. Denied.

WILLIAM A. PIERCE, Petitioner, v. UNITED STATES OF AMERICA. [No. 980.]

Petition *for a Writ of Certiorari [733 to the Court of Appeals of the District of Columbia.

See same case below, 37 App. D. C. 582.

Mr. A. S. Worthington for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

February 26, 1912. Denied.

WILLIAM ADLER, Petitioner, v. UNITED STATES. [No. 981.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 111 C. C. A. 664, 191 Fed. 1003.

Messrs. E. D. Saunders, Charles Rosen, J. D. Rause, William Grant, and Gustave Lemle for petitioner.

Attorney General Wickersham and Solicitor General Lehman for respondent.

February 26, 1912. Denied.

MITCHELL COAL & COKE COMPANY, Petitioner, v. PENNSYLVANIA RAILROAD COMPANY. [No. 985.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 192 Fed. 475.

Mr. George S. Graham for petitioner.

No appearance for respondent.

February 26, 1912. Denied.

THADDEUS DAVIDS COMPANY, Petitioner, v. CORTLANDT I. DAVIDS et al., etc. [No. 969.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. W. P. Preble for petitioner.

No appearance for respondents.

March 4, 1912. Granted.

FRED J. BLISS, Petitioner, v. WASHOE COPPER COMPANY et al. [No. 772.]

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Messrs. Hannis Taylor, Robert Lee Clinton, and Caleb M. Sawyer for petitioner.

Messrs. John Garver, James M. Beck, and L. O. Evans for respondents.

March 4, 1912. Granted.

UNITED STATES OF AMERICA, Plaintiff in Error, v. AMERICAN DRUGGIST SYNDICATE. [No. 819.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Mr. Chas. J. Murphy for defendant in error.

October 9, 1911. Docketed and dismissed on motion of Mr. Charles J. Murphy for the defendant in error.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 94.]

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Edmund F. Trabue, Attilla Cox, Jr., and John C. Doolan for plaintiff in error.

Attorney General Wickersham for defendant in error.

October 9, 1911. Dismissed on motion of Mr. Edmund F. Trabue for the plaintiff in error.

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CUDAHY PACKING COMPANY, Plaintiff in Error, v. C. E. DENTON, as Secretary of State of the State of Kansas. [No. 16.] In Error to the Supreme Court of the State of Kansas.

See same case below, 79 Kan. 368, 97 Pac. 439, 99 Pac. 601.

Messrs. Alexander New and Edwin A. Krauthoff for plaintiff in error.

Mr. Fred S. Jackson for defendant in error.

October 9, 1911. Dismissed per *stipulation of counsel. **[735]**

GRANTS PASS LAND & WATER COMPANY, Appellant, v. CITY OF LOS ANGELES. [No. 55.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Mr. Oscar A. Trippet for appellant.

Mr. Leslie R. Hewitt for appellee.

October 9, 1911. Dismissed per stipulation of counsel.

WILLIAM A. GUNTER, JR., Plaintiff in Error, v. EVANS HINSON et al. [No. 143.]

In Error to the Supreme Court of the State of Alabama.

Mr. W. A. Gunter for plaintiff in error.

No appearance for defendants in error.

October 9, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

HERBERT S. HADLEY et al., Petitioners, v. ARTHUR C. HUIDEKOPER. [No. 270.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, — L.R.A.(N.S.) —, 100 C. C. A. 395, 177 Fed. 1.

Messrs. Elliott W. Major and John M. Atkinson for petitioners.

Messrs. John L. Thomas and Reginald S. Huidekoper for respondent.

October 19, 1911. Dismissed per stipulation of counsel.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, Plaintiff in Error, v. SUSAN M. MORGAN *et al., as Surviving Trus-[**736** tees, etc. [No. 302.]

In Error to the Supreme Court of the State of New York.

Mr. Chas. L. Frailey for plaintiff in error.

Mr. Norris Morey for defendants in error.

October 9, 1911. Dismissed per stipulation of counsel.

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JESSE L. CARLTON et al., Plaintiffs in Error, v. FRANK W. RUSHING, Judge, etc., et al. [No. 358.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. Amos L. Beaty and William H. H. Clayton for plaintiffs in error.

Mr. William A. Collier for defendants in error.

October 9, 1911. Dismissed with costs, on motion of counsel for the plaintiffs in error.

WILLIAM LEWIN et al., as the Lewin-Scrap Iron Company, Plaintiffs in Error, v. KATE CASPAR, Administratrix, etc. [No. 365.]

In Error to the Supreme Court of the State of Kansas.

Mr. Jules C. Rosenberger for plaintiffs in error.

Mr. Henry L. Alden for defendant in error.

October 9, 1911. Dismissed per stipulation of counsel.

C. A. TILLES, Appellant, v. E. F. REGENHARDT, United States Marshal, etc., et al. [No. 522.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Henry S. Priest for appellant.

No appearance for appellees.

October 9, 1911. Dismissed with costs on motion of counsel for the appellant.

737] *UNITED STATES OF AMERICA, Plaintiff in Error, v. ST. LOUIS NATIONAL STOCKYARDS. [No. 330.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Attorney General Wickersham for plaintiff in error.

Mr. Luther M. Walter for defendant in error.

October 18, 1911. Judgment affirmed per stipulation, on motion of Mr. Solicitor General Lehmann for the plaintiff in error.

RUSSELL B. HERRIMAN, Appellant, v. C. T. Elliot, U. S. Marshal, etc. [No. 200.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. A. A. Birney and Henry F. Woodard for appellant.

Attorney General Wickersham for appellee.

October 19, 1911. Death of appellant suggested by Mr. Henry F. Woodard, counsel for appellant, and case abated.

WARNER VALLEY STOCK COMPANY, Plaintiff in Error, v. J. L. MORROW and W. H. Cooper. [No. 458.]

In Error to the Supreme Court of the State of Oregon.

Mr. James B. Kerr for plaintiff in error.

Mr. A. M. Crawford for defendants in error.

November 1, 1911. Dismissed without costs to either party, per stipulation, on motion of Mr. A. M. Crawford for the defendants in error.

BLAS AUSINA PI, Plaintiff in Error, v. UNITED STATES. [No. 35.]

In Error to the Supreme Court of the Philippine Islands.

Messrs. A. B. Browne, Alex. Britton, and W. A. Kincaid for plaintiff in error.

Attorney General Wickersham for defendant in error.

November 1, 1911. Dismissed pursuant to the Tenth Rule.

*J. A. SCRIVEN COMPANY, Appellant, [738 v. FERGUSON-MCKINNEY DRY GOODS COMPANY. [No. 301.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Arthur v. Briesen for appellant.

Mr. George W. Winstead for appellee.

November 6, 1911. Dismissed for the want of jurisdiction, per stipulation to abide decision in case No. 299 [223 U. S. 708, ante, 622, 32 Sup. Ct. Rep. 518], on motion of Mr. George W. Winstead for the appellee.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. STATE OF MINNESOTA. [No. 369.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. Rome G. Brown and Charles S. Albert for plaintiff in error.

Mr. George T. Simpson for defendant in error.

November 7, 1911. Dismissed, per stipulation, clerk's costs to be paid by the plaintiff in error.

BANKS LAW PUBLISHING COMPANY, Appellant, v. LAWYERS CO-OPERATIVE PUBLISHING COMPANY. [No. 82.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 94 C. C. A. 642, 169 Fed. 386, 17 Ann. Cas. 957.

Mr. William Hepburn Russell for appellant.

Messrs. Frederick F. Church, Frank F. Reed, and Edward S. Rogers for appellee.

November 9, 1911. Dismissed, per stipulation, each party to pay its own costs in this court.

JOHN C. HAMILTON, Plaintiff in Error, v. JOHN A. ROEBLING'S SONS COMPANY et al. [No. 59.]

In Error to the Supreme Court of the State of Ohio.

739] *Mr. George Hoadly for plaintiff in error.

No appearance for defendants in error.

November 9, 1911. Dismissed with costs, pursuant to the Tenth Rule.

DORSET CARTER et al., Appellants, v. J. GEORGE WRIGHT, Commissioner, etc. [No. 62.]

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Mr. William H. Robeson for appellants. No appearance for appellee.

November 10, 1911. Dismissed with costs, pursuant to the Tenth Rule.

AMERICAN RAILROAD COMPANY OF PORTO RICO, Appellant, v. CENTRAL SAN CHRISTOBAL. [No. 58.]

Appeal from the District Court of the United States for Porto Rico.

See same case below, on motion for a new trial, 4 Porto Rico Fed. Rep. 245; on second trial, 4 Porto Rico Fed. Rep. 422.

Mr. Francis H. Dexter for appellant.

Mr. Henry P. Blair for appellee.

November 13, 1911. Dismissed with costs, pursuant to the Sixteenth Rule, on motion of Mr. Henry P. Blair for the appellee.

CATHERINE LEHMAN et al., Plaintiffs in Error, v. STATE OF INDIANA ON RELATION OF CHARLES W. MILLER, Attorney General. [No. 592.]

In Error to the Appellate Court of the State of Indiana.

Mr. Ferdinand Winter for plaintiffs in error.

Mr. Thos. M. Honan for defendant in error.

November 14, 1911. Dismissed with costs, on motion of counsel for plaintiffs in error.

56 L. ed.

H. L. DENOON et al., Plaintiffs in Error, v. TAX TITLE COMPANY OF RICHMOND. [No. 67.]

In Error to the *Supreme Court of [740 Appeals of the State of Virginia.

Mr. S. S. P. Patteson for plaintiffs in error.

No appearance for defendant in error.

November 14, 1911. Dismissed with costs, pursuant to the Tenth Rule.

UNITED STATES EX REL. LOUIS F. ALLARDT, Appellant, v. MATTHEW J. LONG, Criminal Sheriff, etc. [No. 78.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. William Grant for appellant.

Messrs. St. Clair Adams and Albert D. Henriques, Jr., for appellee.

November 16, 1911. Dismissed with costs, pursuant to the Tenth Rule.

TERRITORY OF NEW MEXICO EX REL. ORA BUTLER MEECE, Appellant, v. IRA A. ABBOTT, Associate Justice, etc. [No. 135.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. Neill B. Field for appellant.

No appearance for appellee.

December 4, 1911. Dismissed with costs, on motion of counsel for the appellant.

FRANK A. MCCOMBER et al., Appellants, v. ALVA A. NICHOLSON et al. [No. 459.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Mr. Benjamin I. Salinger for appellants.

Mr. George Cosson for appellees.

December 4, 1911. Dismissed with costs, on motion of counsel for the appellants.

PULLMAN COMPANY, Plaintiff in Error, v. *DAISY B. CALDER. [No. 768.] [741

In Error to the Supreme Court of the State of South Carolina.

See same case below, — S. C. —, 71 S. E. 841.

Mr. W. Huger FitzSimons for plaintiff in error.

Mr. J. P. Kennedy Bryan for defendant in error.

December 4, 1911. Dismissed with costs, per stipulation.

MUNICIPAL COUNCIL OF SAN JUAN et al.,
Appellants, v. JOSÉ E. SALDANA et al.
[No. 91.]

Appeal from the Supreme Court of Porto Rico.

Mr. C. M. Boerman for appellants.

No appearance for appellees.

December 7, 1911. Dismissed with costs, pursuant to the Tenth Rule.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error, v. HENRY GIBBS. [No. 142.]

In Error to the Circuit Court of Nelson County, State of Virginia.

Messrs. George H. Fearons, Henry D. Estabrook, and Francis Raymond Stark for plaintiff in error.

No appearance for defendant in error.

December 12, 1911. Dismissed with costs, on motion of counsel for the plaintiff in error.

BETTIE LIGON et al., Appellants, v. DOUGLAS H. JOHNSTON et al. [No. 101.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Webster Ballinger for appellants.

No appearance for appellees.

December 12, 1911. Dismissed with costs, pursuant to the Tenth Rule.

PAUL H. KATZ, Appellant, v. MATTHEW J. 742] *LONG, Criminal Sheriff, etc. [No. 105.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. James J. McLoughlin for appellant.

Messrs. St. Clair Adams and Albert B. Henriquez, Jr., for appellee.

December 13, 1911. Dismissed with costs, pursuant to the Tenth Rule.

J. A. SCRIVEN COMPANY, Appellant, v. EDWARD MORRIS et al., Trading as Morris & Company. [No. 110.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Arthur v. Briesen and George W. Case, Jr., for appellant.

Messrs. Edgar H. Gans and W. Calvin Chesnut for appellees.

December 14, 1911. Dismissed with costs, pursuant to the Tenth Rule.

JAMES VAUGHAN, Plaintiff in Error, v. LYDIA STARR TABOR. [No. 116.]

In Error to the Supreme Court of the State of Michigan.

Mr. William L. Carpenter for plaintiff in error.

Mr. Herschel H. Hatch for defendant in error.

December 15, 1911. Dismissed without costs to either party, per stipulation.

JAMES VAUGHAN, Plaintiff in Error, v. LYDIA STARR TABOR. [No. 117.]

In Error to the Supreme Court of the State of Michigan.

Mr. William L. Carpenter for plaintiff in error.

Mr. Herschel H. Hatch for defendant in error.

December 15, 1911. Dismissed without costs to either party, per stipulation.

*CHICAGO, BURLINGTON, & QUINCY [743] RAILWAY COMPANY, Plaintiff in Error, v. CHARLES A. HAMILTON. [No. 229.]

In Error to the Supreme Court of the State of Iowa.

Mr. Hale Holden for plaintiff in error.

No appearance for defendant in error.

December 18, 1911. Dismissed with costs, on motion of counsel for the plaintiff in error.

CIENEGUITA COPPER COMPANY, Appellant, v. THOMAS FARISH, JR., et al. [No. 126.]
Appeal from the Supreme Court of the Territory of Arizona.

Mr. Eugene S. Ives for appellant.

Messrs. John F. Wilson and Walter Bennett for appellees.

December 18, 1911. Dismissed with costs, pursuant to the Tenth Rule.

BELT RAILWAY COMPANY OF CHICAGO, Petitioner, v. UNITED STATES. [No. 144.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 22 L.R.A. (N.S.) 582, 93 C. C. A. 666, 168 Fed. 542.

Messrs. William J. Henley and William L. Reed for petitioner.

The Attorney General Wickersham for respondent.

December 19, 1911. Dismissed, pursuant to the Tenth Rule.

AMERICAN SUGAR REFINING COMPANY,
Plaintiff in Error, v. UNITED STATES.
[No. 275.]

In Error to the Circuit Court of the United States for the Southern District of New York.

See same case below, 178 Fed. 109.

Mr. James M. Beck for plaintiff in error.

Attorney General Wickersham and Solicitor General Lehmann for defendant in error.

December 21, 1911. Dismissed on motion of counsel for the plaintiff in error.

744] *UNITED STATES, Plaintiff in Error, v. ROBERT JAMIESON. [No. 587.]

In Error to the Circuit Court of the United States for the Southern District of New York.

See same case below, 185 Fed. 165.

Attorney General Wickersham for plaintiff in error.

Mr. George Whitefield Betts, Jr., for defendant in error.

January 9, 1912. Dismissed on motion of Mr. Solicitor General Lehmann for the plaintiff in error, and cause remanded to the District Court of the United States for the Southern District of New York.

W. J. McNAUGHTON, Plaintiff in Error, v. STATE OF GEORGIA. [No. 829.]

In Error to the Supreme Court of the State of Georgia.

See same case below, 136 Ga. 600, 71 S. E. 1038.

Mr. William Wallace Lambdin for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

January 9, 1912. Dismissed with costs, pursuant to the Tenth Rule.

JOHN CHEMGAS, Plaintiff in Error, v. THOMAS J. TYNAN, Warden of the Colorado State Penitentiary. [No. 943.]

In Error to the Supreme Court of the State of Colorado.

Mr. Archibald A. Lee for defendant in error.

January 22, 1912. Docketed and dismissed with costs, on motion of Mr. Archibald A. Lee for the defendant in error.

PETER HORONS, Plaintiff in Error, v. THOMAS J. TYNAN, Warden of the Colorado State Penitentiary. [No. 944.]

In Error to the Supreme Court of the State of Colorado.

Mr. Archibald A. Lee for defendant in error.

January 22, 1912. Docketed and dismissed with costs, on motion of Mr. Archibald A. Lee for the defendant in error.

56 L. ed.

*BOARD OF CHOSEN FREEHOLDERS OF [745] THE COUNTY OF BURLINGTON et al., Appellants, v. PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Trustee. [No. 278.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. Alan H. Strong for appellants.

Messrs. Samuel Dickson and Thomas E. French for appellee.

January 22, 1912. Dismissed without costs to either party, per stipulation, and cause remanded to the District Court of the United States for the District of New Jersey.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. GRACE WATSON, Administratrix, etc. [No. 158.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

See same case below, 169 Fed. 942.

Messrs. Lewis Rhoton, James H. Stevenson, Joseph W. Canada, and E. B. Kinsworthy for plaintiff in error.

Mrs. Grace Watson, *in propria persona*, for defendant in error.

January 26, 1912. Judgment affirmed with costs, but without interest, per stipulation, and cause remanded to the District Court of the United States for the Eastern District of Arkansas.

BUD BROWN, Plaintiff in Error, v. STATE OF TEXAS. [No. 167.]

In Error to the Court of Criminal Appeals of the State of Texas.

Messrs. Charles K. Bell and George G. Clough for plaintiff in error.

Messrs. Jewell P. Lightfoot and James D. Walthall for defendant in error.

January 26, 1912. Dismissed with costs, pursuant to the Sixteenth Rule, on motion of Mr. J. P. Lightfoot for the defendant in error.

*ROBERT P. STEWART et al., Appellants, v. W. W. MITCHELL et al. [No. 175.]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

Mr. Caruthers Ewing for appellants.

Mr. W. C. Caldwell for respondents.

January 29, 1912. Dismissed with costs, on motion of counsel for the appellants, and cause remanded to the District Court of the United States for the Western District of Tennessee.

MARGARET KOPP et al., Appellants, v. MARIA WATERS. [No. 298.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 34 App. D. C. 575.

Mr. Wilton J. Lambert for appellants.

No appearance for respondent.

February 19, 1912. Dismissed with costs on motion of counsel for the appellants.

E. E. TAENZER & COMPANY, Petitioner, v. CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY. [No. 959.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 191 Fed. 543.

Mr. Caruthers Ewing for petitioner.

No appearance for respondent.

February 19, 1912. Dismissed on motion of counsel for the petitioner.

NORTHERN PACIFIC RAILWAY COMPANY et al., Appellants, v. UNITED STATES. [No. 258.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 101 C. C. A. 117, 176 Fed. 706.

Messrs. Charles W. Bunn and Charles Donnelly for appellants.

Attorney General Wickersham for respondent.

February 23, 1912. Dismissed on motion of counsel for the appellants.

747] *MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error, v. WILLIAM H. LADD. [No. 319.]

In Error to the Circuit Court of Rusk County, State of Wisconsin.

Mr. John A. Erdall for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

February 23, 1912. Dismissed without costs to either party, per stipulation.

MARY J. LEESNITZER et al., Appellants, v. MARGARET E. TAYLOR in Her Own Right and as Executrix of Thomas Taylor, Deceased. [No. 995.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. J. J. Darlington for appellee.

February 26, 1912. Docketed and dismissed with costs, on motion of Mr. J. J. Darlington for the appellee.

CHARLES W. McCONNEL, Appellant, v. GEORGE H. BURR et al. [No. 536.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. Robert C. Cooley for appellant.

No appearance for appellees.

February 26, 1912. Dismissed with costs, on motion of counsel for appellant.

J. A. SCRIVEN COMPANY, Appellant, v. PREMIUM MANUFACTURING COMPANY. [No. 300.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Arthur v. Briesen for appellant.

Messrs. F. W. Lehmann and S. L. Swarts for appellee.

February 28, 1912. Dismissed for want of jurisdiction, per stipulation, on motion of Mr. F. W. Lehmann for the appellee.

*HOMER WALT et al., Plaintiffs in Error, v. PEOPLE OF THE STATE OF COLORADO. [No. 182.]

In Error to the Supreme Court of the State of Colorado.

Mr. Robert W. Bonyngue for plaintiffs in error.

No appearance for defendant in error.

February 29, 1912. Dismissed with costs, pursuant to the Tenth Rule.

WASHINGTON WATER POWER COMPANY, Plaintiff in Error, v. WALTER S. GASKILL. [No. 186.]

In Error to the Supreme Court of the State of Idaho.

Mr. F. T. Post for plaintiff in error.

Messrs. John C. Gittings and Justin Morrill Chamberlain, for defendant in error.

March 1, 1912. Dismissed with costs, pursuant to the Tenth Rule.

ALEXANDER D. MCKNIGHT, Plaintiff in Error, v. ROBERT T. HODGE, Sheriff, etc. [No. 189.]

In Error to the Supreme Court of the State of Washington.

See same case below, 55 Wash. 289, — L.R.A.(N.S.) —, 104 Pac. 504.

Messrs. Lawrence Maxwell and Charles D. Fullen for plaintiff in error.

Mr. J. H. Forney for defendant in error.

March 5, 1912. Dismissed with costs on motion of Mr. Lawrence Maxwell for the plaintiff in error.

CAROLINE LESLIE CARTER PAYNE, also known as Mrs. Leslie Carter, Plaintiff in Error, v. ANLISS E. HEERMAN. [No. 205.]

In Error to the City Court of the City of New York, State of New York.

Mr. Nathaniel Levy for plaintiff in error.

Mr. Max D. Josephson for defendant in error.

March 7, 1912. Dismissed with costs, pursuant to the Tenth Rule.

749] *MONEYWEIGHT SCALE COMPANY, Plaintiff in Error, v. FELIX C. McBRIDE. [No. 211.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

Sec same case below, 199 Mass. 503, 85 N. E. 870.

Messrs. Charles F. Morse & John M. Zane for plaintiff in error.

Messrs. Edmund A. Whitman and Albert H. Meads for defendant in error.

March 7, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

56 L. ed.

PERFECTO DIMAGUILA and Buenaventura Dimaguila, Appellants, v. INTERNATIONAL BANKING CORPORATION et al. [No. 429.]

Appeal from the Supreme Court of the Philippine Islands.

Mr. William Henry White for appellants.

No appearance for appellees.

March 11, 1912. Dismissed with costs on motion of counsel for the appellants.

AGNES W. B. SHEPARD et al., Plaintiffs in Error, v. THE CITY OF SEATTLE. [No. 461.]

In Error to the Supreme Court of the State of Washington.

Messrs. Thomas R. Shepard and Alfred J. Daly for plaintiffs in error.

Mr. Harold Preston for defendant in error.

July 31, 1911. Dismissed, pursuant to the Twenty-eighth Rule.

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES

AT

OCTOBER TERM, 1911.

Vol. 224.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1911.

1] *SIDNEY HENRY et al.

v.

A. B. DICK COMPANY.

(See S. C. Reporter's ed. 1-73.)

Federal courts — jurisdiction — contracts affecting patents.

1. An agreement arising from the purchase of a Rotary mimeograph subject to a license restriction that the machine may be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, is not collateral, so as to make its validity dependent on principles of general law, of which a Federal court will have no jurisdiction.

[For other cases, see Courts, 556-561, in Digest Sup. Ct. 1908.]

Courts — rules of decision.

2. The Supreme Court of the United States will not refrain from ruling that a patentee may sell a patented machine subject to restrictions as to its use, and predicate infringement on a use in violation of such restrictions, on the ground that such a ruling might draw to the Federal courts cases which otherwise would not come to them.

[For other cases, see Courts, 1613-1615, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — infringement of patent.

3. An action by the patentee of a Rotary mimeograph sold under a license restriction that such machine should be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, against one selling ink to the

purchaser with the expectation that it would be used in connection with such mimeograph, is one arising under the patent laws, of which a Federal court has jurisdiction. [For other cases, see Courts, 562-568, in Digest Sup. Ct. 1908.]

Election of remedies — violation of license restriction.

4. A patentee selling a Rotary mimeograph under a license restriction that it shall be used only with stencil paper, ink, and other supplies made by the patentee, may elect to sue for an infringement by the sale of ink to the purchaser with the expectation that it would be used in connection with such mimeograph, although he might have sued on the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with the materials supplied by the patentee.

[As to choice of remedies, see Election of Remedies, III., in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — infringement of patents.

5. Whether a patentee selling a Rotary mimeograph under a license restriction that it shall be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, thereby reserves to himself as patentee the exclusive right to all unpermitted uses which may be made of his invention as embodied in the machine sold, is a question arising under the patent laws, of which a Federal court has jurisdiction.

[For other cases, see Courts, 562-568, in Digest Sup. Ct. 1908.]

Patents — license restrictions.

6. A license restriction may lawfully be

NOTE.—On the right of purchaser of patented article to sell or use it free from restrictions affecting it in the hands of the vendor—see note to Garst v. Hall & L. Co. 55 L.R.A. 633.

On the validity of contract provision seeking to control price at which an arti-

cle shall be resold—see note to Grogan v. Chaffee, 27 L.R.A. (N.S.) 395.

On contributory infringement of patents—see notes to Edison Electric Light Co. v. Peninsular Light, Power & Heat Co. 43 C. C. A. 485, and Æolian Co. v. Harry H. Juelg Co. 86 C. C. A. 206.

imposed on the purchaser of a rotary mimeograph, that the machines sold may be used only with the stencil paper, ink, and other supplies made by the patentee, although they are all unpatented.

[For another case, see *Patents*, 840, in *Digest Sup. Ct.* 1908.]

Statutes — patents — monopoly — liberal construction.

7. The statute creating and guarantying to an inventor the exclusive right to his patent will be so construed as to give effect to the broad public policy intended to be subserved in granting the monopoly.

[For other cases, see *Statutes*, 463-470, in *Digest Sup. Ct.* 1908.]

Patents — contributory infringement.

8. The sale of ink to a purchaser of a Rotary mimeograph sold with a license restriction that it could be used only with the ink supplied by the patentee, with the expectation that the ink sold would be used in connection with such mimeograph, constitutes contributory infringement of the patent.

[As to what constitutes infringement of patent generally, see *Patents*, XIV. a, in *Digest Sup. Ct.* 1908.]

Cases certified.

9. Defendants in an action for contributory infringement of a patented Rotary mimeograph by a sale of ink to the purchaser in violation of a license restriction that it should be used only with the ink made by the patentee cannot, where the facts certified to the United States Supreme Court state that they made a direct sale of the ink to the user of the patented article with knowledge that, under the license from the patentee, she could not use such ink in connection with the machine without infringement of the monopoly of the patent, and that the sale was made with the expectation that it would be used in connection with such mimeograph, claim that the sale of the ink was not an infringement as it might be used in a noninfringing way.

[As to scope of inquiry in cases certified, see *Cases Certified*, 108-115, in *Digest Sup. Ct.* 1908.]

[No. 20.]

Argued October 27, 1911. Decided March 11, 1912.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting a question as to whether a sale of ink to a purchaser of a Rotary mimeograph, with license restricting its use only with ink made by the patentee, with the expectation that it would be used in connection with such mimeograph, constitutes contributory infringement of a patent. Answered in the affirmative.

The facts are stated in the opinion.

Mr. Arthur v. Briesen argued the cause and filed a brief for Henry:

The doctrine of contributory infringement should not be extended beyond those articles which are either parts of a patented combination or device, or which are produced for the sole purpose of being so used, and should not be applied to the staple articles of commerce.

A. B. Dick Co. v. Roper, 126 Fed. 966; Cortelyou v. Charles Eneu Johnson & Co. 207 U. S. 196, 52 L. ed. 167, 28 Sup. Ct. Rep. 105.

If the defendant had maliciously induced Miss Skou to violate her contract, to the injury of complainant, the defendant should have been proceeded against for procurement of the violation of the contract.

1 Addison, Torts, 1876 ed. 11, 37; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240.

If the defendant Henry, in selling the can of ink to Miss Skou, affected the rights of the complainant injuriously and maliciously he did so by inducing Miss Skou to violate her contract, and not by inducing Miss Skou to infringe upon the patent.

Bloomer v. McQuewan, 14 How. 539-549, 14 L. ed. 532-537; Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; Scribner v. Straus, 210 U. S. 352, 52 L. ed. 1094, 28 Sup. Ct. Rep. 735.

Contributory infringement of a patent involves a primary infringement of a patent, to which the party defendant contributes.

Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627.

A court of equity should never by injunction imply obligations on one party when there are no clear and definite obligations imposed upon the other party to the contract.

Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Rafolovitz v. American Tobacco Co. 73 Hun, 87, 25 N. Y. Supp. 1036; Jackson v. Alpha Portland Cement Co. 122 App. Div. 345, 106 N. Y. Supp. 1052; Lawrence v. Dixey, 119 App. Div. 295, 104 N. Y. Supp. 516.

The contract on its face is one which is condemned by the Sherman law.

Blount Mfg. Co. v. Yale & T. Mfg. Co. 166 Fed. 555; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 88, 46 L. ed. 1058, 1067, 22 Sup. Ct. Rep. 747:

Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

Where one comes into court to seek to enforce an unlawful contract, he does not come into equity with clean hands.

American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

The law on patents is based upon one provision of the Constitution, and the Sherman act is based upon another provision of the Constitution. If the later act modifies the former in obedience to the Constitutional provision relating to the regulation of interstate commerce, it effectuates such regulation under the established theory that a later act of Congress supercedes or modifies a former.

Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

Congress has the exclusive right to limit the time for which monopolies shall be granted. It follows that the patentee himself has no right to create additional terms, or so to arrange matters that there shall be no time limitation.

Pennock v. Dialogue, 2 Pet. 1, 7 L. ed. 327; Evans v. Robinson, Brunner, Col. Cas. 400, Fed. Cas. No. 4,571.

Mr. Antonio Knauth also filed a brief for Henry:

The attempted restriction on the sale of the article is void at common law.

2 Kent, Com. 14th ed. p. 347; 2 Bl. Com. 4th ed. pp. 1, 389, 446; Benjamin, Sales, 6th ed. p. 746; Taddy v. Sterious [1904] 1 Ch. 354, 73 L. J. Ch. N. S. 191, 89 L. T. N. S. 628, 52 Week. Rep. 152, 20 Times L. R. 102; McGruther v. Pitcher [1904] 2 Ch. 306, 73 L. J. Ch. N. S. 653, 91 L. T. N. S. 678, 53 Week. Rep. 138, 20 Times L. R. 652; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376.

The patent statute does not interfere with the working of the rule of the common law as applied to patented articles which have been sold by the patentee by an absolute sale passing the title, not conditionally, but absolutely.

Wilson v. Rousseau, 4 How. 646, 11 L. ed. 1141; Bloomer v. McQuewan, 14 How. 539-549, 14 L. ed. 532-537; Chaffee v. 56 L. ed.

Boston Belting Co. 22 How. 217-222, 16 L. ed. 240-242; Goodyear v. Beverly Rubber Co. 1 Cliff. 354, Fed. Cas. No. 5,557; Mitchell v. Hawley, 16 Wall. 544-547, 21 L. ed. 322, 323; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Webber v. Virginia, 103 U. S. 344, 348, 26 L. ed. 565, 566; Paper-Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Hobbie v. Jenkinson, 149 U. S. 355, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738; Bloomer v. Millinger, 1 Wall. 340, 17 L. ed. 581.

If the patentee desires to secure to himself the continued control over the use of the patented article in the hands of others, he may do so by leasing it upon suitable conditions, terminating the lease in case of a breach of the condition, or by selling it under conditional sale, providing that upon breach of the condition, the title to the article will revert to the patentee. In that case a use of the article in violation of the condition may terminate the lease or sale of the article which, in the case of such a sale, would become the property of the patentee again, and a use thereof by the lessee or purchaser may constitute a violation of the patent for which an infringement suit may lie.

Henry Bill Pub. Co. v. Smythe, 27 Fed. 914.

In trying to enforce the license restriction by a suit which has for its object to prevent the use contracted against, the patentee is not rescinding the contract at all, but is enforcing the right given to him by the contract, implied from the terms of the restricted license. A rescission would have as an object to obtain the article again, but that is not what he seeks. He leaves the purchaser in possession of the article which the purchaser has paid for, and asks the courts to enforce the agreement which he has made with the purchaser, and which is expressed in the license restriction attached to the article. That this is not a suit arising under the patent statute, but a suit arising from the contract, and having for its object the enforcement of the contract, seems manifest both on principle and on authority.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

The license restriction is void because unreasonable and tending to create an unlawful, permanent monopoly in the patentee in something which is not protected by his patent.

Cortelyou v. Johnson, 76 C. C. A. 455, 145 Fed. 935; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627.

Mr. Frederick P. Fish argued the cause, and, with Mr. Samuel Owen Edmonds, filed a brief for the A. B. Dick Company:

Complainant has the exclusive control over the manufacture, the use, and the sale of the patented Rotary mimeographs. Included herein is the right to prescribe within what limits and under what conditions these machines may be used by its vendees.

Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; Birdsell v. Shaliol, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; Hobbie v. Jennison, 149 U. S. 355, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 40 Fed. 580; Steam Cutter Co. v. Sheldon, 10 Blatchf. 1, Fed. Cas. No. 13,331; American Cotton-Tie Co. v. Simmons, 3 Bann. & Ard. 320, Fed. Cas. No. 293; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; American Cotton-Tie Supply Co. v. Bullard, 17 Blatchf. 160, Fed. Cas. No. 294; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co. 12 Blatchf. 202, Fed. Cas. No. 4,015.

The rights of vendees or licensees of Rotary mimeographs are fixed and determined by the restriction borne by the machines themselves. The machines so restricted having been accepted by the vendees, they are bound to use them only within the authority so conferred.

Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 427; Robinson, Patents, §§ 809, 812; National Phonograph Co. v. Menck, 27 Times L. R. 239; American Cotton-Tie Supply Co. v. Bullard, 17 Blatchf. 160, Fed. Cas. No. 294; American Cotton-Tie Co. v. Simmons, 3 Bann. & Ard. 320, Fed. Cas. No. 293; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730.

The use of a Rotary mimeograph with

ink not made by complainant is a use outside of the license or authority granted to the licensee. Such a use is unlawful and an infringement upon the patent in suit.

Magic Ruffle Co. v. Elm City Co. 13 Blatchf. 151, Fed. Cas. No. 8,949; Robinson, Patents, § 1250; Goodyear v. Union India Rubber Co. 4 Blatchf. 63, Fed. Cas. No. 5,586; Pope Mfg. Co. v. Owsley, 27 Fed. 104; Commercial Acetylene Co. v. Autolux Co. 181 Fed. 387; New Jersey Patent Co. v. Weinberg, 183 Fed. 588 (Fed. Adv. Sheets, March 2, 1911); The Fair v. Dover Mfg. Co. 92 C. C. A. 43, 166 Fed. 117; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Willis v. McCullen, 29 Fed. 641; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730.

Such a use being an infringement, he who makes the ink and sells it to the licensee, with intent that it shall be put to the infringing use, is a party to the infringement, and liable as a contributor thereto.

Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 296; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 996; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 40 Fed. 581; American Cotton-Tie Supply Co. v. McCready, 17 Blatchf. 291, Fed. Cas. No. 295; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; Travers v. Beyer, 23 Blatchf. 423, 26 Fed. 450; Commercial Acetylene Co. v. Autolux Co. 181 Fed. 387; New Jersey Patent Co. v. Weinberg, 183 Fed. 588 (Fed. Adv. Sheets, March 2, 1911); Celluloid Mfg. Co. v. American Zylonite Co. 30 Fed. 437; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100; Renwick v. Pond, 10 Blatchf. 39, Fed. Cas. No. 11,702; Richardson v. Noyes, 10 Off. Gaz. 507, Fed. Cas. No. 11,792; Bowker v. Dows, 3 Bann. & Ard. 518, Fed. Cas. No. 1,734.

Complainant's remedy is in equity, for infringement of its patents, and not at law, for violation of the license contract.

Littlefield v. Perry, 21 Wall. 205, 21 L. ed. 577; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Atherton Mach. Co. v. Atwood-Morrison Co. 43 C. C. A. 72, 102 Fed. 949; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Ball & Socket Fastener Co. v. Ball Glove Fastening Co. 7 C. C. A. 498, 5 U. S. App. 588, 58 Fed. 818; Seibert Cylinder Oil-Cup Co. v. Manning, 32 Fed. 625; Dunham v. Bent, 72 Fed. 61; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 366.

Apparently, although this is somewhat beside the point, under the facts here presented complainant was at liberty to sue either under the patents (for infringement), or under the license contract (for the breach), or under both.

Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 732.

The gravamen of the tort of contributory infringement is the unlawful intent of the infringer. This may be proved in two ways. If the thing which he produces be incapable of lawful use, mere proof that he produced it at all carries with it the presumption of unlawful intent. If, on the other hand, that thing be capable of a lawful use as well as an unlawful use, mere proof of its production is insufficient. His evil intent must otherwise be made to appear, and until it has been, the patentee is without remedy.

Thompson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 170, 54 U. S. App. 1, 80 Fed. 721; Harper v. Kalem Co. 94 C. C. A. 429, 169 Fed. 61; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 732; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co. 147 Fed. 266; Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 607, 129 Fed. 105; John R. Williams Co. v. Miller, D. B. & P. Mfg. Co. 107 Fed. 290.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432, 26 Sup. Ct. Rep. 208; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038.

The patent laws give the patentee the right to impose upon his licensee any legal conditions, no matter what their character; and if the licensee sufficiently desires a share of the patent monopoly to bind himself not to use a public commodity, it is of no concern to the public that he has thus limited his activities, if for no other reason than because the rights of the public are thereby in nowise affected.

Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358; American Cotton Tie Co. v. Simmons, 56 L. ed.

3 Bann. & Ard. 320, Fed. Cas. No. 293; American Cotton-Tie Supply Co. v. Bullard, 17 Blatchf. 160, Fed. Cas. No. 294; Hartman v. John D. Park & Sons Co. 145 Fed. 370.

The "self-interest" of the patentee acts as an automatic governor, guarantying the public in most emphatic manner against abuse of the doctrine of contributory infringement.

Under the authorities it is unnecessary to prove that the machine ever was, in fact, actually used with the defendant's ink.

Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 733; Thompson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1008; Thompson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 721; German-American Filter Co. v. Loew Filter Co. 103 Fed. 306, affirmed in 47 C. C. A. 94, 107 Fed. 949; Stearns v. Phillips, 43 Fed. 795; Samuel Bros. & Co. v. Hostetter Co. 55 C. C. A. 111, 118 Fed. 257; Gannert v. Rupert, 62 C. C. A. 594, 127 Fed. 962.

If the license agreement between complainant and its licensees is "valid" (John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 27), if the "conditions" thereof are "reasonable and legal" (E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747), the Sherman act has nothing to do with the matter.

Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358.

Mr. Justice Lurton delivered the opinion of the court:

This cause comes to this court upon a certificate under the 6th section of the court of appeals act of March 3, 1891. [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550.]

The facts and the questions certified, omitting the terms of the injunction awarded by the circuit court, are these:

"This action was brought by the complainant, an Illinois corporation, for the infringement of two letters patent, owned by the complainant, covering a stencil-duplicating machine known as the 'Rotary Mimeograph.' The defendants are doing business as copartners in the city of New York. The complainants sold to one Christina B. Skou, of New York, a Rotary mimeograph embodying the invention described and claimed in said patents under license which was attached to said machine, as follows:

"License Restriction.

"This machine is sold by the A. B. Dick

Company with the license restriction that it may be used only with the stencil paper, ink, and other supplies made by A. B. Dick Company, Chicago, U. S. A.

"The defendant Sidney Henry sold to Miss Skou a can of ink suitable for use upon said mimeograph, with knowledge of the said license agreement, and with the expectation that it would be used in connection [12] with *said mimeograph. The ink sold to Miss Skou was not covered by the claims of said patent."

"Question Certified.

"Upon the facts above set forth the question concerning which this court desires the instruction of the Supreme Court is:

"Did the acts of the defendants constitute contributory infringement of the complainant's patents?"

There could have been no contributory infringement by the defendants unless the use of Miss Skou's machine with ink not made by the complainants would have been a direct infringement. It is not denied that she accepted the machine with notice of the conditions under which the patentee consented to its use. Nor is it denied that thereby she agreed not to use the machine otherwise. What defendants say is that this agreement was collateral, and that its validity depended upon principles of general law, and that if valid the only remedy is such as is afforded by general principles of law. Therefore, they say that the suit is not one arising under the patent law, and one not cognizable in a Federal court, unless diversity of citizenship exists.

But before coming to the question whether this is a suit of which the circuit court had jurisdiction as a suit arising under the patent law, it may be well to notice an argument against jurisdiction, based upon the suggestion that if a breach of such a license restriction will support a suit for infringement, direful results will follow. Chief among the results suggested are, an encroachment upon the authority of the state courts and an extension of the jurisdiction of the Federal courts. And to swell the grievance it is said that if it be held that a breach of such a restriction will support a suit for infringement, parties will be deprived of the right to have the validity and import of the license restriction determined [13] by the general law, *and be compelled to have their rights determined by the patent law.

We are unable to assent to these suggestions. We do not prescribe the jurisdiction of courts, Federal or state, but only give effect to it as fixed by law. If a bill asserts a right under the patent law to sell a

patented machine subject to restrictions as to its use, and alleges a use in violation of the restrictions as an infringement of the patent, it presents a question of the extent of the patentee's privilege, which, if determined one way, brings the prohibited use within the provisions of the patent law, or, if determined the other way, brings into operation only principles of general law. Obviously, a suit for infringement, which must turn upon the scope of the monopoly or privilege secured to a patentee, presents a case arising under the patent law. The jurisdiction of the circuit court over such cases has, for more than a century, been *exclusive*, by the express terms of the statute, although, for the most part, its jurisdiction over other kinds of suits arising under the Constitution and laws of the United States is only concurrent with that of the state courts.

The suggestion, therefore, that we should refrain from ruling that a patentee may sell a patented machine subject to restrictions as to its use, and may predicate infringement upon a use in violation of the restrictions, lest such a ruling may draw to the Federal courts cases which otherwise would not come to them, cannot be sustained without placing our decision upon considerations which are quite apart from the law. This, of course, we may not do. In determining questions of jurisdiction, this court has never shirked the responsibility of maintaining the lines of separation defined in the Constitution and the laws made in pursuance thereof, but, on the contrary, has been ever watchful to maintain those lines as obligatory alike upon all courts and all suitors.

*We come, then, to the question [14] whether a suit for infringement is here presented.

That the license agreement constitutes a contract not to use the machine in a prohibited manner is plain. That defendants might be sued upon the broken contract, or for its enforcement, or for the forfeiture of the license, is likewise plain. But if, by the use of the machine in a prohibited way, Miss Skou infringed the patent, then she is also liable to an action under the patent law for infringement. Now that is primarily what the bill alleged, and this suit is one brought to restrain the defendants as aiders and abettors to her proposed infringing use.

That the patentee may waive the tort and sue upon the broken contract, or in assumpsit, is elementary. 3 Robinson, Patents, §§ 1225, 1250, and notes; Steam Stone Cutter Co. v. Sheldon, 21 Blatchf. 260, 15 Fed. 608; Pope Mfg. Co. v. Owsley, 27 Fed. 100; Button-Fastener Case, 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, 291; Wilson v. Sandford, 10 How. 99,

13 L. ed. 344. But if the patentee elect to waive the tort, and sue upon the covenants, or for a breach of contract, the suit would not be one dependent upon or arising out of the patent law, and a Federal court would have no jurisdiction unless diversity of citizenship existed. 3 Robinson, Patents, § 1250; *Magic Ruffle Co. v. Elm City Co.* 13 Blatchf. 151, Fed. Cas. No. 8,949; *Goodyear v. Union India Rubber Co.* 4 Blatchf. 63, Fed. Cas. No. 5,586; *Goodyear v. Congress Rubber Co.* 3 Blatchf. 449, Fed. Cas. No. 5,565. This would be so although the damages for a breach would be measured by the loss resulting from the infringement. *Magic Ruffle Co. v. Elm City Co.* 13 Blatchf. 151, Fed. Cas. No. 8,949. After such a recovery in assumpsit, no further damages for the infringement can be claimed. *Steam Stone Cutter Co. v. Sheldon*, 21 Blatchf. 260, 15 Fed. 608.

The remedy which the complainant seeks may often determine whether the suit is one arising under the patent law, and cognizable only in a court of the United States, or one upon a contract between the patentee and his assigns or licensees, and therefore 15]cognizable only in a state court, unless there be diversity of citizenship. Thus, a bill to enforce a contract concerning the title to a patent, or an interest therein, or to declare a forfeiture of an assignment of an interest in a patent, or even a license, to make, sell, or use the patented thing, or an action to recover damages for a breach of a contract relating to a patent or a license thereunder, would not because of the character of remedy or relief sought, be a suit cognizable in a United States court, although the facts stated might have justified a suit for infringement in a United States court, if the complainant had elected that remedy. To sustain the contention that a breach of the implied agreement not to use the machine in question except in a particular way might have supported a suit to forfeit the license, or an action for damages upon the broken contract, counsel have cited and commented at great length upon the cases of *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; *Albright v. Teas*, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Keeler v. Standard Folding Bed Co.* 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738; and *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; but an examination of these cases will disclose that while in some of them a suit for infringement might have been brought, the complainants had in fact 56 L. ed.

brought suits to set aside or enforce contracts relating to patents, or licenses under patents. They were therefore not "patent cases," but cases determinable upon principles of general law. In *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681, Mr. Justice Brown reviews the cases and shows so plainly why they were not patent cases that we shall only refer to that opinion.

To support their contention that the only remedy for a violation of the license under which Miss Skou acquired her machine is one in the state courts, counsel quote a paragraph from the same opinion in these words: "Now, it may be freely conceded that if the licensee had failed to ob-[16 serve any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts, either to recover the royalties or to procure a revocation of the license. Such suit would not involve any question under the patent law." But the three conditions of the license there referred to were: First, to pay royalties; second, that the transferee would not transfer or assign the license without consent of the licensor; third, that the failure to use the license in the manufacture of pipe should operate to revoke it. It is evident that the licensee would not have infringed the patent by either failing to pay royalties, by assigning the license, or by neglecting to use his privilege. The licensor would clearly have been compelled to rely wholly upon his contract, as such, in any suit for the violation of any of the conditions named.

The test of jurisdiction is this: Does the complainant "set up some right, title, or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?" *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 259, 42 L. ed. 458, 460, 18 Sup. Ct. Rep. 62; *White v. Rankin*, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768.

The bill alleges that the complainant's patent has been infringed by the breach of the conditions upon which the patented machine was sold. The remedy it seeks is an injunction against indirect infringement by the defendants. The facts stated upon the face of the bill may be insufficient to show an infringement of the patent; but the right to treat the conduct of the defendants as an indirect infringement is a right which the complainant sets up as arising under the patent law. One construction of the scope of the grant will sustain the rights as-

serted, if the facts be as alleged, and another will defeat those rights.

17] *Whether a patentee may lawfully impose such restrictions, and whether their violation constitutes an infringement, are obviously questions arising under the patent law. In *Littlefield v. Perry*, 21 Wall. 205, 222, 22 L. ed. 577, 579, this court said: "An action which raises a question of infringement is an action arising 'under the law;' and one who has the right to sue for the infringement may sue in the circuit court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved, it carries with it the whole case."

Although the complainant might have sued upon the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with materials supplied by it, it has elected to sue for infringement. To quote from Judge Shipman's opinion in *Magic Ruffle Co. v. Elm City Co.* supra: "It was competent for the complainants to take either one of the two remedies. . . . They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this court jurisdiction, could bring a proper suit setting up the breach of the contract as the gravamen of their action."

That a patentee may effectually restrict the time, place, or manner of using a patented machine, so that a prohibited use will constitute an infringement of the patent, is fully conceded. Thus, in the printed brief, counsel for defendants say: "Aside from such special contracts, an agreement that the article shall be used only in a certain manner can be made only by way of lease of the article, terminating the lease upon condition broken, or by way of conditional sale, by breach of which the title reverts to the seller." In either such case, counsel say, "a use of the article in violation of the condition may terminate the lease or sale of 18] the article * (which) would become the property of the patentee again, and a use thereof by the lessee or purchaser may constitute a violation of the patent, for which an infringement may lie. . . . He cannot make a sale with the condition attached that the article shall be used or disposed of in a certain manner, leaving the title, however, in the purchaser in case of a breach of the condition."

The books abound in cases upholding the right of a patentee owner of a machine to license another to use it, subject to any qualification in respect of time, place, manner, or purpose of use which the licensee

agrees to accept. Any use in excess would obviously be an infringing use and the license would be no defense. 3 Robinson, Patents, §§ 915, 916, and notes. This is so elementary we shall not stop to cite cases.

The contention is not that a patentee may not permit the use of a patented thing, with such qualifications as he sees fit to impose, and that a prohibited use will be an infringing one, but that he can only keep the article within the control of the patent by retaining the title. To put the contention in another form,—it is, that any transfer of the patentee's property right in a patented machine carries with it the right to use the entire invention so long as the identity of the machine is preserved, irrespective of any restrictions placed by the patentee upon the use of the article, and accepted by the buyer. It is said that by such a sale the patentee "disposes of all his rights under his patent, and thereby removes the article from the operation of the patent law." If he attempts to sell the machine for specified uses only, and prohibit all others, the restriction is disposed of as constituting a collateral agreement such as any vendor of personal property might impose, and enforceable, if valid at all, only as a collateral contract.

The issue is a plain one. If it be sound, it concludes the case, and our response should be a negative one, since *the vio-[19] lation of a mere collateral contract, which is not also an infringement of the patent, would not be a case arising under the patent law. But is it true that where a patentee sells his patented machine for a specific and limited use, he does not thereby reserve to himself, as patentee, the exclusive right to all unpermitted uses which may be made of his invention as embodied in the machine sold? Obviously, this is a question arising under the patent law. By a sale of a patented article subject to no conditions, the purchaser undeniably acquires the right to use the article for all the purposes of the patent, so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. *Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322; *Livingston v. Woodworth*, 15 How. 546, 550, 14 L. ed. 809, 811; *Adams v. Burke*, 17 Wall. 453, 456, 21 L. ed. 700, 703; *Folding Bed Case*, 157 U. S. 659, 666, 39 L. ed. 848, 850, 15 Sup. Ct. Rep. 738. By such an unconditional sale of the thing patented it is said to be "no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."

In the cases cited above, as well as in the leading case of *Bloomer v. McQuewan*,

14 How. 539, 14 L. ed. 532, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought unconditionally; that is, subject to no specified limitation upon his right of use. The question of the effect of limitations upon the right of use arose, however, in *Mitchell v. Hawley*, and there we find the distinction was deemed material and the effect declared.

In that case one Taylor was the patentee, under a grant for a term of fourteen years, for a machine for felting hats. By what Mr. Justice Clifford calls "a conveyance or license, subject to certain restrictions or 20]limitations," *one Bayley was given the "exclusive right to make and use and to license to others the right to use the said machines in the states of Massachusetts and New Hampshire, during the remainder of the original term of said letters patent," subject to a stipulation that "the licensee shall not in any way or form dispose or sell or grant any license to use the said machines beyond the expiration of the original term." There was also a provision that if the term of the patent should be extended, Bayley should have the right to control the same in those two states, upon paying a reasonable compensation, etc.

Bayley, as such licensee, made and sold four machines to the appellant Mitchell, with the right to use them for felting hats in the town of Haverhill, Massachusetts, "under Taylor's patent bearing date May 3, 1864." Before the patent expired it was extended for the further term of seven years, the benefits of which extension for the said two states were assigned to the appellee Hawley. Hawley then filed his bill to restrain Mitchell from using the four identical machines which had been sold to him by Bayley. From a decree restraining their further use Mitchell appealed. Mr. Justice Clifford, before stating the facts upon which the judgment must rest as to the right of Mitchell as the purchaser of the machines to continue their use after the expiration of the original term of Taylor's patent, and after directing attention to what he termed "the well-grounded distinction between the grant of the right to make and vend the patented machine and the grant of the right to use it," which, he says, "was first satisfactorily pointed out by the late Chief Justice Taney, with his accustomed clearness and precision," says:

"Purchasers of the exclusive privilege of making or vending the patented machine hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and, of course, 56 L. ed.

the interest *which the purchaser ac-[21 quires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds, as he does not acquire any right to construct another machine, either for his own use or to be vended to another for any purpose. Complete title to the implement of machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly."

In the succeeding paragraph he, in effect, limits what was above said to unconditional sales of such patented machines by adding this:

"Patented implements or machines sold to be used in the ordinary pursuits of life become the private individual property of the purchasers, and are no longer specifically protected by the patent laws of the state where the implements or machines are owned and used. Sales of the kind may be made by the patentee with or without conditions, as in other cases; but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it or improve upon it as he pleases, in same manner as if dealing with property of any other kind."

The force and bearing of this opinion cannot be escaped by suggesting that the court was referring to mere common-law contractual conditions, for the suit was to restrain infringement by the use of four machines which had been sold, *not leased*.

That the bill was one alleging and seeking to enjoin further use as an infringement of the patent is shown by the statement that "they," referring to the purchaser *Mitchell and those associated with him, [22 "appeared to the suit and filed an answer setting up as a defense to the charge of infringement that they are by law authorized to continue to use the four machines just the same under the extended letters patent as they had the right to do under the original patent, when the purchase was made by those under whom they claim, which is the only question in the case."

The question argued, as shown by the brief, as set out in the report, was there, as here, that by a sale of the machines "they were taken out of the reach of the patent law altogether, and that as long as the machines themselves lasted, the owner

could use them." For the patentee it was urged that "the right to make and use and to license others to use was expressly limited by apt words, showing clearly an intent that it should not survive the original term of the patent." This latter was the argument which prevailed. Mr. Justice Clifford, after referring to the principle of law that one cannot convey a better title or right than he has, said, touching the restriction imposed by Bayley on the machines sold by him to Mitchell: "The form of the license which he gave to the purchaser shows conclusively that he understood that he was not empowered to give a license which should extend beyond that limitation." Later, referring to this sale with license to use, the learned Justice says: "The terms of the license which the seller gave to the purchasers were sufficient to put them upon inquiry, and it is quite obvious that the means of knowledge were at hand, and that if they had made the least inquiry they would have ascertained that their grantor could not give them any title to use the machine beyond the period of fourteen years from the date of the original letters patent, as he was only a licensee, and never had any power to sell a machine so as to withdraw it indefinitely from the operation of the franchise secured by the patent."

23] *The distinction between the sale of a machine free from specific restrictions upon the right of use and a sale subject to such limitations becomes the more evident, in view of the fact that but for the license to use only for the remainder of the original patent term the purchaser would have acquired the right to continue the use during an extended term of the same patent. This was the express holding in the two prior cases of *Wilson v. Rosseau*, 4 How. 646, 11 L. ed. 1141, and *Bloomer v. McQuewan*, 14 How. 539, 14 L. ed. 532, where the unlimited right of use by an unconditional purchaser was laid down in the strongest terms, and which cases are now relied upon by counsel in this case as equally applicable to a sale subject to a restricted use.

It is obvious that if Taylor, the patentee, could authorize Bayley to make and sell the patented machines, subject to the restriction that he should not sell for use beyond the terms of the original patent, and that a purchaser of the machines so made and sold by Bayley, with notice, would infringe the extended patent by a use after the original term had expired, it is because the exclusive right of the patentee embraces the right to make and sell patented machines subject to restrictions upon the right

of use, which, if not observed, will support an action for infringement.

An absolute and unconditional sale operates to pass the patented thing outside the boundaries of the patent, because such a sale implies that the patentee consents that the purchaser may use the machine so long as its identity is preserved. This implication arises, first, because a sale without reservation, of a machine whose value consists in its use, for a consideration, carries with it the presumption that the right to use the particular machine is to pass with it. The rule and its reason is thus stated in *Robinson on Patents*, vol. 2, § 824: "The sale must furthermore be unconditional. Not only may the patentee impose conditions limiting the use of the patented article, *upon his grantees and express[24] licensees, but any person having the right to sell may, at the time of sale, restrict the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale."

The argument for the defendants ignores the distinction between the property right in the materials composing a patented machine, and the right to use for the purpose and in the manner pointed out by the patent. The latter may be and often is the greater element of value, and the buyer may desire it only to apply to some or all of the uses included in the invention. But the two things are separable rights. If sold unreservedly the right to the entire use of the invention passes, because that is the implied intent; but this right to use is nothing more nor less than an unrestricted license presumed from an unconditional sale. A license is not an assignment of any interest in the patent. It is a mere permission granted by the patentee. It may be a license to make, sell, and use, or it may be limited to any one of these separable rights. If it be a license to use, it operates only as a right to use without being liable as an infringer. If a licensee be sued, he can escape liability to the patentee for the use of his invention by showing that the use is within his license. But if his use be one prohibited by the license, the latter is of no avail as a defense. As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee. 2 *Robinson, Patents*, §§ 806, 808.

We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee

will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee. *If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases.

In *Sawin v. Guild*, 1 Gall. 485, Fed. Cas. No. 12,391, Mr. Justice Story, as far back as 1813, recognized the distinction by holding that a sale of patented machines under an execution against the patentee did not render the sheriff liable under a statute which made any person liable who should sell a patented device without consent of the patentee, because the sheriff had merely sold the materials, and had not undertaken to pass any right of use. But in *Wilder v. Kent*, 15 Fed. 217, it was held that under such an execution sale there passed whatever right of use the debtor had if the sale was unconditional.

Judge Lowell, in *Porter Needle Co. v. National Needle Co.* 17 Fed. 536, after saying that an absolute and unqualified sale of a patented machine carried with it the right of use, said: "But the mere value of a patented machine is often, and is proved to be in this case, insignificant in comparison with the value of its use; and the courts have permitted a severance of ownership and right of use, if the patentee has chosen to dis sever them, and if his intent is not doubtful."

It is plain from the power of the patentee to subdivide his exclusive right of use that when he makes and sells a patented device, that the extent of the license to use which is carried by the sale must depend upon whether any restriction was placed upon the use and brought home to the person acquiring the article.

That here the patentee did not intend to sell the machine made by it subject to an unrestricted use is, of course, undeniable from the words upon the machine, viz.:

License Restriction.

This machine is sold by the A. B. Dick 26]Company, with the *license restriction that it may be used only with the stencil, paper, ink, and other supplies made by A. B. Dick Company.

The meaning and purpose of this restriction was that while the property in the machine was to pass to the purchaser, the right to use the invention was restricted to use with other articles required in its practical operation, supplied by the patentee. It was stated at the bar, and 56 L. ed.

appears fully in the opinion of Judge Ray (149 Fed. 424), who decided the case in the circuit court, that the patentee sold its machines at cost, or less, and depended upon the profit realized from the sale of other nonpatented articles adapted to be used with the machine, and that it had put out many thousands of such machines under the same license restriction. Such a sale, while transferring the property right in the machine, carries with it only the right to use it for practising the invention according to the terms of the license. To no other or greater extent does the patentee consent to the use of the machine. When the purchaser is sued for infringement by using the device, he may defend by pleading, not the general and unlimited license which is carried by an unconditional sale, but the limited license indicated by the metal tablet annexed to the machine. If the use is not one permitted, it is plainly an infringing use.

If, then, we assume that the violation of restrictions upon the use of a machine made and sold by the patentee may be treated as infringement, we come to the question of the kind of limitation which may be lawfully imposed upon a purchaser.

To begin with, the purchaser must have notice that he buys with only a qualified right of use. He has a right to assume, in the absence of knowledge, that the seller passes an unconditional title to the machine, with no limitations upon the use. Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye *shall we read a[27 meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 89-92, 46 L. ed. 1058, 1068, 1069, 22 Sup. Ct. Rep. 747, this court quoted with approval the language of Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. ed. 376, 384. Concerning the favorable view which the law takes as to the protection extended

to the exclusive right, the court, through Chief Justice Marshall, said:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

If the patent be for a machine, the monopoly extends to the right of making, selling, and using, and these are *separable and substantial rights. In *Bloomer v. McQuewan*, 14 How. 539, 547, 14 L. ed. 532, 536, it is said that the grant is of "the right to exclude everyone from making, using, or vending the thing without the permission of the owner." In *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 90, 46 L. ed. 1058, 1068, 22 Sup. Ct. Rep. 747, there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combination and contracts were obnoxious to the Sherman act; but, upon the other side, it was said that as the contracts concerned only the sale of patented articles, that that act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the *Button-Fastener Case*, 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, as follows:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use, or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon

the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it."

*In the *Paper Bag Case*, 210 U. S. 405, [29 52 L. ed. 1122, 28 Sup. Ct. Rep. 748, this right to exclude others from all use of the invention was held to be so comprehensive that a patentee was allowed to restrain, by injunction, one who was infringing his patent, although he had, during a long term of years, neither used his invention himself, nor allowed others to use it.

That there are limitations upon the right of vending and using a patented machine may be conceded. Thus, if the thing patented belong to a class of things which, on account of their inherent danger to the public safety or health, cannot be sold or used, because prohibited by an exertion of the police power of a state, they will not be immune to such a law because patented. Upon this ground a patent for "an improved burning oil" was held not to take the article without the operation of a state statute forbidding the sale of oil which was unsafe for illuminating purposes. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115. And so in the *Bement Case*, the court said of this exclusive grant of privilege:

"It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation."

In that case the question was not one of infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman law, although the agreements covered only patented articles. The court, after referring to the exceptions to the patentee's monopoly resulting from conflict with the police power of the state, said:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the *patent laws [30 of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which

are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Now, if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use, made by the patentee, the only possible defense would be that the agreement was one contrary to public policy, in that it affected freedom in the sale of such articles to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the Bement Case. The court in that case found that the contracts did include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200] said:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers."

As to whether the restrictions upon sales imposed by the agreements were "legal and reasonable conditions," the court said:

"The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the im-
31]plements manufactured *and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and en-

forceable. It must also follow that if the stipulation be one which qualifies the right of use in a machine sold subject thereto, so that a breach would give rise to a right of action upon the contract, it would be at the same time an act of infringement giving to the patentee his choice of remedies.

But it has been very earnestly said that a condition restricting the buyer to use it only in connection with ink made by the patentee is one of a character which gives to a patentee the power to extend his monopoly so as to cause it to embrace any subject, not within the patent, which he chooses to require that the invention shall be used in connection with. Of course, the argument does not mean that the effect of such a condition is to cause things to become patented which were not so without the requirement. The stencil, the paper, and the ink made by the patentee, will continue to be unpatented. Anyone will be as free to make, sell, and use like articles as they would be without this restriction, save in one particular,—namely, they may not be sold to a user of one of the patentee's machines with intent that they *shall[32 be used in violation of the license. To that extent competition in the sale of such articles, for use with the machine, will be affected; for sale to such users for infringing purposes will constitute contributory infringement. But the same consequence results from the sale of any article to one who proposes to associate it with other articles to infringe a patent, when such purpose is known to the seller. But could it be said that the doctrine of contributory infringement operates to extend the monopoly of the patent over subjects not within it because one subjects himself to the penalties of the law when he sells unpatented things for an infringing use? If a patentee says, "I may suppress my patent if I will. I may make and have made devices under my patent, but I will neither sell nor permit anyone to use the patented things," he is within his right, and none can complain. But if he says, "I will sell with the right to use only with other things proper for using with the machines, and I will sell at the actual cost of the machines to me, provided you will agree to use only such articles as are made by me in connection therewith,"—if he chooses to take his profit in this way, instead of taking it by a higher price for the machines, has he exceeded his exclusive right to make, sell, and use his patented machines? The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention

to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market.

A like objection has been made against injunctions restraining the sale for infringing purposes of a single element in a patent combination. It was said that to enjoin such sales, although the thing sold was in-
33]tended *to be used with other elements to complete an infringing combination, was to extend the scope of the patent so as to give to the patentee the same advantage as if the element had been claimed alone. But in *Davis Electrical Works v. Edison Electric Light Co.* 8 C. C. A. 615, 619, 21 U. S. App. 74, 83, 60 Fed. 276, 280, Judge Putnam answered this, saying:

"Neither in such instances, nor in the case at bar, is the course of the law to be turned aside because the practical result may be to give a patentee for the time being more than the Patent Office contemplated, nor is the patentee to be deprived of his just rights because under some circumstances he gets incidental advantages beyond what he expressly bargained for. We do not in terms give the patentee the benefit of a claim for the filament alone, nor prohibit its use in some other combination than that set out in the second claim if some ingenious way of making such other combination is ever discovered."

In *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.* 72 Fed. 1016, the language was adopted by Judge Townsend.

Neither can we see that the liability of the defendants for aiding and abetting an infringing use by Miss Skou would be different whether she had made her machine in open defiance of the rights of the patentee, or had bought it under conditions limiting her right of use. If she had made it, she would have been liable to an action for infringement for making; and if she used it, she would become liable for such infringing use. But if the defendants knew of the patent and that she had unlawfully made the patented article, and then sold her ink or other supplies without which she could not operate the machine, *with the intent and purpose that she should use the infringing article by means of the ink supplied by them*, they would assist in her infringing use.

"Contributory infringement," says Judge Townsend in *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.* supra, 34] *"*has been well defined as the intentional aiding of one person by another in the unlawful making, or selling, or using of the*

patented invention." To the same effect are *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *Risdon Iron & Locomotive Works v. Trent*, 92 Fed. 375; *Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 721; *American Graphophone Co. v. Hawthorne*, 92 Fed. 516.

In the *Risdon Case*, a member of the firm which made the plans for the construction of certain mining machinery to be made in the owner's shop, and then superintended its erection at the mine, was held to be guilty of infringement, though he neither personally made nor used the machines which were found to be an infringement of valid patents. In *American Graphophone Co. v. Hawthorne*, one who sold a machine with knowledge that it was to be used to produce an infringing article was held to be liable as an infringer.

For the purpose of testing the consequence of a ruling which will support the lawfulness of a sale of a patented machine for use only its connection with supplies necessary for its operation, bought from the patentee, many fanciful suggestions of conditions which might be imposed by a patentee have been pressed upon us. Thus it is said that a patentee of a coffee pot might sell on condition that it be used only with coffee bought from him, or, if the article be a circular saw, that it might be sold on condition that it be used only in sawing logs procured from him. These and other illustrations are used to indicate that this method of marketing a patented article may be carried to such an extent as to inconvenience the public and involve innocent people in unwitting infringements. But these illustrations all fail of their purpose, because the public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented article will not find a market. The public, by permitting the invention to go unused, loses nothing *which it had before, and when[35 the patent expires will be free to use the invention without compensation or restriction. This was pointed out in the *Paper Bag Case*, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell, and to use, is an attack upon

the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions **36]** *requiring a use only with other things necessary to the use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also. That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use has been decided by a great majority of the circuit courts and circuit courts of appeal, and has come to be a well-recognized principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. But it is now said that the numerous decisions by the lower courts have been erroneous in respect to the proper construction of the limit of the monopoly conferred by a patent, and that they should now be overruled. To these courts has been committed the duty of interpreting and administering the patent law. There is no power in this court to review their judgments, except upon a writ of certiorari, or to direct their decisions, save through a certified interrogatory for direction upon a question of law. This power to review by certiorari is one which has been seldom exercised in patent cases. A line of decisions which has come to be something like a rule of property, under which large businesses have been conducted, should at least not be overruled except upon

reasons so clear as to make any other construction of the patent law inadmissible.

The earliest of the reported cases in which the precise question here presented arose were cases arising in suits for the infringement of a patent upon an iron band connected by a buckle, intended for binding cotton bales. The band and this buckle were of iron. The buckle was so adjusted as that the band could be removed from the bale only by cutting. Upon the buckle were stamped the words: "Licensed to use only once." When cut from the bale the band and buckle were sold to persons who used the buckles either upon a new band, or one repaired, and these bands were sold to planters to be used again in baling *cotton. The question arose in a **37** number of cases as to whether such second use of the buckles by one with notice was an infringing use. In *American Cotton-Tie Co. v. Simmons*, 3 Bann. & Ard. 320, Fed. Cas. No. 293, Judge Shepley dismissed the bill. The case, upon appeal to this court, was reversed, upon the ground that that which had been done after the first use was a reconstruction, and not a repair, and was therefore an infringement. 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52. The court did not pass upon the question whether a second use of the buckles would be an infringing use. Another case arising under the same patent was that of *American Cotton Tie Supply Co. v. Bullard*, 4 Bann. & Ard. 520, Fed. Cas. No. 294, decided by Judge Blatchford, who gave the question great consideration. "It is manifest," says Judge Blatchford, "that the owners of the patents intended, by the stamps on the buckles and the imprints on the billheads, to grant a restricted license for the use of the ties and the buckles, and that the intended restriction was to a use of them once only as baling ties. The words, 'Licensed to use once only,' stamped on each buckle, was notice to everyone who handled it that there was attached to it a restriction in the shape of a license, and of a license merely to use, and of a license to use only once. This was a lawful restriction." Concerning the question of the effect of this restriction upon subsequent buyers of the cotton with its bands and buckles, the court said: "It is difficult to see how, in view of the facts of the case, the owners of these patents can properly be said to have sold the buckles for the purpose of allowing them to be used in the ordinary pursuits of life, and to pass into the markets of the country as an ordinary article of commerce. . . . The original license is fairly a license to have the buckle and the band confine a bale until the consumer needs to confine the bale

no longer, and a license for no longer time. There is no purchase of buckle and band by a purchaser of the baled cotton, except as he purchases them confining the cotton, 38] *and to confine it till it reaches the consumer, and such purchase of buckle and band is, in effect, only a purchase of them subject to such original license. It is quite as reasonable to say that the purchaser of the cotton buys subject to such license as it is to say that the licensor, having imposed the restricted license, permits it to be instantly destroyed. The former view is consistent with the original intention, and the latter view is inconsistent with it."

As indicating the trend of judicial opinion that such license restrictions annexed to patented articles, when sold, constitute licenses under the patent, and that their violation by persons having notice constitutes an infringement of the patent, we here set out in the margin a number of the reported cases.†

It would lengthen this opinion unreasonably to make *quotations from these opinions to show either the grounds upon which they go or their applicability. Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the circuit court of appeals of the eighth circuit, delivered by Judge (now Mr. Justice) Van Devanter in *National Phonograph Co. v. Schlegel*, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said:

"An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, or an article embodying

the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer."

There is no collision between the rule against restrictions upon the alienation or use of chattels not made under the protection of a patent and the right of the patentee through his control over his invention. The distinction is pointed out by Mr. Justice Hughes in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 401, 55 L. ed. 502, 516, 31 Sup. Ct. Rep. 376.

The English patent law, like our own, grants to the *patentee the exclusive[40 right to make, to sell, and to use. The decisions of the English courts upon the subject are therefore worthy of examination, and weight should be attached not only because of the respect due by reason of the similarity of statutes, but because many English patentees take out American patents, and the converse. The English opinions which we shall refer to have to do with the sale of patented articles with restrictions upon the use.

The cases of *Incandescent Gaslight Co. v. Cantelo*, 12 Rep. Pat. Cas. 262, decided

†*Dickerson v. Matheson*, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524, second circuit court of appeals; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, sixth circuit court of appeals; *Tubular Rivet & Stud Co. v. O'Brien*, 93 Fed. 200; *Cortelyou v. Lowe*, 49 C. C. A. 671, 111 Fed. 1005, second circuit court of appeals; *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960; *Edison Phonograph Co. v. Pike*, 116 Fed. 863; *Victor Talking Mach. Co. v. The Fair*, 61 C. C. A. 58, 123 Fed. 424, seventh circuit court of appeals; *National Phonograph Co. v. Schlegel*, 64 C. C. A. 594, 128 Fed. 733; *The Fair v. Dover Mfg. Co.* 92 C. C. A. 43, 166 Fed. 117; *Æolian Co. v. Hary H. Juelg* Co. 86 C. C. A. 205, 155 Fed. 119, second circuit court of appeals; *A. B. Dick Co. v. Milwaukee Office Specialty Co.* 168 Fed. 930; *Crown Cork & Seal Co. v. Brooklyn*

Bottle Stopper Co. 172 Fed. 225; *Rupp & W. Co. v. Elliott*, 65 C. C. A. 544, 131 Fed. 730, sixth circuit court of appeals; *Commercial Acetylene Co. v. Autolux Co.* 181 Fed. 387; *Boesch v. Gräff*, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378, where articles made in Germany under a German patent, and imported to this country, were held to infringe a United States patent for the same article; and *Dickerson v. Tinling*, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 192, where it was held that one purchasing a patented article in Germany from the owners of a United States patent, having marked on it a condition that it should not be imported into the United States, was held guilty of infringement by bringing it into the United States.

See also *Curtis on Patents*, §§ 218, 218a; *Walker on Patents*, §§ 300-302; *Wilson v. Sherman*, 1 Blatchf. 536, Fed. Cas. No. 17,833.

in 1895, and *Incandescent Gaslight Co. v. Brogden*, 16 Rep. Pat. Cas. 179, decided in 1899, were actions for the infringement of the Welsbach mantle patent for incandescent gas lighting. The mantles were sold subject to a license restriction, printed on the box containing them, that they should be used in connection with burners or apparatus sold or supplied by the patentee. In the *Cantelo Case* Mr. Justice Wills said:

"The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. Of course, if he knows of restrictions and they are brought to his mind at the time of the sale, he is bound by them. He is bound by them on this principle: The patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using them or dealing in them at all, he has the right to do the lesser thing; that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are. It does not matter what they are, if he says at the time when the purchaser proposes to buy or the person to take a license: 'Mind, I only give you this license on this condition,' and the purchaser is free to take it or leave it, as he likes. If he takes it, he must be bound by the condition. It seems 41] *to be common sense, and not to depend upon any patent law or any other particular law."

Upon the evidence it was held that *Cantelo* not having bought direct, he did not have actual knowledge of the restriction, and he was given judgment for costs upon that defense.

In the subsequent case against *Brogden*, the complainants were given an injunction against future infringement, and an accounting for damages for past infringement, upon the second point in the claim; namely, that the defendant had sold, being a dealer, with notice of the restriction, for use upon a burner not made or supplied by the patentee. As to the effect of the sale subject to the license restriction as to the use, Lord Justice Kennedy said: "A patentee has a right, not merely by sale without reserve, to give an unlimited right to the purchaser to use, and thereby to make a grant from which he cannot derogate, but may attach to it conditions, and if these conditions are broken, then there is no license, because the licensee is bound up with the observance of the conditions."

In *British Mutoscope & Biograph Co. v. Homer*, 17 Times L. R. 213 [1901] 1 Ch. 671, 70 L. J. Ch. N. S. 279, 49 Week. Rep. 56 L. ed.

277, 84 L. T. N. S. 26, 18 Rep. Pat. Cas. 177, decided in 1901, it was held that the purchaser of a mutoscope under a rent distress warrant obtained no greater right to the use of the patented machine than that which pertained to the execution debtor, and that if the debtor had no right other than a strictly personal right to use, the purchaser obtained no right to the use. Mr. Justice Farwell, who delivered the opinion, cited and quoted with approval from the case of the *Incandescent Gaslight Co. v. Brogden*, supra, where it was said that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to use a patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a *limitation of the grant[42 of the licensee to use, so that if the conditions are broken there is no grant at all.

In *McGruther v. Pitcher*, 20 Times L. R. 652 [1904] 2 Ch. 306, 73 L. J. Ch. N. S. 653, 53 Week. Rep. 138, 91 L. T. N. S. 678, it is held that the purchaser of an article made under a patent and sold originally subject to restrictions as to place or method of use is not bound by such restrictions unless he buys with notice of them, as such restrictions do not run with the goods, and are obligatory only upon those persons who take the article with knowledge of the conditions.

In the very late case of the *National Phonograph Co. v. Menck*, decided in 1911 by the judicial committee of the Privy Council, and reported in 27 Times L. R. 239, the cases were cited and reviewed. Referring to the distinction between the principles applicable to sales of unpatented and patented articles, Lord Shaw, in delivering the opinion of the court, said: "To begin with, the general principle, that is to say, the principle applicable to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he thinks fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods." Referring to former cases, he proceeds: "All that is affirmed is that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that the person purchasing them, and in the knowledge of the conditions attached by the patentee, which knowledge is clearly brought home to himself at the time of sale, shall be bound by that knowledge and accept

the situation of ownership subject to the limitations. These limitations are merely the respect paid and the effect given to those [43] conditions of transfer of the *patented article which the law, laid down by statute, gave the original patentee a power to impose. Whether the law on this head should be changed and the power of sale *sub modo* should be withdrawn or limited is not a question for a court. It may be added that where a patented article has been acquired by sale, much, if not all, may be implied as to the consent of the licensee to an undisturbed and unrestricted use thereof. In short such a sale negatives in the ordinary case the imposition of conditions and the bringing home to the knowledge of the owner of the patented goods that restrictions are laid upon him." Lord Shaw then referred to the case of the Incandescent Gas-light Co. v. Cantelo, cited above, saying that the judgment in that case by Mr. Justice Wills forms undoubtedly a leading authority in the law of England. The passage above set out is then quoted in full.

The precise question here involved has never been decided by this court. It was raised in the Cotton-Tie Case, 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52, but was passed by and the case decided upon the single ground that the defendants had infringed by a reconstruction of the bands after they had been cut. It was again presented in Cortelyou v. Johnson, 207 U. S. 199, 52 L. ed. 167, 28 Sup. Ct. Rep. 105, but was not decided, because it did not appear that the defendants, charged as contributory infringers as in the present case, had notice of the restriction upon the use of the patented machine.

In Bobbs-Merrill Co. v. Straus, 210 U. S. 345, 52 L. ed. 1091, 28 Sup. Ct. Rep. 722, it was urged that the analogy between the right of one under the copyright statute to fix the price at which a copyrighted book might be sold by retailers by a mere notice accompanying the book, and the right of one selling a patented article subject to a condition that it should not be sold at less than a prescribed minimum price was such as to entitle the owner of the copyright to treat a sale contrary to the notice as an infringing sale. But this court declined to consider the rule applicable to restrict- [44]ive *licenses accompanying the sale of a patented article, saying: "If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court.

"We may say in passing, disclaiming any

intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. This was recognized by Judge Lurton, who wrote a leading case on the subject in the Federal courts (Button-Fastener Case, 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288), for he said in the subsequent case of John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24:

"There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute, and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other."

Touching the question there involved, the court said:

"The precise question, therefore, in this case, is, Does the sole right to vend (named in Rev. Stat. § 4952, U. S. Comp. Stat. 1901, p. 3406) secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is *no claim[45 in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work,—a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to

sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

Though the Constitution gives to Congress power to promote "science and useful acts," by securing for a limited time to writers and inventors "the exclusive right to their respective writings and discoveries," the legislation for this purpose had to be adapted to the difference between a "discovery" and a [46] "writing." To secure to "the author an exclusive right to his "writings" Congress provided that he should have "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." Rev. Stat. § 4952. This is, in short, the sole right to multiply and vend copies of his production. While there are resemblances between the right of the author to "vend" his copyrighted production, and of the patentee to "vend" the patented thing, the inherent difference between the production of an author, be it a book, music, or a picture, and that of an inventor, be it a machine, a process, or an article, is so manifest that the exclusive right of one to multiply and sell was declared sufficient to give him that exclusive right to his writings purposed by the Constitution. To the inventor, by § 4884, Revised Statutes (U. S. Comp. Stat. 1901, p. 3381), there is granted "the exclusive right to make, use, and vend the invention or discovery." This grant, as defined in *Bloomer v. McQuewan*, 14 How. 549, 14 L. ed. 537, "consists altogether in the right to exclude every one from making, using, or vending the thing patented." Thus, there are several substantive rights, and each is the subject of subdivision, so that one person may be permitted to make, but neither to sell nor use, the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. *Adams v. Burke*, 17 Wall. 453, 21 L. ed. 700; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 798, 19 L. ed. 566, 569. Thus, in the case last cited, the license was "to use the said Goodyear gum-elastic com-

position for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear, . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being "intended to[47 convey any right to make any contract with the government of the United States." Of this license, this court said:

"It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument, and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell India-rubber cloth, to be used in the place, and for the purposes, of patent or japanned leather. In our judgment it conveyed authority to this extent and nothing more."

The licensees were held to have infringed the license by uses not permitted.

We have already pointed out that in the *Bement Case*, 186 U. S. 91, 46 L. ed. 1068, 22 Sup. Ct. Rep. 747, it was said in respect of the power of a patentee that, in the sale of rights under a patent, "with few exceptions that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture, or use, or sell the article, will be upheld by the courts." (Italics ours.) The question, as was said in reference to the copyright, is one of statutory construction. The kinds of property rights sought to be guaranteed and the terms of the two statutes are so different that very different constructions have been placed upon them. There is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute, and the special facts of the cases.

The *Paper Roll Case*, 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627, has been relied upon by the defendants. We do not question that case, nor anything it decides.[48 But it has no application to the question here presented. This is manifest when that case is attentively examined. First, because here the ink and other supplies used in the operation of the complainant's rotary mimeograph patent were not made elements of the patent, as in the *Paper Roll Case*: and second, the toilet paper fixture in the *Paper*

Roll Case was not sold with the license restriction that it was not to be used except in connection with paper supplied by the patentee. There was some evidence of a practice to sell the fixture only to those who used the patentee's paper; but this was far from proof of a specific license annexed to the sale of the fixtures that they were sold only to be used with paper supplied by the patentee. One who bought subject to no such restriction acquired the right to use the fixture with any paper. The opinion in that case is considered and analyzed in all of its aspects in the Button-Fastener Case, 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, 298, 299.

We come, then, to the question as to whether "the acts of the defendants constitute contributory infringement of the complainants' patent."

The facts upon which our answer must be made are somewhat meager. It has been urged that we should make a negative reply to the interrogatory as certified, because the intent to have the ink sold to the licensee used in an infringing way is not sufficiently made out. Undoubtedly a bare supposition that by a sale of an article which, though adapted to an infringing use, is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use. *Rupp & W. Co. v. Elliott*, 65 C. C. A. 544, 131 Fed. 730. It may also be inferred where its most conspicuous use is one which will co-operate in an infringement when sale to such user is invoked by advertisement. 49] *Kalem Co. v. Harper Bros.* decided at this term [222 U. S. 55, ante, 92, 32 Sup. Ct. Rep. 20].

These defendants are, in the facts certified, stated to have made a direct sale to the user of the patented article, with knowledge that under the license from the patentee she could not use the ink, sold by them directly to her, in connection with the licensed machine, without infringement of the monopoly of the patent. It is not open to them to say that it might be used in a noninfringing way, for the certified fact is that they made the sale, "with the expectation that it would be used in connection with said mimeograph." The fair interpretation of the facts stated is that the sale was with the purpose and intent that it would be so used.

So understanding the import of the question in connection with the facts certified, we must answer the question certified affirmatively.

Mr. Justice Day did not hear the argument, and took no part in the decision of this case.

Mr. Chief Justice White, with whom concurred Mr. Justice Hughes and Mr. Justice Lamar, dissenting:

My reluctance to dissent is overcome in this case: First, because the ruling now made has a much wider scope than the mere interest of the parties to this record, since, in my opinion, the effect of that ruling is to destroy, in a very large measure, the judicial authority of the states by unwarrantedly extending the Federal judicial power. Second, because the result just stated, by the inevitable development of the principle announced, may not be confined to sporadic or isolated cases, but will be as broad as society itself, affecting a multitude of people, and capable of operation upon every conceivable subject of human contract, interest, or activity, however intensely local and exclusively within [50] state authority they otherwise might be. Third, because the gravity of the consequences which would ordinarily arise from such a result is greatly aggravated by the ruling now made, since that ruling not only vastly extends the Federal judicial power, as above stated, but as to all the innumerable subjects to which the ruling may be made to apply, makes it the duty of the courts of the United States to test the rights and obligations of the parties, not by the general law of the land, in accord with the conformity act, but by the provisions of the patent law, even although the subjects considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public policy of the state, and injuriously affecting a multitude of persons. Lastly, I am led to express the reasons which constrain me to dissent, because of the hope that if my forebodings as to the evil consequences to result from the application of the construction now given to the patent statute be well founded, the statement of my reasons may serve a twofold purpose: First, to suggest that the application in future cases of the construction now given be confined within the narrowest limits, and, second, to serve to make it clear that if evils arise, their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative department in failing to amend the statute so as to avoid such evils.

Let me briefly recapitulate the facts and the rulings based thereon. A machine styled a rotary mimeograph was covered by a patent. The claims of the patent,

however, did not embrace the ink or other materials used in working the machine, nor were they covered by independent patents. The Dick Company, owner of the patent, sold one of the machines to a Miss Skou. The entire title was parted with; in other 51] words, there *was no condition imposed affecting the title or the uses to which the machine might be applied, or the duration of the use. Upon the machine, however, was inscribed a notice, styled a License Restriction, reciting that the machine "may be used only with the stencil paper, ink, and other supplies made by the A. B. Dick Company, Chicago, U. S. A." The Henry Company, dealers in ink, sold to Miss Skou, for use in working her machine, ink not made by the Dick Company. The court now decides that a use of such ink by Miss Skou would have been "a use of the machine in a prohibited way" and would have rendered her "liable to an action under the patent law for infringement," and that the seller of the ink was liable as an infringer of the patent on the machine because of the aiding and abetting a proposed infringing use.

I cannot bring my mind to assent to the conclusion referred to, and shall state in the light of reason and authority why I cannot do so. As I have said, the ink was not covered by the patent; indeed, it is stated in argument, and not denied, that a prior patent which covered the ink had expired before the sale in question. It therefore results that a claim for the ink could not have been lawfully embraced in the patent, and if it had been by inadvertence allowed, such claim would not have been enforceable. This curious anomaly, then, results, that that which was not embraced by the patent, which could not have been embraced therein, and which, if mistakenly allowed and included in an express claim, would have been inefficacious, is now, by the effect of a contract, held to be embraced by the patent and covered by the patent law. This inevitably causes the contentions now upheld to come to this: that a patentee, in selling the machine covered by his patent, has power by contract to extend the patent so as to cause it to embrace things which it does not include; in other words, to exercise legislative power 52] *of a far-reaching and dangerous character. Looking at it from another point of view, and testing the contention by a consideration of the rights protected by the patent law and the rights which an inventor who obtains a patent takes under that law, the proposition reduces itself to the same conclusion. The natural right of anyone to make, vend, and use his invention which, but for the patent law, might be in-

vaded by others, is by that law made exclusive; and hence the power is conferred to exclude others from making, using, or vending the patented invention. Paper Bag Case, 210 U. S. 424, 425, 52 L. ed. 1130, 1131, 28 Sup. Ct. Rep. 748, and cases cited.

The exclusive right of use of the invention embodied in the machine which the patent protected was a right to use it anywhere and everywhere, for all and every purpose of which the machine, as embraced by the patent, was susceptible. The patent was solely upon the mechanism which, when operated, was capable of producing certain results. A patent for this mechanism was not concerned in any way with the materials to be used in operating the machine, and certainly the right protected by the patent was not a right to use the mechanism with any particular ink or other operative materials. Of course, as the owner of the machine possessed the ordinary right of an owner of property to use such materials as he pleased in operating his patented machine, and had the power in selling his machine to impose such conditions in the nature of covenants not contrary to public policy as he saw fit, I shall assume that he had the power to exact that the purchaser should use only a particular character of materials. But as the right to employ any desired operative materials in using the patented machine was not a right derived from or protected by the patent law, but was a mere right arising from the ownership of property, it cannot be said that the restriction concerning the use of the materials was a restriction upon the use of the machine protected *by the 53] patent law. When I say it cannot be said, I mean that it cannot be so done in reason, since the inevitable result of so doing would be to declare that the patent protected a use which it did not embrace. And this, after all, serves to demonstrate that it is a misconception to qualify the restriction as one on the use of the machine, when in truth, both in form and substance, it was but a restriction upon the use of materials capable of being employed in operating the machine. In other words, every use which the patent protected was transferred to Miss Skou, and the very existence of the particular restriction under consideration presupposes such right of complete enjoyment, and because of its possession there was engrafted a contract restriction, not upon the use of the machine, but upon the materials. And these considerations are equally applicable to the exercise of the exclusive right to vend protected by the patent unless it can be said that, by the act of selling a patented machine, and disposing of all the use of which it is capable, a patentee is

endowed with the power to amplify his patent by causing it to cover in the future things which, at the time of the sale, it did not embrace.

But the result of this analysis serves at once again to establish, from another point of view, that the ruling now made in effect is that the patentee has the power, by contract, to extend his patent rights so as to bring within the claims of his patent things which are not embraced therein, thus virtually legislating by causing the patent laws to cover subjects to which, without the exercise of the right of contract, they could not reach, the result not only to multiply monopolies at the will of an interested party, but also to destroy the jurisdiction of the state courts over subjects which, from the beginning, have been within their authority.

The vast extent to which the results just stated may be carried will be at once apparent by considering the facts *of this case, and bearing in mind that this is not the suit of patentee against one with whom he has contracted to enforce, as against such person, an act done in violation of a contract as an infringement, but it is against a third person who happened to deal in an ordinary commodity of general use with a person with whom the patentee had contracted. And this statement shows that the effect of the ruling is to make the virtual legislative authority of the owner of a patented machine extend to every human being in society, without reference to their privy to any contract existing between the patentee and the one to whom he has sold the patented machine. It is worthy of observation that the vast power which the ruling confers upon the holders of patented inventions does not alone cause controversies which otherwise would be subject to the state jurisdiction to become matters of exclusive Federal cognizance, but subjects the rights of the parties when in the Federal forum to the patent law to the exclusion of the state law which otherwise would apply, and it may be to the overthrow of the settled public policy of the state wherein the dealings involved take place. All these results are in a measure comprehensively portrayed by the decree of the circuit court. They are, moreover, vividly shown by a reference made by the court to, and the putting aside as inapplicable of, a previous decision of this court (*Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376), which, if here applied, would cause the alleged license to be held void as against public policy. As the theory upon which the *Miles Medical Company Case* is treated as inapplicable is

that this case is one governed by the patent laws, and therefore not within the rule of public policy which the *Miles Case* applied, it is made indubitably clear that the ruling now announced endows the patentee with a right by contract not only to produce the fundamental change as to jurisdiction of the state and Federal courts to which I have referred, but also to bring about the overthrow *of the public policy, both of [55] the state and nation, which I at the outset indicated was a consequence of the ruling now made.

I do not think it necessary to stop to point out the innumerable subjects which will be susceptible of being removed from the operation of state judicial power, and the fundamental and radical character of the change which must come as a result of the principle decided. But nevertheless let me give a few illustrations:

Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine, or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a particular person, or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to everyone,—a patented sewing machine. It is now established that, by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine of thread, needles, and oil lubricants or other materials convenient or necessary for operation of the machine. The illustrations might be multiplied indefinitely. That they are not imaginary is now a matter of common *knowledge, for, as the result of a [56] case decided some years ago by one of the circuit courts of appeal, which has been followed by cases in other circuit courts of appeal, to which reference will hereafter be made, what prior to the first of those

decisions on a sale of a patented article was designated a condition of sale, governed by the general principles of law, has come in practice to be denominated a license restriction; thus, by the change of form, under the doctrine announced in the cases referred to, bring the matters covered by the restriction within the exclusive sway of the patent law. As the transformation has come about in practice since the decisions in question, the conclusion is that it is attributable as an effect caused by the doctrine of those cases. And, as I have previously stated, it is a matter of common knowledge that the change has been frequently resorted to for the purpose of bringing numerous articles of common use within the monopoly of a patent when otherwise they would not have been embraced therein, thereby tending to subject the whole of society to a widespread and irksome monopolistic control.

But I need not reason further, since, in my opinion, many adjudications of this court directly refute the existence of a supposed right of extension by contract of the patent laws, and are therefore, as I understand them, in conflict with the ruling now made. In *Wilson v. Sandford* (1850) 10 How. 99, 13 L. ed. 344, the facts were these: Wilson granted to Sandford and the other defendants the right to use a patented planing machine, the consideration to be paid in instalments. Each note contained a provision that the title should revert in case of nonpayment. Upon the theory that the refusal to pay an instalment forfeited the rights of the licensees, Wilson sued to restrain the further use of the machine on the ground that such use was an infringement of his patent rights. It was, however, decided that the matter in controversy arose 57] *upon contract, and that the requisite jurisdictional value was not involved. The claim that jurisdiction could be exercised because the case arose under the patent laws was thus disposed of (p. 101):

"Now, the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents." It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the

decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights. And whenever a contract is made in relation to them which is not provided for and regulated by Congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal; and the decree of the circuit court cannot be revised here, unless the matter in dispute exceeds \$2,000."

The foregoing views were reiterated in *Bloomer v. McQuewan* (1852) 14 How. 539, 14 L. ed. 532.

In *Hartshorn v. Day* (1856) 19 How. 211, 15 L. ed. 605, the court, in commenting upon the effect upon a license, of the nonperformance, by the licensee of a patent right, of covenants *made by him, and speak-[58 ing in particular of a covenant to pay an annuity to one Chaffee, the patentee, said (p. 222):

"The payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and, of course, . . . the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant. . . . The remedy for the breach could rest only upon the personal obligation of . . . [the covenantor]."

The cases just referred to and others in accord with them were reviewed in the opinion in *Albright v. Teas*, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550, decided in 1883. The case was this: A patentee sold and assigned all his title and interest in the invention covered by his patents, and the purchasers covenanted to use their best efforts to introduce the invention, to pay specified royalties for the use of the patented improvements, etc. The assignor sued in a state court for a discovery and account and a decree for the amount of royalties found due, and for general relief. On the application of the defendants the cause was removed into a circuit court, upon the theory that the suit was one arising under the patent laws of the United States, and, in consequence, exclusively within the cognizance of the courts of the United States. On final hearing, however, the circuit court remanded the cause as being one for the settlement of controversies under a contract, of which the state court had full cognizance.

This court held that as the transfer of title was absolute, no rights secured by the patent under any act of Congress remained in the patentee, and that the case arose solely upon the contract, and not upon the patent laws of the United States.

The prior cases on the subject were again reviewed by Mr. Justice Gray in *Dale Tile Mfg. Co. v. Hyatt* (1888) 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756. The plaintiff [59] sued in a state court to recover *from one who had been licensed by a patentee to make and use certain patented articles, to recover royalties due under the contract. The defendant contended in the state court that the subject-matter was one exclusively cognizable in the courts of the United States because the case was one arising under the patent laws, citing Rev. Stat. §§ 629, cl. 9, 711, cl. 5, U. S. Comp. Stat. 1901, pp. 504, 577. The contention was held untenable, and in the course of the opinion the court said (p. 52):

"It has been decided that a bill in equity in a circuit court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, chap. 357, § 17, 5 Stat. at L. 124; Rev. Stat. § 699; *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344; *Brown v. Shannon*, 20 How. 55, 15 L. ed. 826."

Reviewing the decisions in *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357 and *Albright v. Teas*, supra, the court said (p. 53):

"It was said by Chief Justice Taney in *Wilson v. Sandford* and repeated by the court in *Hartell v. Tilghman* and in *Albright v. Teas*: 'The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.' 10 How. 101, 192, 13 L. ed. 345, 99 U. S. 552, 25 L. ed. 359; 106 U. S. 619, 27 L. ed. 298, 1 Sup. Ct. Rep. 550.

"Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same state within the [60] exclusive jurisdiction of the *state
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courts; and the only Federal question in the case was rightly decided."

The case of *Keeler v. Standard Folding Bed Co.* 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738, touches upon the precise question before us. In the course of the opinion, the court said—*italics mine*—(p. 666):

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contract brought home to the purchaser is not a question before us, and upon which we express no opinion. *It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.*"

A reference to the foregoing and other decided cases is contained in the opinion in *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681. The suit was by a licensee authorized to manufacture and sell wooden pipe under certain letters patent, against two defendants, one of whom was the licensor and owner of the patent. The covenants of the licensee were (1) to pay a license fee or royalty; (2) not to transfer or assign the license without the consent of the patentee; and (3) that the license might be revoked for failure to manufacture. While, because of peculiar conditions present in the case, the suit was held to be one arising under the patent laws, the court yet observed (p. 290):

"Now, it may be freely conceded that if the licensee had failed to observe any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts either to recover the royalties or to procure a revocation of the license. Such suit would not involve any question under the patent law."

The court, after reciting the facts in the case of *Pratt v. *Paris Gaslight & Coke* [61 Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62, said (pp. 286, 287):

"It was held that the action was not one arising under the patent laws of the United States, and that to constitute such a cause the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. That '§ 711 (U. S. Comp. Stat. 1901, p. 577) does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of cases arising under those

laws. There is a complete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleadings—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.”

The case of *E. Bement & Sons v. National Harrow Co.* [186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747], decided at the same term as the *Wooden Pipe Case*, illustrates the doctrine. In that case the *National Harrow Company*, the patentee, commenced the action in a state court of New York to recover damages for the violation of license contracts pertaining to the manufacture and sale of a patent harrow, and also sought to restrain the future violation of the contracts, and compel their specific performance. If, in consequence of the subject-matter, the case was one arising under the patent laws, as it would have been if the question of infringement of the patent was involved, the jurisdiction of the courts of the United States was exclusive. The case was disposed of on its merits in the state courts, and came to this court by writ of error upon the question as to whether the agreements between the licensor and licensee violated the Federal anti-trust law, and jurisdiction was entertained and the Federal question was passed upon.

Finally, it seems to me the rulings made in the *Morgan Envelope Case*, 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627, are so apposite here as practically in reason to foreclose all controversy on the question. In that case suit was brought on three patents, one for an oval roll of paper, the other two for apparatus for holding the paper. The patentee sold the fixtures or apparatus only to purchasers of his paper, with the understanding that the paper would be subsequently purchased of the plaintiff company. It was held that the patent for the roll of paper was invalid, but the validity of the apparatus claims, or, at least, of some of them, was not challenged. The defendant sold the paper with full knowledge of the restriction imposed by the patentee. Mr. Justice Brown, after quoting from *Chaffee v. Boston Belting Co.* 22 How. 217, 223, 16 L. ed. 240, 242, says (p. 432):

“The real question in this case is whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, with the intent that it shall be used with

the other element, is an infringement. We are of opinion that it is not. . . . Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him.”

Earlier in the opinion it was said (p. 431):

“The first defense raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the mill the wheat which is ground by the rollers, the pin which is produced by the patented machine, the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances.”

Nor when accurately appreciated is there any conflict between the principles so long and firmly established by the cases to which I have just referred and the doctrine upheld in the *Goodyear Rubber Case*, 9 Wall. 788, 19 L. ed. 566, and *Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322. In the *Goodyear Case* the facts were these: The right was conferred upon one Chaffee by license “to use the said Goodyear’s gum elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; . . . the right and license hereby conferred being limited to the United States and not extending to any foreign country, and not being intended to convey any right to make any contract with the government of the United States.” Looking at the terms of the license and the testimony in the record, the court considered the instrument only “to authorize the licensee to make and sell India-rubber cloth, to be used in the place, and for the purpose, of patent or japanned leather.” The patent was held to be infringed because a right of use of the invention not granted to the licensee, but reserved by the patentee or his assignee to himself, viz., “the exclusive right to manufacture and sell army and navy equipments made of vulcanized India rub-

ber," etc., had been invaded by the defendants.

In *Mitchell v. Hawley* this was the controversy: A patentee of certain machines, 64] whose original patent had *still between six and seven years to run, conveyed to another person the "right to make and use, and to license to others the right to make and use, four of the machines" in two states "during the remainder of the original term of the letters patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The licensee constructed and sold four machines to persons who, as found by the court, had knowledge of the limited title of the licensee. After the patent had expired, and during an extended term of the patent, the persons to whom the licensee had transferred the machines made use of the machines in violation of the limitation, and the owner of the patent sued to prevent the infringement, and his right to do so was upheld. Stating it to be unquestioned that a patentee who had absolutely parted with the title to the machine and with the use which the patent protected must be understood to have parted with all his exclusive right, and hence ceased to have any interest in the machine protected by the patent law, the court maintained the contentions of the complainant, on the ground that the rule just stated did not apply where the patentee did not grant the entire right covered by the patent, but retained a part thereof in himself, and therefore a violation of such reserved right was in conflict with a right still protected by the patent, and an infringement of the patent. The difference between the rule applied in that case and the doctrine of the many other cases which we have cited, and which also exists between the controversy presented in *Mitchell v. Hawley* and the one here under consideration, was simply as follows: (a) That which exists between the conveyance of all one's rights covered by a patent and a transfer of only a part of such rights; (b) that which obtains between the ability of a patentee to protect the right which he enjoys under the patent law from infringement, 65] and his *want of power, on parting with all his rights under the patent, to contract so as to secure rights never embraced in his patent, and to bring such newly acquired contract rights under the protection of the patent law. That the sale here in question was one of all the rights which the patent protected has, it seems to me, at the outset been demonstrated beyond reasonable dispute. I mean, of course, within the limit of my powers of understanding, since, looking at the so-called license restric-

tion again and again with a purpose, if possible, to bring my mind to assent to the view which the court takes of it, I find it impossible to do so. And in this connection it is to be observed that the real nature of the transaction is, in the argument of counsel for the Dick Company, stated to be directly the opposite of that which the court now holds it to be. Thus, counsel say:

"In the license plan in issue, the licensor, by limiting the market at which supplies may be purchased, is merely insuring to himself a royalty based upon the output of the machine. The licensor, by requiring the purchase of ink of him, in fact exacting a royalty (infinitesimal in amount) for every copy of the original produced by the mimeograph. The very nature of the work of these machines forbids the use of a fixed money royalty upon the work produced, since the money value is so small that the expense of the accounting would be prohibitive of such a method."

A construction of the restriction which, by speaking of license and licensor, obscures the fact that the restriction itself states the transaction to have been a sale of the machine and its right of use, yet, by the very force of the nature of the so-called restriction, describes it as being in essence and effect but a consideration for the rights parted with, and thus brings the case within the doctrine of *Wilson v. Sandford*, *Albright v. Teas*, and other cases which I have referred to.

*The distinction between the two rules [66 and the absolute harmony and co-operation between them had been pointed out before the decision in *Mitchell v. Hawley*, and has been since so clearly indicated as to my mind to leave no room for contention or evasion. Let me quote from some of the cases. In one of the early cases, *Bloomer v. McQuewan*, 14 How. 539, 14 L. ed. 532, after referring to previous cases which had marked the distinction between the grant of the right to make and vend a patented machine and the grant of the right to use it, the court said (p. 549):

"The distinction is a plain one. The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtained by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share of the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. . . .

"But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it, he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress. And if his right to the implement or machine is infringed, he must seek redress in the courts of the state, according to the laws of the state, and not in the courts of the United States, nor under the law of Congress granting the patent. The implement or machine becomes his private, individual *property, not protected by the laws of the United States, but by the laws of the state in which it is situated. Contracts in relation to it are regulated by the laws of the state, and are subject to state jurisdiction."

Likewise in *Adams v. Burke*, 17 Wall. 453, 21 L. ed. 700, the court, speaking through Mr. Justice Miller, said (p. 456):

"In the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having, in the act of sale, received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

Yet, again, in the *Folding Bed Co. Case*, 157 U. S. 666, 39 L. ed. 850, 15 Sup. Ct. Rep. 738, this court, reiterating the doctrine, said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.

"The conclusion reached does not deprive

a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

*In view of the settled rule of this [68 court, established by so many decisions, I might well refrain from referring to the English cases and the decisions of lower Federal courts relied on as persuasively supporting the doctrine now announced. But, nevertheless, I shall briefly notice the cases.

I pass by the English decisions relied upon with the remark that it is not perceived how they can have any persuasive influence on the subject in hand, in view of the distinction between state and national power which here prevails, and the consequent necessity, if our institutions are to be preserved, of forbidding a use of the patent laws which serves to destroy the lawful authority of the states and their public policy. I fail also to see the application of English cases in view of the possible difference between the public policy of Great Britain concerning the right, irrespective of the patent law, to make contracts with the monopolistic restriction which the one here recognized embodies and the public policy of the United States on that subject, as established, after great consideration, by this court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376. See especially on this subject the grounds for dissent in that case expressed by Mr. Justice Holmes, referring to the English law, on page 413.

So far as the various decisions of circuit courts of appeals which the court refers to are concerned, as they conflict with the many adjudications of this court to which I have referred, it seems to me they ought not to be followed, but should be overruled. It is undoubted that the leading one of the cases, which all the others but follow and reiterate, is the *Button-Fastener Case* [35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288] to which I have previously referred. I shall not undertake to review that case elaborately, because in substance and effect the theory upon which it proceeds is in absolute conflict with the many adjudications of this court to which I have referred, and the reasoning which was employed in the case, in my *opin-[69 ion, in its ultimate aspect rests upon a failure to distinguish between the principle announced in *Wilson v. Sandford*, and followed and applied in the many cases which I have reviewed, and the doctrine announced and applied in *Mitchell v. Hawley*. In other words, the *Button-Fastener Case* and the

confusion which has followed the application of the ruling made in that case was but the consequence of failing to observe the difference between the rights of a patentee which were protected by the patent, and those which arose from contract, and therefore were subject alone to the general law. In addition it may be well to observe that the very groundwork upon which the case proceeded has been since authoritatively declared by this court to be without foundation. For instance, it will become apparent for an analysis of the opinion in the case that it proceeded upon the theory that the doctrine upheld had been virtually sanctioned in previous adjudications of this court. Since the decision, however, this court, in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 345, 52 L. ed. 1091, 28 Sup. Ct. Rep. 722, has expressly declared that the doctrine had never been upheld by this court. Moreover, also, in the *Bobbs-Merrill Case* this court, in considering one of the cases principally relied upon, in the opinion in the *Button-Fastener Case*—the *Cotton-Tie Case*—expressly pointed out that that case had been misconceived in the opinion in the *Button-Fastener Case*, and did not have the significance which had there been attributed to it.

But even if I were to put aside everything I have said, and were to concede, for the sake of argument, that the power existed in a patentee, by contract, to accomplish the results which it is now held may be effected, I nevertheless would be unable to give my assent to the ruling now made. If it be that so extraordinary a power of contract is vested in a patentee, I cannot escape the conclusion that its exercise, like every other power, should be subject to the law of the land. To conclude otherwise

70] *would be but to say that there was a vast zone of contract lying between rights under a patent and the law of the land, where lawlessness prevailed and wherein contracts could be made whose effect and operation would not be confined to the area described, but would be operative and effective beyond that area, so as to dominate and limit rights of everyone in society, the law of the land to the contrary notwithstanding.

Again, a curious anomaly would result from the doctrine. The law, in allowing the grant of a patent to the inventor, does not fail to protect the rights of society; on the contrary, it safeguards them. The power to issue a patent is made to depend upon considerations of the novelty and utility of the invention. and the presence of these prerequisites must be ascertained and sanctioned by public authority; and although this authority has been favorably exerted, yet, when the rights

of individuals are concerned, the judicial power is then open to be invoked to determine whether the fundamental conditions essential to the issue of the patent existed. Under the view now maintained of the right of a patentee by contract to extend the scope of the claims of this patent, it would follow that the incidental right would become greater than the principal one, since by the mere will of the party rights by contract could be created, protected by the patent law, without any of the precautions for the benefit of the public which limit the right to obtain a patent.

I have already indicated how, since the decision in the *Button-Fastener Case*, the attempt to increase the scope of the monopoly granted by a patent has become common by resorting to the device of license restrictions manifested in various forms, all of which tend to increase monopoly and to burden the public to the exercise of their common rights. My mind cannot shake off the dread of the vast extension of such practices which must come from the decision of the court now rendered. Who, I submit, *can put

71 a limit upon the extent of monopoly and wrongful restriction which will arise, especially if by such a power a contract which otherwise would be void as against public policy may be successfully maintained?

What could more cogently serve to point to the reality and conclusiveness of these suggestions than do the facts of this case? It is admitted that the use of the ink to work the patented machine was not embraced in the patent, and yet it is now held that by contract the use of materials not acquired from a designated source has become an infringement of the patent, and exactly the same law is applied as though the patent in express terms covered the use of ink and other operative materials. It is not, as I understand it, denied, and if it were, in the face of the decision in the *Miles Medical Co. Case*, *supra*, in reason it cannot be denied, that the particular contract which operates this result, if tested by the general law, would be void as against public policy. The contract, therefore, can only be maintained upon the assumption that the patent law and the issue of a patent is the generating source of an authority to contract to procure rights under the patent law not otherwise within that law, and which could not be enjoyed under the general law of the land. But here, as upon the main features of the case, it seems to me this court has spoken so authoritatively as to leave no room for such a view. In *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632, the validity of certain stipulations contained in a license to use patented inventions came under considera-

tion. It was decided that contracts of that character, like all others, were to be measured by the law of the land, and were non-enforceable if they were contrary to general rules of public policy. And it was further held that even if contracts of that character were not void as against general principles of public policy, the aid of a court of equity would not be given to their enforcement if the stipulations were unconscionable and *oppressive, as are, in my judgment, aside from the rule of public policy, the stipulations of the contract here involved.

Indeed, when the decree rendered by the lower court which is now affirmed and which is excerpted in the margin† is considered,

†The circuit court granted a decree in favor of the complainant for an accounting of profits and damages and for an injunction restraining the defendants from infringing upon the said letters patent, and "from directly or indirectly procuring or attempting to procure, inducing or attempting to induce, or causing, any breach or violation of the covenant, condition, or obligation now existing or which may hereafter exist on the part of vendees or licensees of said patented and restricted Rotary mimeographs to the complainant by reason of the license restrictions hereinbefore set out, and particularly from directly or indirectly making or causing to be made, or selling or causing to be sold, or offering or causing to be offered, to any person or concern whatsoever, any supplies adapted for use or capable of being used on said patented or restricted mimeographs with design or intent that the same shall be so used in violation of such license restriction; from directly or indirectly persuading or inducing such persons or concerns to purchase any such supplies not of the complainant's manufacture and sale, designed or adapted for use in such machines for use thereon in violation of such license; from advertising or causing to be advertised in any manner any supplies intended or designed for use in said Rotary mimeographs in violation of such license; from publishing or causing to be published any offer, promise, or inducement designed or intended to procure licensees or vendees of the said patented and restricted Rotary mimeographs to use or purchase for use in such machine supplies not of the manufacture of the complainant, in violation of such license, and from doing and performing any and all other acts or things designed or intended to persuade or induce said licensees or vendees to violate the condition or covenant binding upon them with respect to the use of said Rotary mimeograph, and from in any way further interfering with the business of the said complainant of marketing said machines and supplies therefor under license restrictions limiting such machines to use only in conjunction with supplies made by or procured from said complainant.

56 L. ed.

it seems to me the conclusion cannot be escaped that although in the mental process by which it was held that relief under the patent law could *be afforded, the contract was treated as a restriction upon the use of the machine covered by the patent, so inexorable was the contrary result of the contract that in framing the decree it became necessary to give relief upon the theory that the gravamen of the suit was the violation of a contract stipulation in regard to unpatented materials.

For these reasons I therefore dissent.

CASSIUS B. THOMAS, William D. Eddy,
and Edgar D. Starbuck, Plffs. in Err.,

v.

WILLIAM C. TAYLOR.

(See S. C. Reporter's ed. 73-84.)

Pleading — national bank act.

1. The facts pleaded in an action for attesting as directors a false report of the condition of a national bank, in reliance upon which plaintiff was induced to purchase some of its stock, determine the rights of plaintiff, so that a recovery is not prevented by the designation of the action as one for deceit, instead of as one arising under the national bank act.

[For other cases, see Pleading, 3-5, in Digest Sup. Ct. 1908.]

National banks — liability of directors for making false report.

2. The act of directors of a national bank in including as a part of the resources in a report of the condition of the bank, pursuant to a call of the Comptroller of the Currency, assets which had previously been called to their attention by the Comptroller as doubtful, with directions for their immediate collection or removal from the bank, is in effect an intentional violation of the national bank act, knowingly committed, so as to render them liable for a loss resulting to one purchasing, in reliance on such report, stock of the bank on which an assessment is soon after made on announcement by the Comptroller that its capital stock has become totally impaired.

[For other cases, see Banks, 325a-326, in Digest Sup. Ct. 1908.]

Appeal — change of theory — liability of national bank directors.

3. Directors of a national bank, in an action against them for attesting a false report of the condition of the bank, in reliance upon which plaintiff purchased stock of the bank, cannot urge on appeal that if the action in the trial court had not been based on deceit, instead of on a violation of the national bank act, they would have

NOTE.—On the personal liability of national bank directors—see notes to Robinson v. Hall, 12 C. C. A. 680, and Warner v. Penoyer, 33 C. C. A. 230

been able to make a showing under which they would have been acquitted of knowingly violating such act, where the action was tried on the theory that, to maintain an action for deceit, knowledge of the falsity of the representations must be shown, and their defense was that the requirements of the national bank act had not been violated.

[For other cases, see Appeal and Error, VIII. J. 3, in Digest Sup. Ct. 1908.]

Appeal — change of theory.

4. A judgment cannot be reversed in the appellate court on the mere suggestion that, upon some other theory than that on which the case was tried, evidence might have been introduced which might have changed the result.

[For other cases, see Appeal and Error, VIII. J. 3, in Digest Sup. Ct. 1908.]

[No. 171.]

Argued February 28, 1912. Decided March 18, 1912.

IN ERROR to the Supreme Court of the State of New York in and for the County of Saratoga, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, modifying a judgment of the Supreme Court, finding defendants liable for attesting, as directors of a national bank, a false report as to its condition, in reliance upon which plaintiff was induced to purchase some of its stock. Affirmed.

See same case below, in Appellate Division, 124 App. Div. 53, 108 N. Y. Supp. 454; in Court of Appeals, 195 N. Y. 590, 89 N. E. 1113.

The facts are stated in the opinion.

Mr. Nash Rockwood argued the cause, and, with Mr. L. B. McKelvey, filed a brief for plaintiffs in error:

The remedy prescribed by the statute is exclusive; no common-law action for deceit will lie.

Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638.

It is of the very essence of a common-law action for deceit that the representation charged to have been made fraudulently must have been a voluntary statement made with the intent and for the purpose of deceiving. On the other hand, the report described in U. S. Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, is not, and cannot be, a voluntary statement, because it is exacted by the mandatory provisions of the statute, and is made for no other purpose. It is a statement which must be made,—a report required by law to be filed and published. It is not made

for the benefit of any private person, nor as a representation to him, but rather to the Comptroller of the currency, for the protection of the state.

Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Yates v. Jones Nat. Bank, 206 U. S. 180, 51 L. ed. 1015, 27 Sup. Ct. Rep. 638.

Again, in a common-law action for deceit it is not always necessary to establish that the party charged actually knew the representation to be false, and actually intended to defraud; very often the action is maintained upon circumstances which do not disclose actual knowledge and *scienter*, but lead rather to the assumption that the defendant knew or ought to have known of the falsity of the statement, and he is charged with liability upon the theory that his want of care or reckless inattention has made the injury possible.

Kountze v. Kennedy, 147 N. Y. 129, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414.

On the other hand, however, it is expressly declared by the provisions of U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, that the directors shall be liable only in case they shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title. And this statute has been so strictly construed as to require proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice.

Yates v. Jones Nat. Bank, 206 U. S. 180, 51 L. ed. 1015, 27 Sup. Ct. Rep. 638; Utley v. Hill, 155 Mo. 264, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743.

Again, in certain actions for fraud, parties are often held liable for the deceit of agents in whom they have vested authority to act, although no actual knowledge of the agents' fraud is shown; and this upon the theory that of two innocent persons, he who makes the injury possible must suffer. But this could not be possible under the statute, where the only ground upon which a director could be held liable for a violation by an agent or servant must be that he knowingly permitted the wrong.

The proceedings by virtue of which it is sought to impose upon these plaintiffs in error a severe penalty and to mulct them in heavy damages do not in any sense constitute that due process of law to which every citizen is entitled under the Constitution, and which has been his dearest right since Magna Charta. Due process of

law means a legal proceeding appropriate to the case and just to the parties,—a proceeding instituted and pursued in the ordinary manner prescribed by law, and which, above all else, gives the party to be affected a full opportunity to be heard respecting the justice of the judgment proposed to be rendered against him.

Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 663, 53 Fed. 904; Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51; Re Rosser, 41 C. C. A. 497, 101 Fed. 567; Galpin v. Page, 18 Wall. 350-368, 21 L. ed. 959-963; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 409-414, 42 L. ed. 215-220, 17 Sup. Ct. Rep. 841; Simon v. Craft, 182 U. S. 427-436, 46 L. ed. 1165-1170, 21 Sup. Ct. Rep. 836; Holden v. Hardy, 169 U. S. 366-391, 42 L. ed. 780-790, 18 Sup. Ct. Rep. 383; Merrill v. Rokes, 4 C. C. A. 433, 12 U. S. App. 183, 54 Fed. 450; Garfield v. United States, 211 U. S. 249-262, 53 L. ed. 168-174, 29 Sup. Ct. Rep. 62; Bailey v. Alabama, 219 U. S. 219-238, 55 L. ed. 191-200, 31 Sup. Ct. Rep. 145; Moyer v. Peabody, 212 U. S. 78-84, 53 L. ed. 410-416, 29 Sup. Ct. Rep. 235.

No violation of the statute was shown even if the proper remedy had been invoked.

Yates v. Jones Nat. Bank, 206 U. S. 158-180, 51 L. ed. 1002-1015, 27 Sup. Ct. Rep. 638; United States v. Graves, 53 Fed. 634; Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Coffin v. United States, 156 U. S. 446, 39 L. ed. 488, 15 Sup. Ct. Rep. 394; Graves v. United States, 165 U. S. 324, 41 L. ed. 732, 17 Sup. Ct. Rep. 393; Twining v. United States, 72 C. C. A. 529, 141 Fed. 41; United States v. Young, 128 Fed. 111.

The court of appeals of the state of New York erred in affirming the decision of the supreme court, to the effect that the notice from the Comptroller of the Currency on the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired in March, 1904. The said court also erred in affirming the decision of the supreme court to the effect that the letter from the Comptroller of the Currency to the bank that a certain list of notes therein mentioned was considered doubtful, and that immediate steps must be taken to collect or remove them from the bank, was evidence that such assets were in fact doubtful.

Lord v. Goddard, 13 How. 198, 14 L. ed. 111; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653; Brady v. Evans, 24 C. C. A. 236, 47 U. S. App. 416, 78 Fed. 560.
56 L. ed.

Until the board of directors had declared these assets worthless, or had directed them to be charged off, they had to be included in the statement, and the plaintiffs in error had no alternative. The report was the report of the bank, and was attested by the plaintiffs in error, as required by U. S. Rev. Stat. § 5211. And had the statement omitted these assets, the plaintiffs in error in attesting the report, would have been guilty of making a false entry in the report, under § 5209, and would have been liable to the bank and the stockholders, under § 5239, for the damages which would have resulted from omitting them.

Hanna v. Lyon, 179 N. Y. 107, 71 N. E. 778.

Defendant in error has mistaken his forum, as this action cannot be maintained in a state court.

Re Eno, 54 Fed. 669; State v. Tuller, 34 Conn. 280; Com. v. Felton, 101 Mass. 204; People v. Fonda, 62 Mich. 401, 29 N. W. 26; Com. ex rel. Torrey v. Ketner, 92 Pa. 372, 37 Am. Rep. 692; United States v. Buskey, 38 Fed. 99; State v. Fields, 93 Iowa, 748, 62 N. W. 653; State v. Bardwell, 72 Miss. 535, 18 So. 377, 10 Am. Crim. Rep. 71.

Mr. Edgar T. Brackett argued the cause and filed a brief for defendant in error:

At the time of the commencement of the action the facts here proved and before recited made out against the defendants a case of deceit at common law.

Arthur v. Griswold, 55 N. Y. 410, 7 Mor. Min. Rep. 46; Brackett v. Griswold, 112 N. Y. 467, 20 N. E. 376; Kley v. Healy, 127 N. Y. 561, 28 N. E. 593; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 85, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124; Kingsland v. Haines, 62 App. Div. 148, 70 N. Y. Supp. 873; Ettlinger v. Weil, 94 App. Div. 294, 87 N. Y. Supp. 1049; Mason v. Moore, 73 Ohio St. 275, 4 L.R.A.(N.S.) 605, 76 N. E. 932, 4 Ann. Cas. 240.

It was not necessary, in such an action, that the representations should be made directly to the party injured, personally, nor that the fraudulent intent related to the plaintiff, or had in view a design to defraud him in particular. If the representations were made publicly, and the plaintiff became one of the victims, then the law gives him a remedy against any one, or all, of the parties who set the machinery by which he was misled in motion.

Brackett v. Griswold, 112 N. Y. 467, 20 N. E. 376, reversing 14 N. Y. S. R. 451;

Morse v. Swits, 19 How. Pr. 287; Barber v. Morgan, 51 Barb. 116.

But the case of *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; decided by this court in May, 1907, holds that an action cannot be maintained at common law for deceit practised by means of a false report under the national banking act, the remedies provided by the act being exclusive.

Conceding, then, that in no case an action at common law can be maintained against directors for a false report under the banking act, since the decision in *Yates v. Jones Nat. Bank*, it still stands that the action is well brought and the recovery right under the terms of such banking act.

It is contended that this is sustaining a recovery here upon a theory different from that upon which the judgment was based by the special term. The answer to such contention is that a correct decision will not be reversed because founded on a wrong reason.

Marvin v. Universal L. Ins. Co. 85 N. Y. 284, 39 Am. Rep. 657; *Ward v. Hasbrouck*, 169 N. Y. 420, 62 N. E. 434; *Siefke v. Siefke*, 6 App. Div. 474, 39 N. Y. Supp. 601; *Penny v. Rochester*, 7 App. Div. 606, 40 N. Y. Supp. 172; *Cullinan v. Furthmann*, 70 App. Div. 112, 75 N. Y. Supp. 90.

It does not matter that the view of the case taken here differs from that of the court below; the judgment is justified by undisputed facts, and will therefore be affirmed.

Arnot v. Erie R. Co. 67 N. Y. 321.

This court will only look to see whether the Federal question has been decided erroneously. If that question has been decided right, it will look no further for errors.

McLaughlin v. Fowler, 154 U. S. 663, 26 L. ed. 176, 14 Sup. Ct. Rep. 1192.

If this rule is applied, the evidence fully makes out a case under the Federal statute. And a judgment will not be reversed when it is clear that the error could not have prejudiced, and did not prejudice, the party seeking reversal.

Lancaster v. Collins, 115 U. S. 222, 227, 29 L. ed. 373, 375, 6 Sup. Ct. Rep. 33.

A statement made in a report required to be published by the banking act must be true, and, if false, liability follows.

Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638.

An assertion that one had reason to believe that another had stolen a watch is equivalent to a charge that such other had stolen it.

Miller v. Miller, 8 Johns. 75.

And a statement recklessly made, with-

out knowledge of its truth, which is, in reality, false, is a false statement knowingly made.

Cooper v. Schlesinger, 111 U. S. 148, 155, 28 L. ed. 382, 384, 4 Sup. Ct. Rep. 360; *Moline Plow Co. v. Carson*, 18 C. C. A. 606, 36 U. S. App. 449, 72 Fed. 392; *Boddy v. Henry*, 113 Iowa, 468, 53 L.R.A. 769, 85 N. W. 771; *Rothschild v. Mack*, 115 N. Y. 7, 21 N. E. 726; *Haddock v. Osmer*, 153 N. Y. 609, 47 N. E. 923.

Mr. Justice McKenna delivered the opinion of the court:

Action against plaintiffs in error for attesting as directors a false report, as it is alleged, of the condition of the Citizens' National Bank of Saratoga Springs, New York, whereby the plaintiff in the action (defendant in error) *was deceived and [78 induced to purchase thirty shares of the stock of the bank for the sum of \$160 per share, which would have been worth that sum had the report been true, but, on account of its being false, he was compelled to pay 100 per cent assessment on his shares, which was required to be made by the Comptroller of the Currency. Damages were laid in the sum of \$4,800, for which, with interest, judgment was prayed.

The action was framed in deceit under the common law, the trial court stating that "the defendant claims, and the plaintiff concedes, that this is not an action to recover upon any liability stated in the national banking act against a director or officer of a national bank." And this was the ground of judgment, the trial court rejecting the contention of defendants (plaintiffs in error) that the only action, if any, available to the plaintiff (defendant in error), was under the national bank act. The court said: "But here the liability set forth in the complaint is not created by statute; the action is not a statutory action. It is the common-law action to recover damages for deceit affecting the plaintiff only, not the bank or the stockholders generally, and must be considered as such. In the complaint the plaintiff has set forth a cause of action for deceit, and not a cause of action under the statute." [55 Misc. 414, 106 N. Y. Supp. 538.] The court was also of the view that there was nothing in the statutes of the United States "that destroys the common-law action for deceit practised by the directors of a national bank;" and said, further, that if the plaintiff were attempting to enforce a liability under the statute against the directors of a national bank, there would be a different case. Considering that the evidence established all the elements necessary for the recovery in an action for deceit, the court

rendered judgment against defendants (plaintiffs in error) for the sum of \$4,800 and interest.

The appellate division, where the case was carried by defendants, and also the 79] court of appeals, gave a broader *effect to the action, and decided that its requirements under the common law of the state coincided with the requirements of the statutes of the United States, and satisfied the measure of responsibility of those statutes as expressed in *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638. "The case," the court said, "both as to pleadings and proofs, meets the statutory requirements."

The court, however, decided that by the realization of \$97,000 of the assets condemned by the Comptroller, defendant in error's stock was not a total loss, as found by the trial court, but had a value of nearly \$2,000, and required him to stipulate to deduct from the judgment the sum of \$2,000 and interest, in which case the judgment so reduced was to be affirmed. The stipulation was filed.

The judgment was affirmed by the court of appeals, "on opinion of Cochrane, J., in the appellate division." We shall refer to the opinion as that of the appellate division, although it was adopted by the court of appeals.

A consideration of the pleadings need not detain us long. How the action should be denominated or regarded was for the appellate division and the court of appeals to decide, and those courts, considering the laws of the state, decided that it was the facts pleaded, and not the technical designation of the action, which constituted grounds of recovery; and we accept their decision. There is nothing in the national banking laws which precludes such view. Those laws are not concerned with the form of pleadings. They only require that the rule of responsibility declared by them shall be satisfied.

The attack made by the plaintiffs in error is as much directed against the evidence as against the ruling of the court; and it is well to consider the facts. They are stated in a general way in the opinion of the appellate division as follows:

80]*"The defendants [plaintiffs in error here] are directors of the Citizens' National Bank, organized under the national bank law, and doing business in the village of Saratoga Springs, New York. Prior to March 1, 1904, the Comptroller of the Currency informed the directors of the bank by letter that certain specified assets, amounting to \$194,107.02, must be regarded as doubtful, and that immediate steps should be taken for their collection or removal from the 56 L. ed.

bank. Of such letter the defendants had knowledge. On April 8, 1904, pursuant to a call of the Comptroller, a report of the condition of the bank at the close of business on March 28th, 1904, made in regular form, verified by the cashier of the bank, and attested to be correct by each of the defendants, was published as required by law. In such report were included as a part of the resources of the bank the doubtful assets to which the attention of the defendants had been called by the Comptroller. The report also stated that the capital stock of the bank was \$100,000; that there was a surplus of \$50,000; and that there were undivided profits of \$13,456.75. This published report was not seen by plaintiff, but its contents were communicated to him, and relying on the same he purchased, in the early part of June, 1904, thirty shares of the stock of said bank for the sum of \$4,800. On June 27th, 1904, the bank received notice from the Comptroller that its capital had become totally impaired, and that the same must be supplied by assessment upon the stockholders. Immediately thereafter such assessment was ordered, and the plaintiff paid \$3,000 on account of the stock he had recently purchased." [124 App. Div. 54, 108 N. Y. Supp. 454.]

All through the argument of plaintiffs in error runs the insistence that the common-law action of deceit does not lie against the directors of a national bank, and that the only measure of their responsibility is laid down in the national banking laws. This is admitted. It was conceded by the appellate division as having been established *by *Yates v. Jones Nat. Bank*, [81 supra, and the question in the case comes to the simple one, whether the appellate division rightly decided that the findings in the case at bar satisfied the test of liability declared in the *Yates Case*.

In that case a broad consideration of the national banking laws was given, and it was deduced from them that the report which § 5211 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3498) required must contain a "true" statement of the condition of the bank, and that "the making and publishing of a false report is prohibited." These, however, it was said, were implications, but that the liability of the directors was fixed by the express provisions of the laws, and its extent was measured "by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of'" the title relating to national banks.

This test is the foundation of the action. The complaint charges plaintiffs in error with actual knowledge. The allegation is that when plaintiffs in error attested the

report "they knew the same was not correct, and was false, and said statement was thus attested by them with the intention of deceiving the public, and, among others, the plaintiff" (defendant in error). And the appellate division says: "That the report was false, and known to the defendants to be false, they do not deny, nor do they attempt to explain their conduct." This would seem like a finding of fact of knowledge of the falsity of the report on the part of plaintiffs in error. Indeed, in distinguishing the case from the Yates Case the court did so on the ground that in that case "there had been a recovery against directors without proof of *scienter*, which proof the statute requires," and added: "Such proof has been supplied in the present case."

But, not insisting on this, let us consider the argument of plaintiffs in error. It is that the statement was not voluntary, having been made under the command of 82]the *national banking act, and therefore an element of the action of deceit is wanting; and that such act requires "proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice." Yates v. Jones Nat. Bank and other cases are cited to support the contention. The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is "that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required,—that is, that the violation must in effect be intentional." Not, therefore, that as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation "in effect" intentional. There is "in effect" an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the Comptroller of the Currency that \$194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This "was a direct warning to them," as the trial court said, "by the bank examiner and Comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful." They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster

and the public who deal with them and support them from deception.

It is further urged that it is unjust to sustain against plaintiffs in error the view of the action entertained by the appellate division, because they say that their defense in the trial court was addressed and adapted to the case made *against them.[83 "Had the action," they say, "been considered as based upon a Federal statute, there were many matters of defense which they could have interposed to such a charge, but which they had a right to omit, and were justified in omitting, at the time." In specialization of this it is said that they might have shown their relation to the bank and the confidence they had and were justified in having in the statements of certain of its officers, the cashier being instanced as one upon whom they might have relied "to prepare and correct a legal statement." And they contend that by such showing they would have been acquitted of having "knowingly violated the statute."

This contention does not seem to have been urged in any of the courts below. It is stated in the opinion of the appellate division that "there is no pretense by defendants that they have been prejudiced by the theory followed in the court below." It is somewhat late now to urge it, but, however, we think it is without merit. There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books, and to show that the report was a true copy of them, as it was alleged in their answer to be. No attempt was or is made to show why the notice from the Comptroller was disregarded (we have seen it was known to plaintiffs in error prior to the attesting of the report), except that they point to the fact that \$97,000 of the items mentioned by the Comptroller were subsequently collected, and that they should have been given time to collect the other assets. But the fact of the false representation remains, and the assessment of 100 per cent upon the stock purchased by defendant in error, which increased the cost of his stock \$3,000.

The plaintiffs in error, indeed, are quite at pains to show that a representation, to be actionable for deceit, *must not only[84 be false, but must be known to be false. In other words, to quote from their brief, "To sustain an action for deceit, not only falsity but knowledge of falsity of representation must be shown;" and for this New York cases are cited. In another part of their argument they say actual knowledge is not necessary, but that the action

may be supported if reckless inattention has made the injury possible.

It is manifest, therefore, that plaintiffs in error did not refrain from showing want of knowledge because of the theory upon which the case was tried, and such showing was obviously relevant to support that theory and the defense that the requirement of the national banking act had not been violated, which was their explicit contention.

Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result. But we are extending the discussion unnecessarily. The courts of New York have decided that the requirements of the local law of deceit are identical with what we have decided are the requirements of the national banking act.

Judgment affirmed.

85] *OTTO H. BEUTLER, Administrator
of the Estate of John Fetta, Deceased.
v.

GRAND TRUNK JUNCTION RAILWAY
COMPANY and Grand Trunk Railway.

(See S. C. Reporter's ed. 85-89.)

Courts — power to change laws — fellow-servant rule.

1. The established fellow-servant doctrine cannot be done away with by the courts, but the legislature must act if any change is to be made.

[For other cases, see Courts, I. e. 3, in Digest Sup. Ct. 1908.]

Trial — questions of law for court — who are fellow servants.

2. The Federal courts will, in cases tried in them, follow their own understanding of the common law, when no settled rule of property intervenes, in determining who are fellow servants, and will determine that question without submitting it to the jury. [For other cases, see Trial, 193-196, in Digest Sup. Ct. 1908.]

Master and servant — fellow servants — railroad employees.

3. An employee at work in the repair yard of a railroad is a fellow servant of members of an engine and switching crew by whose negligence in running a car needing repair from the general tracks into the special yard the former is killed.

[For other cases, see Master and Servant, 131-147, in Digest Sup. Ct. 1908.]

[No. 194.]

NOTE.—As to what servants are deemed to be in the same common employment, apart from statutes, where no questions as to vice-principalship arise—see note to *Sofield v. Guggenheim Smelting Co.* 50 L.R.A. 417.

56 L. ed.

Submitted March 6, 1912. Decided March 18, 1912.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit, presenting the question whether members of an engine and switching crew were fellow servants of an employee killed by the negligence of the former in running a car needing repair into a special yard for repairs where the latter was at work. Answered in the affirmative.

The facts are stated in the opinion.

Mr. James J. Barbour submitted the cause for Beutler, administrator. Messrs. Raymond W. Beach and Elmer E. Beach were on the brief:

A car repairer exclusively employed under a separate and special foreman in the car repair department of a railroad company, whose duties never bring him in relation to or in contact with the persons comprising an engine and switching crew,—exclusively engaged in a separate and distinct department, known as the operating department,—is not a fellow servant with the members of such engine or switching crew.

Gilmore v. Northern P. R. Co. 9 Sawy. 558, 18 Fed. 870; *Pike v. Chicago & A. R. Co.* 41 Fed. 99; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 383, 37 L. ed. 772, 779, 13 Sup. Ct. Rep. 914; *Santa Fe Pacific R. Co. v. Holmes*, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676; *McCabe & S. Constr. Co. v. Wilson*, 209 U. S. 275, 280, 52 L. ed. 788, 792, 28 Sup. Ct. Rep. 558; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983.

The case at bar arose in the state of Illinois, and the supreme court of Illinois has held in cases similar to the one at bar that the doctrine of fellow servant does not apply. Although the state decisions are not binding on this court, the reasoning therein may well be adopted as the law covering this particular case.

Northern P. R. Co. v. Hambly, 154 U. S. 361, 38 L. ed. 1014, 14 Sup. Ct. Rep. 983; *Indiana, I. & I. R. Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *Haas v. St. Louis & Suburban R. Co.* 111 Mo. App. 713, 90 S. W. 1155; *Gathman v. Chicago*, 236 Ill. 15, 19 L.R.A.(N.S.) 1178, 86 N. E. 152, 15 Ann. Cas. 830; *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453; *Duffy v. Kivilin*, 195 Ill. 634, 63 N. E. 503.

Mr. George W. Kretzinger submitted the cause for the railway companies:

Persons in the service of the same employer, and bearing such relations to each other and to the business they are jointly engaged in, as a switching crew and a car repairer in the railroad yards of the master, are fellow servants, and the master is not liable for an injury to one through the negligence of the other.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; Central R. Co. v. Keegan, 160 U. S. 267, 40 L. ed. 422, 16 Sup. Ct. Rep. 269; Northern P. R. Co. v. Dixon, 194 U. S. 345, 48 L. ed. 1009, 24 Sup. Ct. Rep. 683; Northern P. R. Co. v. Peterson, 162 U. S. 355, 40 L. ed. 997, 16 Sup. Ct. Rep. 843; New England R. Co. v. Conroy, 175 U. S. 328, 44 L. ed. 184, 20 Sup. Ct. Rep. 85; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319.

88] *Mr. Justice Holmes delivered the opinion of the court:

The deceased, Fetta, was at work in the repair yard of a railroad; other servants of the road, an engine and switching crew, ran a car needing repair from the general tracks into the special yard, and by their negligence killed him. There was no further relation between the parties than these facts disclose, and the question is certified whether they were fellow servants within the rule that would exempt the railroad from liability in that case.

The doctrine as to fellow servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient. So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes. Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; Northern P. R. Co. v. Hambly, 154 U. S. 349, 360, 38 L. ed. 1009, 1013, 14 Sup. Ct. Rep. 983.

The precedents in this court carry the doctrine as far as it is necessary to carry it in this case to show that the two persons concerned were engaged in a common employment. No testimony can shake the obvious fact that the character of their respective occupations brought the people engaged in them into necessary and frequent contact, although they may have had no personal relations. Every time that a car was to be repaired it had to be switched into the repair yard. There is no room for the

exception to the rule that exists where the negligence consists in the undisclosed failure to furnish a safe place to work in,—an exception that perhaps has been pushed to an extreme in the effort to limit the rule. Santa Fe Pacific R. Co. v. Holmes, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676; McCabe & S. Constr. Co. v. Wilson, 209 U. S. 275, 52 L. ed. 788, 28 Sup. Ct. Rep. 558. The head of the switching crew and the deceased were as *clearly fellow[89 servants as the section hand and engineer in Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983. It may be that in the state court the question would be left to the jury (Gathman v. Chicago, 236 Ill. 9, 19 L.R.A.(N.S.) 1178, 86 N. E. 152, 15 A. & E. Ann. Cas. 830; Indiana, I. & I. R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387) but whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad, the legislature, not juries, must make a change. We answer the certificate, Yes.

SAN JUAN LIGHT & TRANSIT COMPANY, Piff. in Err.,
v.
BELEN REQUENA.

(See S. C. Reporter's ed. 89-99.)

Appeal — refusal to strike out pleading — harmless error.

1. Refusal to strike from the complaint, in an action for negligence causing the death of plaintiff's husband, a paragraph relating to exemplary damages, if erroneous, is harmless, where the jury are instructed that there can be no recovery of exemplary damages.

[For other cases, see Appeal and Error, 5012-5015, in Digest Sup. Ct. 1908.]

Appeal — sufficiency of pleading — first raising question on appeal.

2. An objection that the complaint in an action for negligence causing the death of plaintiff's husband did not sufficiently charge the negligence which was found to have caused the accident is not available in an appellate court, where the case was tried on the theory that such negligence was within the issues, and both parties in-

NOTE.—On the applicability of the rule *res ipsa loquitur* to accident on private property, due to escape of electricity from disordered electrical appliances—see notes to Western Coal & Min. Co. v. Garner, 22 L.R.A.(N.S.) 1183, and Turner v. Southern Power Co. 32 L.R.A.(N.S.) 848.

troduced evidence bearing on that question, without objection.

[For other cases, see Appeal and Error, VIII. J. 4, in Digest Sup. Ct. 1908.]

Evidence — res ipsa loquitur — injury by electric current.

3. The doctrine of *res ipsa loquitur* is properly applied where a customer of a company supplying electricity for lighting purposes, engaging to deliver a suitable current for such purpose, was killed without fault on his part, while the secondary wire carrying the current to his residence conveyed an excessive and dangerous current which could only come from the primary wire of such company, which carried a current of high and deadly voltage, which dangerous current would not have been communicated to the secondary wire if its wires and converters, which were exclusively under its control, had been in proper condition, and the converters were found, immediately after the accident, to be out of order, one being heated and its insulation charred, and the protecting ground wire of the other being severed.

[For other cases, see Evidence, II. h, in Digest Sup. Ct. 1908.]

[No. 96.]

Argued December 13, 1911. Decided March 18, 1912.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment awarding damages to a widow for the death of her husband by an electric shock received while adjusting an incandescent light in his residence. Affirmed.

The facts are stated in the opinion.

Mr. Hugo Kohlmann argued the cause, and, with Messrs. F. Kingsbury Curtis, H. H. Scoville, and H. P. Leake, filed a brief for plaintiff in error:

The doctrine of *res ipsa loquitur* was not applicable, and the court below erred in applying it in the case at bar.

Peters v. Lynchburg Light & Traction Co. 108 Va. 333, 22 L.R.A.(N.S.) 1188, 61 S. E. 745; Minneapolis General Electric Co. v. Cronon, 20 L.R.A.(N.S.) 816, 92 C. C. A. 345, 166 Fed. 651; Memphis Consol. Gas & Electric Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; National F. Ins. Co. v. Denver Consol. Electric Co. 16 Colo. App. 86, 63 Pac. 949; Harter v. Colfax Electric Light & P. Co. 124 Iowa, 500, 100 N. W. 508; McGrath v. St. Louis Transit Co. 197 Mo. 97, 94 S. W. 872.

The doctrine of *res ipsa loquitur*, even if applicable, was incorrectly applied by the court below.

Lyles v. Branno Carbonating Co. 140 N. C. 26, 52 S. E. 233; Ross v. Double Shoals Cotton Mills, 140 N. C. 119, 1 L.R.A.(N.S.) 298, 52 S. E. 121; Chenall v. Palmer Brick Co. 117 Ga. 108, 43 S. E. 443; Buckland v. 56 L. ed.

New York, N. H. & H. R. Co. 181 Mass. 3, 62 N. E. 955; De Glopper v. Nashville R. & Light Co. 123 Tenn. 633, 33 L.R.A.(N.S.) 913, 134 S. W. 609; Zahniser v. Pennsylvania Torpedo Co. 190 Pa. 353, 42 Atl. 707; Dean v. Tarrytown, W. P. & M. R. Co. 113 App. Div. 439, 99 N. Y. Supp. 250; Dentz v. Pennsylvania R. Co. 75 N. J. L. 893, 70 Atl. 164.

Plaintiff's cause of action being based upon alleged negligence of defendant in respect to the interior wiring of deceased's house, there could be no recovery in this action if such wiring was not under the defendant's control.

McGrath v. St. Louis Transit Co. 197 Mo. 97, 94 S. W. 872; Batterson v. Chicago & G. T. R. Co. 49 Mich. 184, 13 N. W. 508; Toledo, W. & W. R. Co. v. Foss, 88 Ill. 551; Atlantic Coast Line R. Co. v. Caple, 110 Va. 514, 66 S. E. 855; Long v. Doxey, 50 Ind. 385; Murphy v. North Jersey Street R. Co. 71 N. J. L. 5, 58 Atl. 1018.

The burden of showing that negligence or other wrong was the proximate cause of the injury is upon the plaintiff. The plaintiff must not only prove negligence, but he must also prove that such negligence was the proximate cause of the injury.

Kelsey v. Jewett, 28 Hun, 51.

And he must show this by sufficient evidence; a mere surmise or conjecture that the negligence was the proximate cause of the injury is not sufficient.

Larson v. St. Paul & D. R. Co. 43 Minn. 488, 45 N. W. 1096.

Proximate cause was a question for the jury.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; St. Louis, I. M. & S. R. Co. v. Needham, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823.

The question of proximate cause should have been submitted to the jury under proper instructions from the court.

1 Thomp. Negl. § 161; Pittsburgh C. C. & St. L. R. Co. v. Carlson, 24 Ind. App. 559, 56 N. E. 251.

The proximate cause is the efficient cause, and one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.

Ætna F. Ins. Co. v. Boon, 95 U. S. 130, 24 L. ed. 398.

Unavoidable accident means that the accident could not have been avoided by the defendant by the use of ordinary caution and care.

Clyde v. Richmond & D. R. Co. 59 Fed. 394; Hodgson v. Dexter, 1 Cranch, C. C. 109, Fed. Cas. No. 6,565; Dreyer v. People,

188 Ill. 40, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424; Dygert v. Bradley, 8 Wend. 469; Texas & P. R. Co. v. Patton, 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; Atlantic Coast Line R. Co. v. Caple, 110 Va. 514, 66 S. E. 855.

Although bound to exercise extraordinary care in the maintenance of its electric wires, defendant was not an insurer, especially in view of the fact that it did not own or control the installations of the plaintiff. There was sufficient evidence showing that a proper inspection was made a short time before the accident, and that the inspection disclosed no defect.

Smith v. East End Electric Light Co. 198 Pa. 19, 47 Atl. 1123; Denver Consol. Electric Co. v. Simpson, 21 Colo. 371, 31 L.R.A. 570, 41 Pac. 499; Cosgrove v. Kennebec Light & Heat Co. 98 Me. 477, 57 Atl. 841.

The Court declined to hear Messrs. Willis Sweet and George H. Lamar, who filed a brief for defendant in error:

A prima facie case of negligence was made out.

15 Cyc. 447, 448; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 555, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653; Alton R. & Illuminating Co. v. Foulds, 81 Ill. App. 322; Alexander v. Nanticoke Light Co. 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068; 2 Cooley, Torts, 3d ed. 1424; Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; Giraudi v. Electric Improv. Co. 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108; Perham v. Portland General Electric Co. 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; Suburban Electric Co. v. Nugent, 58 N. J. L. 658, 32 L.R.A. 700, 34 Atl. 1069; Harrison v. Kansas City Electric Light Co. 195 Mo. 606, 7 L.R.A.(N.S.) 293, 93 S. W. 951; Brown v. Edison Electric Illuminating Co. 90 Md. 400, 46 L.R.A. 745, 78 Am. St. Rep. 442, 45 Atl. 182; Western U. Teleg. Co. v. State, 82 Md. 311, 31 L.R.A. 572, 51 Am. St. Rep. 464, 33 Atl. 763.

The court properly instructed the jury that no verdict could be rendered herein against the defendant unless it had been shown by a preponderance of the evidence that it was guilty of the negligence which was the approximate cause of the death of the deceased.

Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So.

51; Alexander v. Nanticoke Light Co. 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068.

There was no room for an instruction as to inevitable accident.

Alton R. & Illuminating Co. v. Foulds, 81 Ill. App. 322; Mitchell v. Charleston Light & P. Co. 45 S. C. 146, 31 L.R.A. 557, 22 S. E. 767.

There was no possible interposition of the negligence of a third party which could relieve the plaintiff in error.

Harrison v. Kansas City Electric Light Co. 195 Mo. 606, 7 L.R.A.(N.S.) 293, 93 S. W. 951.

*Mr. Justice Van Devanter deliv[94] ered the opinion of the court:

The judgment here to be reviewed is one awarding damages to a widow for the death of her husband, caused by an electric shock received while he was adjusting an incandescent light in his residence in San Juan, Porto Rico. The case presented by the evidence produced upon the trial, which was to the court and a jury, was this:

The defendant was supplying the inhabitants of San Juan with electricity for lighting purposes, and had engaged to deliver at the deceased's residence a current suitable for lighting it. The electricity was conveyed along the street in front of his residence by a primary wire carrying a current of 2,200 volts, and by means of parallel or multiple converters the current was reduced to 110 volts and then carried to his residence and those of his neighbors by a secondary wire. These wires and converters were owned and controlled by the defendant, and the wiring and fixtures in the residence of the deceased were owned and controlled by him. On the occasion in question, the current carried by the secondary wire, and by it communicated to the wiring in the residence of the deceased, became in some way greatly and dangerously increased in voltage, and it was because of this that he received the fatal shock. Had this current been maintained at substantially its normal standard, as was contemplated, it would not, in the circumstances, have done him any injury. He was not responsible for the increased voltage, and neither did he have reason to expect it.

There were no outside electric wires in that vicinity save those of the defendant, and the increased and dangerous current could only have come from its primary wire. About the time of the shock to the deceased, two of his neighbors had trouble with a like current in their houses. One received a shock which felled him to the *floor and[95] rendered him unconscious, and the other found the wires in his shop flashing, and on coming in contact with one of them was

made unconscious and burned so that he was taken to a hospital for treatment. Shortly thereafter it was found that the ground or protecting wire leading from one of the converters to the earth was broken or severed, and that the other converter was heated and out of order, the insulation being charred.

There was testimony tending to show that on the day preceding these shocks the primary and secondary wires and the converters had been examined by the defendant's inspector and found in good condition; but this testimony was greatly impaired upon the cross-examination of the inspector, who then said: "My inspection consisted in seeing that the poles and overhead trolley lines were in good condition. I just walked along and examined each pole, but did not climb them. When I came to the transformer [converter] I did not climb the pole and didn't look at the fuses. . . . No, sir; on that day I didn't look at the transformer any closer than I could see it from the ground. . . . There is no way you can tell from looking at the outside of the transformer whether it is in good condition or not."

There was also testimony tending to show that the wiring in the deceased's residence was not properly insulated or in good condition, but there was no claim that the defendant was responsible for this, and neither was there any evidence that the fatal shock resulted therefrom.

Much of the testimony was addressed to the questions whether a current of unusual and dangerous voltage was communicated from the defendant's wires to the wiring in the residence of the deceased, and, if so, whether this resulted from negligence of the defendant in failing to exercise appropriate care in the maintenance and inspection of its wires and converters. This testimony was *admitted without objection, both parties tacitly treating it as within the issues.

That the fatal shock resulted, without fault of the deceased, from an unusual and dangerous current carried to his residence by the wires of the defendant, was so conclusively established by the evidence that that part of the case might well have been covered by a peremptory direction to the jury, leaving them to determine, under appropriate instructions, the question of the defendant's negligence, and the amount, if any, which the plaintiff was entitled to recover.

With this statement of the case presented upon the trial, we come to the rulings which are assigned as error.

1. A motion to strike from the complaint a paragraph relating in part to exemplary damages was denied, because not all of the paragraph was deemed objectionable, and complaint is made of that ruling. But it is not necessary to consider its propriety. Even if wrong, it did the defendant no harm, because the court instructed the jury that there could be no recovery of exemplary damages, but only such as were compensatory.

2. It is urged that the negligence charged in the complaint related only to the condition of the wiring inside the residence of the deceased, and therefore that the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters outside. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside, whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary, the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection *of its outside[97 wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.

3. In its charge to the jury the court explained, in substance, that a company supplying electricity for lighting purposes, and engaging with individuals to deliver a suitable current at their residences and places of business, over its own system of wires and appliances, is bound to exercise such control over the subtle and perilous agency with which it is dealing, and to take such precautions in the maintenance and inspection of its wires and appliances, as are reasonably essential to prevent an excessive and dangerous current from passing from its supply wires to the service wires of its patrons, and then said:

"And you are further instructed that if you believe from a preponderance of the evidence that the deceased came to his death while innocently and without knowledge of any danger using an incandescent light, the current for which was furnished,

"And you are further instructed that if you believe from a preponderance of the evidence that the deceased came to his death while innocently and without knowledge of any danger using an incandescent light, the current for which was furnished,

or to which the electricity was supplied, by the defendant company, the presumption is that the electric company was negligent; and it devolves upon it to show that the surplus and dangerous current that came over the wires did not occur from any negligent act on its part."

Exception to this instruction was taken upon the ground that it erroneously applied the doctrine of *res ipsa loquitur*. While recognizing that that doctrine is of restricted scope, and when misapplied is calculated to operate prejudicially, we think there was no error in its application in this instance. 98] *The deceased was without fault. The defendant's primary wire was carrying a current of high and deadly voltage. Its secondary wire conveyed to his residence an excessive and dangerous current which could only have come from its primary wire. Had its wires and converters been in proper condition, the excessive and dangerous current would not have been communicated to its secondary wire, and the injury would not have occurred. These wires and converters were exclusively under its control, and it was charged with the continuing duty of taking reasonable precautions, proportioned to the danger to be apprehended, to maintain them in proper condition. In the ordinary or usual course of things, the injury would not have occurred had that duty been performed. Not only did the injury occur, but immediately thereafter both converters were found to be out of order; one being heated and its insulation charred, and the protecting ground wire of the other being broken or severed. Besides, the defendant engaged to supply a current of low voltage, reasonably safe and suitable for lighting, while the current delivered on this occasion was of high voltage, extremely dangerous and unsuitable for lighting purposes. These circumstances pointed so persuasively to negligence on its part that it was not too much to call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable; but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable. This was all that was meant by the instruction, reasonably interpreted. It was not a model, and, if it stood alone, might be subject to criticism. But, if read in the light of what preceded and followed it, and of the case before the jury, it was unobjectionable. When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is 99] shown to be under *the exclusive control of the defendant, and the injury is such

as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care. *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 554, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653; *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 350, 42 Atl. 707; *Alexander v. Nanticoke Light Co.* 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068; *Trenton Passenger R. Co. v. Cooper*, 60 N. J. L. 219, 38 L.R.A. 637, 64 Am. St. Rep. 592, 37 Atl. 730; *Newark Electric Light & P. Co. v. Ruddy*, 62 N. J. L. 505, 57 L.R.A. 624, 41 Atl. 712; 2 *Cooley, Torts*, 3d ed. 1424; 4 *Wigmore, Ev.* § 2509.

4. Complaint is made of the court's refusal to give several instructions requested by the defendant. All have been examined, and we find no error in their refusal. Some were in substance incorporated in the charge, some were inapplicable to the case before the jury, and others did not correctly state the law.

Judgment affirmed.

LAFAYETTE E. CAMPBELL et al., Pliffs.
in Err.,
v.

UNITED STATES

(See S. C. Reporter's ed. 99-106.)

Appeal — review of finding in circuit court of appeals.

1. The circuit court of appeals has no power to consider the sufficiency of the facts found by the district court to support the judgment in an action at law, tried without a jury, contrary to U. S. Rev. Stat. § 566, U. S. Comp. Stat. 1901, p. 461, since such a trial was in the nature of an unauthorized submission to an arbitrator, and the court's determination was not a judicial one, the provisions of §§ 649, 700 (U. S. Comp. Stat. 1901, pp. 525, 570), for such a trial and review, being in terms limited to cases in the circuit courts.

[For other cases, see *Appeal and Error*, 4852-4878, in *Digest Sup. Ct.* 1908.]

Appeal — sufficiency of pleading — first raising question on appeal.

2. The objection that an answer alleging that defendants, who were sureties on the official bond of a receiver of public moneys, had not and could not obtain "sufficient information" upon which to base a belief as to the default of their principal, set up in the complaint, and that they therefore denied the same, is not a sufficient denial,

NOTE.—On the jurisdiction of the circuit courts of appeals—see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6, and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

under Colo. Code, § 56, requiring such a denial to be based upon a disavowal of "sufficient knowledge or information," cannot be first raised in an appellate court. [For other cases, see Appeal and Error, VIII. J, 4, in Digest Sup. Ct. 1908.]

[No. 161.]

Argued March 6, 1912. Decided March 18, 1912.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which, reversing the judgment of the District Court for the District of Colorado, directed the entry of a judgment for plaintiff in an action against sureties on the official bond of a receiver of public moneys, to recover for a default of their principal. Reversed.

See same case below, — L.R.A. (N.S.) —, 95 C. C. A. 114, 170 Fed. 318.

The facts are stated in the opinion.

Mr. Aldis B. Browne argued the cause, and, with Messrs. Gerald Hughes, Alexander Britton, Evans Browne, Clayton C. Dorsey, and Barnwell S. Stuart, filed a brief for plaintiffs in error.

Messrs. Gerald Hughes, Clayton C. Dorsey, and Barnwell S. Stuart filed a separate brief for plaintiffs in error:

In actions at law in the courts of the United States, if the questions of fact are, by the consent of the parties, determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the court of appeals upon writ of error, in the absence of a statute providing otherwise.

Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; United States v. Cleage, 88 C. C. A. 249, 161 Fed. 86; United States v. Louisville & N. R. Co. 93 C. C. A. 58, 167 Fed. 308; United States v. St. Louis, I. M. & S. R. Co. 94 C. C. A. 441, 169 Fed. 74.

The question of jurisdiction is one which the court will determine regardless of whether it was raised or suggested by the parties.

Cutler v. Rae, 7 How. 729, 730, 12 L. ed. 890, 891; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382-386, 28 L. ed. 463-465, 4 Sup. Ct. Rep. 510; Parker v. Ormsby, 141 U. S. 81, 85, 86, 35 L. ed. 654, 656, 11 Sup. Ct. Rep. 912; Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup. Ct. Rep. 561; Dones v. Urrutia, 202 U. S. 614, 50 L. ed. 1172, 26 Sup. Ct. Rep. 767; Henrie v. Henderson, 76 C. C. A. 196, 145 Fed. 316; Fred Macey Co. v. Macey, 68 C. C. A. 363, 135 Fed. 725; Cochran v. Childs, 49 C. C. A. 421, 56 L. ed.

111 Fed. 433; Wetherby v. Stinson, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 173; Tinsley v. Hoot, 3 C. C. A. 612, 2 U. S. App. 548, 53 Fed. 682.

Assistant Attorney General Denison argued the cause and filed a brief for defendant in error:

The judgment of the district court being plainly contrary to law on any view of the facts, the court of appeals had the power to reverse.

Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; Campbell v. Boyreau, 21 How. 223, 226, 227, 16 L. ed. 96, 97; O'Reilly de Camara v. Brooke, 209 U. S. 45, 52 L. ed. 676, 28 Sup. Ct. Rep. 439; Lyons v. Lyons Nat. Bank, 19 Blatchf. 287, 8 Fed. 369; Doty v. Jewett, 22 Blatchf. 65, 19 Fed. 337; Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; Andes v. Slauson, 130 U. S. 435, 32 L. ed. 989, 9 Sup. Ct. Rep. 573; Paine v. Central Vermont R. Co. 118 U. S. 152, 30 L. ed. 193, 6 Sup. Ct. Rep. 1019; Wayne County v. Kennicott, 103 U. S. 554-556, 26 L. ed. 486, 487; Low v. United States, 94 C. C. A. 1, 169 Fed. 86; United States v. St. Louis, I. M. & S. R. Co. 94 C. C. A. 441, 169 Fed. 73; United States v. Cleage, 88 C. C. A. 249, 161 Fed. 85; United States v. Louisville & N. R. Co. 93 C. C. A. 58, 167 Fed. 306; Rush v. Newman, 7 C. C. A. 136, 12 U. S. App. 635, 58 Fed. 158; Prentice v. Zane, 8 How. 470, 12 L. ed. 1160; Guild v. Frontin, 18 How. 135, 15 L. ed. 290; Suydam v. Williamson, 20 How. 427, 433, 15 L. ed. 978, 980; Madison County v. Warren, 106 U. S. 622, 27 L. ed. 311, 2 Sup. Ct. Rep. 86; Glenn v. Fant, 134 U. S. 398, 33 L. ed. 969, 10 Sup. Ct. Rep. 583; Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678; Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483; Wear v. Mayer, 2 McCrary, 172, 6 Fed. 658.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action at law against the sureties on the official bond of a receiver of public moneys to recover for a default of their principal. The answer set forth that the defendants had not and could not obtain sufficient information upon which to base a belief respecting the default charged, and therefore denied the same, and also interposed an affirmative defense, which need not be *specially noticed. The action[105 was begun in the district court, and was tried to the court without a jury. There was a special finding of the facts, accompanied by conclusions of law, and upon these

there was a judgment for the defendants. The plaintiff took the case on writ of error to the circuit court of appeals, which held that the facts found were insufficient to support the judgment, and reversed the latter, with a direction to enter a judgment for the plaintiff upon the finding. — L.R.A.(N.S.) —, 95 C. C. A. 114, 170 Fed. 318. The defendants then sued out the present writ of error.

At the outset we are confronted with the question of the power of the circuit court of appeals to consider the sufficiency of the facts found to support the judgment. Section 566, Rev. Stat. (U. S. Comp. Stat. 1901, p. 461) provided that the trial of issues of fact in the district courts, in all cases except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, should be by jury. This was not one of the excepted cases. Sections 649 and 700, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 525, 570), made special provision for the trial by the court, without a jury, of the issues of fact in actions at law in the circuit courts, and for the review of the rulings of the court in the progress of such a trial, including the question of the sufficiency of the facts found to support the judgment; but those sections were in terms limited to cases in the circuit courts, and there was no similar provision in respect of cases in the district courts. In this state of the statute law, the trial to the district court without a jury was in the nature of a submission to an arbitrator,—a mode of trial not contemplated by law, and the court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore was not subject to re-examination in an appellate court. *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96; *Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. 106] Rep. 91. It follows that the circuit court of appeals was without power to consider the sufficiency of the facts found to support the judgment.

The power of that court was limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding; such as whether the pleadings were sufficient to support the judgment. It is now said that such a question was presented, and that its right solution required that the judgment of the district court be reversed. If the answer did not put in issue the allegation of the complaint respecting the default of the principal in the bond, this claim is well founded; otherwise it is not. The denial of that allegation was predicated

upon a statement that the defendants had not and could not obtain "sufficient information" upon which to base a belief respecting its truth. This, it is said, was not an adequate denial, because the state statute (Colo. Code, § 56) required that such a denial be based upon a disavowal of "sufficient knowledge or information." But of this it is enough to say that no such objection was raised in the district court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably, it could, and doubtless would, have been avoided by an amendment. *Roberts v. Graham*, 6 Wall. 578, 581, 18 L. ed. 791, 792; *Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co.* 189 U. S. 221, 231, 47 L. ed. 782, 786, 23 Sup. Ct. Rep. 517.

It results that the Circuit Court of Appeals erred in not affirming the judgment of the District Court.

Judgment reversed.

*MINNIE SCHODDE, Executrix of [107
Henry Schodde, Deceased, Petitioner,
v.

TWIN FALLS LAND & WATER COMPANY.

(See S. C. Reporter's ed. 107-126.)

Waters — incidental appropriation — current of stream.

1. The current of a river cannot be appropriated by a riparian proprietor in Idaho to the extent necessary to operate the water wheels used by him to divert the water actually appropriated for a beneficial use, so as to give him a right of action for the destruction of the current by subsequent appropriators, when exercising their right, under Idaho Const. art. 15, § 3, to apply the unused water to beneficial uses,—even assuming the coexistence in that state of a system of riparian rights and the doctrine of appropriation.

[For other cases, see *Waters*, II. c., in Digest Sup. Ct. 1908.]

Waters — appropriation — riparian rights.

2. The license given by Idaho Rev. Stat. § 3184, to the owners of land adjacent to any stream, "to place in the channel of, or upon the banks or margin of, the same, dams or other machines for the purpose of raising the waters thereof to a level above the banks requisite for the flow thereof to and upon such adjacent lands," does not confer any power to appropriate, without

NOTE.—On the right of prior appropriation of water—see notes to *Isaacs v. Barber*, 30 L.R.A. 665, and *Atchison v. Peterson*, 22 L. ed. U. S. 414.

reference to beneficial use, the entire volume of a river or its current, to the destruction of the rights of others to make appropriations of the unused water.

[For other cases, see *Waters*, II. c, in *Digest Sup. Ct.* 1908.]

[No. 2.]

Argued March 7 and 8, 1911. Decided April 1, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Idaho, sustaining a demurrer to and dismissing a complaint seeking to enforce the right to appropriate the current of a river as an incident to an appropriation for limited beneficial use. Affirmed.

See same case below, — *L.R.A.(N.S.)* —, 88 C. C. A. 207, 161 Fed. 43.

The facts are stated in the opinion.

Mr. Kirtland I. Perky argued the cause, and, with Messrs. Joseph R. Webster and John F. MacLane, filed a brief for petitioner:

The doctrine of appropriation, which is claimed to have overthrown the common-law doctrine in many of the western states, Idaho among the number, had its historical origin in the customs of the California miners, and its legal justification in necessity.

Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Mor. Min. Rep. 178; *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528, 1 Mor. Min. Rep. 594; *Hill v. King*, 8 Cal. 336, 4 Mor. Min. Rep. 533; *Bear River & A. Water & Min. Co. v. New York Min. Co.* 8 Cal. 327, 68 Am. Dec. 325, 4 Mor. Min. Rep. 526.

While the doctrine of appropriation is established as independent of that of riparian rights, its principles come to be assimilated to the latter doctrine.

Phoenix Water Co. v. Fletcher, 23 Cal. 481, 15 Mor. Min. Rep. 185; *Hill v. Smith*, 27 Cal. 476, 4 Mor. Min. Rep. 597.

The doctrines of riparian rights and of appropriation are independent in California, but not destructive of each other; prior to vesting of title to riparian lands, the water is subject to appropriation, but after title to the land has vested, no hostile appropriation of the water can be made.

Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

The law of riparian rights in Idaho may be thus summarized:

1. The owner of riparian land has all the common-law riparian rights to the use and flow of the stream.

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2. These rights are property which he may protect in the courts, and for which one depriving him thereof must compensate him.

3. These rights may be lost to an appropriator, who may subsequently acquire them, or the right to destroy them, without compensation, simply by complying with the law of appropriation.

4. The riparian owner may claim or "fix" his right in such a way as to prevent its subsequent appropriation. This is accomplished by "appropriating" that right in the manner prescribed by the statute.

Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; *Powell v. Springston Lumber Co.* 12 Idaho, 723, 88 Pac. 97; *Johnson v. Johnson*, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; *Shephard v. Coeur d'Alene Lumber Co.* 16 Idaho, 293, 101 Pac. 591; *Hutchinson v. Watson Slough Ditch Co.* 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

A riparian owner has the right to the current flow of the stream.

Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; *Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Gould v. Boston Duck Co.* 13 Gray, 442; *Head v. Amoskeag Mfg. Co.* 113 U. S. 19, 28 L. ed. 893, 5 Sup. Ct. Rep. 441; *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 33; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 753; *McCalmont v. Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102.

This riparian right to the flow is a valuable property right, of which the riparian owner cannot be deprived without his consent, or compensation being paid therefor, when it is desired to devote the right to a public use.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Pine v. New York*, 103 Fed. 337; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 276, 35 L. ed. 1011, 12 Sup. Ct. Rep. 173.

There is an appropriable element in the current of the stream.

Weiss v. Oregon Iron & Steel Co. 13 Or. 496, 11 Pac. 255; *Bear River & A. Water & Min. Co. v. New York Min. Co.* 8 Cal. 327; *Ortman v. Dixon*, 13 Cal. 33; *Salt Lake City v. Salt Lake City Water & Electrical Power Co.* 24 Utah, 249, 61 L.R.A. 648, 67 Pac. 672; *Isaacs v. Barber*, 10 Wash. 124, 30 L.R.A. 665, 45 Am. St. Rep. 772, 38 Pac. 871; *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452, 1 Mor. Min. Rep. 683.

The diversion of the current was sufficient, if any was required.

Weil, Water Rights, 2d ed. 110; *Hill v. Standard Min. Co.* 12 Idaho, 223, 85 Pac. 907; *Van Camp v. Emery*, 13 Idaho, 202,

89 Pac. 752; Idaho Power & Transp. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821; Salt Lake City v. Salt Lake City Water & Electrical Power Co. 24 Utah, 249, 61 L.R.A. 648, 67 Pac. 672.

The use is not unreasonable.

Mason v. Hoyle, 56 Conn. 255, 14 Atl. 786; Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, 1 Mor. Min. Rep. 683; Rio Grande Western R. Co. v. Telluride Power & Transmission Co. 16 Utah, 137, 51 Pac. 146; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Barnes v. Sabron, 10 Nev. 243, 4 Mor. Min. Rep. 673; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 787, 45 Pac. 472; Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414, 1 Mor. Min. Rep. 583; Weil, Water Rights, 2d ed. § 170, p. 266; Kirk v. Bartholomew, 3 Idaho, 367, 29 Pac. 40.

An appropriator was not deprived of his rights by the fact that he did not describe a definite measurement of what he used, nor furnish clear and satisfactory evidence of the amount required to satisfy his right.

Longmire v. Smith, 26 Wash. 439, 58 L.R.A. 308, 67 Pac. 246; Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752.

The means of utilizing his admittedly valid water appropriation was an incident of, or appurtenant to, that appropriation.

1 Words & Phrases, 477, 479; Carpenter v. Leonard, 5 Minn. 155, Gil. 119; Dauphin County v. St. Stephens Church, 3 Phila. 189; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19; Jackson ex dem. Jones v. Striker, 1 Johns. Cas. 284; Lawrence v. Hennessy, 165 Mo. 659, 65 S. W. 717; Bouvier's Law Dict. 159, title "Appurtenance;" Daniels v. Citizens' Sav. Inst. 127 Mass. 534.

Mr. Edward B. Critchlow argued the cause, and, with Mr. William J. Barrette, filed a brief for respondent:

Each state may determine for itself whether the common-law rule in respect to riparian rights or the rule of appropriation shall be enforced as to waters within its boundaries.

Kansas v. Colorado, 206 U. S. 46, 94, 51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655.

Generally, the arid states and territories, Idaho included, have adopted the rule that water may be appropriated for beneficial uses.

Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Chandler v. Austin, 4 Ariz. 346, 42 Pac. 483; Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Hutchinson v. Watson Slough Co. 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059; Trambley v. Luteran, 6 N. M. 15, 27 Pac. 312; Albuquerque Land & Irrig. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; Reno

Smelting, Mill. & Reduction Works v. Stevenson, 20 Nev. 269, 4 L.R.A. 60, 19 Am. St. Rep. 364, 21 Pac. 317; Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 962, 67 Pac. 914; Morris v. Bean, 146 Fed. 431; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Cole v. Richards Irrig. Co. 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376.

The common-law rights of riparian owners and the rights acquired under the doctrine of appropriation are distinct and antagonistic, and cannot both be recognized or enforced.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. ed. 822, 29 Sup. Ct. Rep. 493; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Hutchinson v. Watson Slough Co. 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059; Stowell v. Johnson, 7 Utah, 225, 26 Pac. 290.

Appropriation involves these several elements:

(a) An intent to apply to some beneficial use.

(b) An actual diversion, such as gives physical control of the stream, or such part as is appropriated.

(c) An application within a reasonable time to some useful industry.

Low v. Rizer, 25 Or. 551, 37 Pac. 84; Black's Pom. Water Rights, 48-51.

The manner of use, so far as it affects the quantity of water sought to be appropriated, must be reasonable and with due regard to the rights of others. An unreasonable claim of appropriation is a void claim.

Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, 1 Mor. Min. Rep. 683; Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414, 1 Mor. Min. Rep. 583; Rio Grande Western R. Co. v. Telluride Power & Transmission Co. 16 Utah, 137, 51 Pac. 146; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Barnes v. Sabron, 10 Nev. 243, 4 Mor. Min. Rep. 673; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 787, 45 Pac. 472; Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Farmers' Co-op. Ditch Co. v. Riverside Irrig. Dist. 16 Idaho, 525, 102 Pac. 481; Fitzpatrick v. Montgomery, 20 Mont. 187, 63 Am. St. Rep. 622, 50 Pac. 416.

But even if we were to concede the application in the state of Idaho of the common-law rule as to riparian rights, plaintiff's claim must fail because, under the circumstances, it is unreasonable. The right of a riparian proprietor at common law is

not unlimited. It must be reasonable. The maxim, *sic utere tuo ut alienum non lædas*, is constantly invoked.

2 Farnham, Waters, §§ 465, 466; Baltimore v. Appold, 42 Md. 442; Howard v. Ingersoll, 13 How. 426, 14 L. ed. 208; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Mor. Min. Rep. 90; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 902, 93 Pac. 781.

And since the use of the Snake river by the defendant is for the benefit of the lands contiguous to the river below plaintiff's wheels, just as the use by the government on the Minidoka project is for the benefit of lands above the wheels, the most that can be claimed for plaintiff in behalf of the current wheels is just and reasonable use of the river in common with other riparian proprietors, and not an exclusive use.

Clark v. Allaman, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571.

114] *Mr. Chief Justice White delivered the opinion of the court:

Since the writ of certiorari in this case was granted, the petitioner died, and his executrix was substituted. The writ was allowed to enable us to review the action of the court below in affirming a judgment of the circuit court of the United States for the district of Idaho. The judgment of the circuit court sustained a demurrer to the complaint of the petitioner, who was plaintiff, on the ground that it stated no cause of action. An absolute judgment of dismissal was entered, consequent on the election by the plaintiff to stand on the complaint as filed. The court below summarized the averments of the three counts of the complaint, and as that summary accurately and sufficiently states the case, we adopt and reproduce it, as follows:

"Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake river, containing in the aggregate 429.96 acres. Two of these tracts, containing 263.96 acres, are on the south bank, and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land and the other is partly agricultural land and partly mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest, and in 1895, the plaintiff himself, appropriated certain quantities of water of the flow of Snake river for use on said lands. In the first count the quantity is stated in cubic feet per second;

in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1,250 miner's inches. Soon after this water was appropriated the parties in interest erected *water wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels were erected opposite or near the tracts on the south side of the river, and two near the tract on the north side of the river. These wheels vary in height from 24 to 34 feet. The parties also constructed wing dams in the river, adjoining or in front of the lands owned by them, for the purpose of confining the flow of the water of the river, and raising it at such points above the natural flow of the river, so that the current would drive the water wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches, and used thereon to irrigate and cultivate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed, that the river at this point runs between high banks, and that the water is lifted by the wheels at least 20 feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake river at a point about nine miles westerly from and below the lands of the plaintiff. The work was prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake river flowing at said point, and to raise the water about 40 feet in height. It is alleged that when defendant's dam was filled with water, the water was turned into a canal known as the 'Twin Falls canal,' owned by the defendant and located on the north side of the river; that this canal was constructed at a cost, as plaintiff is informed and believes, of \$1,500,000, for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands situated below the dam; that for *said lands and for [116 a great number of people, being, as plaintiff is informed and believes, five thousand in number, there is no other supply available for irrigation, stock, domestic, or manufacturing purposes, except the water from said canal. It is alleged that by reason of this dam the waters of Snake river have been backed up from said dam and to and beyond plaintiff's premises, and have de-

stroyed the current in the river by means of which plaintiff's water wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water wheels or flumes, or to build or construct other dams or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff has not been able to irrigate said lands or any part thereof, or to raise profitable crops thereon, or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake river; that by reason of the backing up of said water and stopping the plaintiff from using said water wheels to raise the waters of Snake river to and upon said lands, and cutting off the water supply from plaintiff's lands, he has been damaged in the aggregate sum of \$56,650.

"In the first count of the complaint a separate and distinct cause of action is alleged in an averment that about 12 acres of plaintiff's land *has* been covered by the waters of Snake river, backed up by defendant's dam, but the land is not described or its boundaries given, or any particulars stated, so that the land can be identified or ascertained. To this cause of action defendant interposed a special demurrer on **117**]the ground of uncertainty *and the improper joinder of two separate causes of action. This special demurrer appears to be admitted.

"The defendant also interposed a general demurrer on the ground that the facts stated in the complaint do not constitute a cause of action against the defendant as to either or any of said counts. The demurrer was sustained by the circuit court, and the plaintiff has brought the cause to this court upon a writ of error." [— L.R.A.(N.S.) —, 88 C. C. A. 207, 161 Fed. 43.]

The trial court recognized fully the right of the plaintiff to the volume of water actually appropriated for a beneficial purpose. It nevertheless dismissed the complaint on the ground that there was no right under the Constitution and laws of the state of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses. The court did not find it necessary to deny that power might be one of the beneficial purposes for which appropriations of water

might be made, but in substance held that to uphold as an appropriation the use of the current of the river to the extent required to work the defendant's wheels would amount to saying that a limited taking of water from the river by appropriation for a limited beneficial use justified the appropriation of all the water in the river as incident to the limited benefit resulting from the use of the water actually appropriated. The court said:

"It is conceded and is beyond question, that the statute law as well as judicial authority directly protects plaintiff in all the water he has actually appropriated, diverted, and used; but there is no statute, nor, so far as known, any judicial rulings, protecting him in the establishment and in the use of his water wheels, as he claims to, and must, use them for the diversion of water to his land."

Again:

"As by art. 15, § 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it follows *that all water [118]er that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated; but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation,—it is not reasonable."

After pointing out the limited right of appropriation for beneficial use which had been exercised, considering the quantity of water actually appropriated and the use to which that water was put, the court came to state the vast extent of the incidental appropriation, having no proper relation to beneficial use, which would result from admitting the theory that the plaintiff, because of his limited appropriation for a named beneficial use, had the power to appropriate the entire current of the river for the purpose of making his actual and limited appropriation and meager beneficial enjoyment fruitful. The court said:

"The only way in which his wheels can be used for the purpose he intended them is to preserve the river in the condition it was when he erected them. And with what result? it may be asked. It may be stated as a fact that the banks of the river and the adjacent country sustain such relations to each other that the latter cannot be irrigated by ditches cut from the river in its natural state, and the erection of dams becomes a necessity, which, of course, changing the surface elevation of the water,

affects the plaintiff's premises and all others similarly situated. Then, without the dam, the Twin Falls scheme, with all its present great promise, fails. Not only this, but the government is now constructing a dam across the river some distance above plain-
119]tiff for *another extensive irrigating scheme, known as Minidoka Project, which will take a large amount of the water, and so much that probably there will not be enough left, especially at low stages of the river, for the full operation of the plaintiff's wheels. . . . "

Illustrating the subject, the court said:

"Suppose from a stream of 1,000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100; could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1,000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches; can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation. In effect this is substantially the principle that plaintiff is asking to have established."

The court of appeals, in affirming the decree of dismissal, did so for substantially the reasons which controlled the trial court. The court of appeals said:

"The assignments of error present the single question whether the facts stated in the complaint constitute a cause of action against the defendant. It is not denied that the plaintiff has the right by appropriation to divert 1,250 miner's inches of waters of the Snake river, mainly for irrigation purposes, and it is not charged by plaintiff that this amount of water is not still in the river, subject to his right of appropriation and diversion. His claim is that he cannot divert it by the means he first adopted for taking the waters from the river, and that the defendant, by placing a dam across the river, has deprived him of the right to the current of the river which, prior to the erection of the dam, rendered his means of
120]diversion *available. Is this current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location, and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any

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case—and we know of none—where either of these propositions has been upheld."

After elaborately reviewing the general principles upon which the law of appropriation rested, and referring to provisions of the Constitution and statute law of Idaho, and the decisions interpreting and enforcing the same, it was held that the extent of beneficial use was an inherent and necessary limitation upon the right to appropriate. Pointing out the disastrous results which would follow from any other view, the court said:

"If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises, and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated."

And in this connection, in conclusion, it was observed:

"There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. *In *Basey v. Gallagher*, 20 Wall. 670, [121 683, 22 L. ed. 452, 454, 1 Mor. Min. Rep. 683, the Supreme Court of the United States said: 'Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.'

"In *Fitzpatrick v. Montgomery*, 20 Mont. 181, 187, 63 Am. St. Rep. 622, 50 Pac. 416, 417, the supreme court of the state of Montana, after referring to what has been just quoted from *Basey v. Gallagher*, said: 'While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of

the public. The use of water in this state is declared by the Constitution to be a public use. Const. art. 3. § 15. It is easy to see that, if persons, by appropriating the waters of the streams of the state, became the absolute owners of the waters, without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriations.'"

We have freely excerpted from the opinions of the courts below because, in our judgment, they so clearly portray the situation, and correctly apply the law to that [122]*situation as resulting from the Constitution and statutes of Idaho and the reiterated decisions of the court of last resort of that state, which are referred to in the margin,† that we might place our decree of affirmance upon the reasons which controlled the courts below. We, however, refer to a contention urged by the petitioner as to the existence of riparian rights in Idaho, and the sanction which those rights, as there recognized, are deemed to give to the asserted power to appropriate the whole current of the river for the purpose of making fruitful the limited appropriation of water which was made. It is not urged that the law of appropriation does not prevail in Idaho, but it is supposed that a system of riparian rights goes hand in hand with the doctrine of appropriation, and that the two coexist and may harmoniously cooperate. But the best demonstration of the error which the proposition involves results from a consideration of the effort made to apply it in this case, and the reasons advanced to sustain it. We say this because it may not be doubted that the application

here sought to be made of the doctrine of riparian rights would be absolutely destructive of the fundamental conceptions upon which the theory of appropriation for beneficial use proceeds, since it would allow the owner of a riparian right to appropriate the entire volume of the water of the river, without regard to the extent of his beneficial use. And the incongruity of the proposition is aptly illustrated by the arguments *advanced to sustain it; since those [123] arguments recur to and rest upon the common-law doctrine of riparian rights, of the duty to allow a stream to flow as it was wont, and of the relative rights of all persons bordering upon the stream, arising from their riparian ownership. The misapprehension upon which the contention rests is the assumption that because a certain character of riparian rights may exist in Idaho, therefore such rights as are absolutely incompatible with the rule of prior appropriation for beneficial use may coexist with that system. For instance, the case of *Shephard v. Coeur d'Alene Lumber Co.* 16 Idaho, 293, 101 Pac. 591, which upheld the right of a riparian proprietor to prevent another from wrongfully virtually taking his water front and cutting him off from ingress to and egress from such water front affords no ground for holding that such riparian rights exist as are wholly incompatible with, and, indeed, destructive of, the system of appropriation for beneficial use. So, again, the license given by the terms of § 3184 of the Revised Statutes of Idaho, excerpted in the margin† as pointed out by the court below does not confer upon such riparian owner the power to appropriate, without reference to beneficial use, the entire volume of a river or its current, to the destruction of rights of others, to make appropriations of the unused water. But the precise question we are considering has been so completely foreclosed by a ruling of the supreme court of the state of Idaho as to leave no room for discussion. Thus, in *Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752, *the facts were these: [124

†Constitution of Idaho, art. 14, § 3; Rev. Stat. of Idaho, §§ 3155 et seq.; Laws of Idaho 1903, p. 223.

Malad Valley Irrigating Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; *Geerston v. Barrack*, 3 Idaho, 344, 29 Pac. 42; *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250; *Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134; *Boise Irrig. & Land Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321; *Sand Point Water & Light Co. v. Panhandle Development Co.* 11 Idaho, 405, 83 Pac. 347; *Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Hutchinson v. Watson Slough Ditch Co.* 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059; *Farmers' Co-op. Ditch Co. v. River*

side Irrig. Dist. 16 Idaho, 525, 102 Pac. 481; *Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

†All persons, companies, and corporations owning or having the possessory title or right to lands adjacent to any stream have the right to place in the channel of or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the last two sections.

The defendant lived above the plaintiff on a stream, and was assumed as a prior appropriator to be entitled to 45 inches of the water of the stream. The plaintiff, who also was an appropriator, but subordinate to the rights of the defendant, complained that the latter had not only diverted his 45 inches, but had erected a dam in the stream so as to impede the flow to his (plaintiff's) intake, and deprive him of his right of appropriation, the dam being put in place by the defendant for the purpose of holding the water so as to give him the benefit of sub-irrigation of certain meadow lands which he owned. It was held that the defendant, while he had a full right to draw off the 45 inches to which he was entitled as an appropriator for beneficial use, could not, by damming the stream, get more than his beneficial appropriation entitled him to, so as to injure the right of others to appropriate from the stream. In the course of the opinion the court said:

"If the defendant, who lives above plaintiff, is entitled to a priority for 45 inches of water, he may unquestionably divert that quantity; but, when he has once done so, he may not dam the stream below, or hinder or impede the flow of the remaining stream to the plaintiff's headgate. The fact that such dams and impediments hold the water and cause a subirrigation of the adjacent meadows cannot of itself justify the maintenance of such obstructions. Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree; but beyond that he cannot go under any other pretext or claims for the natural condition of the stream. In this arid country, where the largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres, at a loss of enough [125]*water to surface irrigate ten times as much by proper application."

And the absolute untenability of the contention here made as to riparian rights was again foreclosed by the supreme court of Idaho in *Hutchinson v. Watson Slough Ditch Co.* 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059. Indeed, in that case the court referred to and adversely disposed of the view taken of the authorities here relied on as sustaining the coexistence of the asserted riparian rights and the doctrine of appropriation. After making a full reference to authorities, in the course of its opinion the court said:

"A riparian proprietor in the state of Idaho has no right in or claim to the waters
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of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the Constitution and statutes of this state, and has been abrogated thereby.

"Sight should not be lost of the correct principle involved in such cases; namely, that a riparian owner, as such, acquires no right to the waters flowing by or through his lands that is prior or superior to that of a locator, appropriator, and used of such waters. In other words, there is no such thing in this state as a riparian right to the use of waters, as against an appropriator and used of such waters who has pursued the constitutional and statutory method in acquiring his water right. In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters, and divert the same, as it is for any other user of water to do so."

As we have pointed out, the court below did not question the right of the plaintiff to take by proper means *from the [126] river the quantity of water actually appropriated by him for beneficial use, and our decree of affirmance will therefore not in any way affect such rights.

Affirmed.

JUAN MARTINO GONZALES, Appt.,
v.

LEON RAMOS BUIST, Antonio Ramos Buist, Jesus Ramos Buist, et al.

(See S. C. Reporter's ed. 126-131.)

Appeal — exceptions — necessity.

1. The objection that a judgment of the district court of the United States for Porto Rico, sustaining a plea of *res judicata*, and, upon that ground, dismissing the complaint, was erroneous because plaintiff was not accorded a proper hearing, is not available on an appeal to the Federal Supreme Court, where there was no formal exception taken to any ruling or decision on the subject.

[For other cases, see Appeal and Error, 3659-3700, in Digest Sup. Ct. 1908.]

Appeal — record — findings of fact.

2. The findings of fact made by the district court of the United States for Porto Rico are not such as will enable the Fed-

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to *Garrozi v. Dastas*, 51 L. ed. U. S. 369.

eral Supreme Court to determine whether or not they support the judgment on an appeal which, under the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, is governed by the rules applicable to appeals from the territorial supreme courts, where, instead of stating the ultimate facts, the findings merely embody conflicting statements of counsel concerning the facts as they suppose them to be, and their appreciation of the law which they deem applicable.

[For other cases, see Appeal and Error, 3342-3368, in Digest Sup. Ct. 1908.]

[No. 181.]

Submitted March 4, 1912. Decided April 1, 1912.

A PPEAL from the District Court of the United States for Porto Rico to review a decree sustaining a plea of *res judicata* to, and dismissing, the complaint in a suit over the possession of real property. Affirmed.

See same case below, 4 Porto Rico Fed. Rep. 243.

The facts are stated in the opinion.

Messrs. H. H. Scoville and J. R. F. Savage submitted the cause for appellant.

Mr. Willis Sweet submitted the cause for appellees.

Mr. Chief Justice White delivered the opinion of the court:

Gonzales, the appellant, sued in the court below to be declared the owner and entitled to the possession of a tract of land valued at \$6,000, situated in the district of Porto Rico, from the possession of which he claimed to have been unlawfully ousted by the defendants in March, 1907. In addition to specifically denying the averments of the complaint, the defendants, by an amended answer, pleaded that, as the result of a controversy between them and the grantor of the plaintiff, concerning the land in dispute, the title and right of possession was adjudicated in their favor, and in virtue of the judgment they were put in possession of the property, which was the ouster complained of. Averments were also made which tended to show that the conveyance under which plaintiff asserted his ownership was made and received in bad faith, after the commencement of the action the judgment in which was pleaded as *res judicata*, in order to deprive the plaintiffs in that action of the benefit to result from a recovery therein.

On July 9, 1908, the case was called for trial, a jury was waived, and after the allowance of amendments to the pleadings,

the following took place, according to recitals in the journal of the court:

"Whereupon the court, not being satisfied with the situation of the pleadings, calls upon the respective counsel for argument as to the question whether or not the plea as to the matters in issue being *res judicata* should not be sustained. Thereupon such argument is proceeded with, and the court, after having heard counsel for the *re-[128] spective sides in that behalf, gave them until Monday, the 13th instant, to file briefs and memoranda of authorities, after which the issue will be passed upon."

On July 31, 1908, the court filed a written opinion sustaining the plea of *res judicata*, and ordering the complaint to be dismissed. An entry of dismissal was made on the same day. The next step in the litigation was the filing on October 12, 1909, of a petition for the allowance of an appeal to this court, and the granting of the same on October 26, 1909. Contemporaneous with the allowance of the appeal there was filed with the papers in the cause a document styled, "Findings of Fact and Conclusions of Law." The opening paragraphs contained recitals of the taking of the appeal, and that the court, upon the application of the appellant, "makes the following findings of fact upon which it based its final decree." The written agreement of the parties to waive a trial by jury was next stated, as also that argument was heard "as to the question whether or not the plea as to the matters in issue being *res judicata* should not be sustained," and the statement contained in the excerpt heretofore made from the journal as to granting leave to file briefs, etc., was reiterated.

It was next recited, in the opening sentence of the paragraph of findings numbered III.: "That thereupon counsel for defendants, on July 13, 1908, filed, without first submitting the same to the inspection of counsel for the plaintiff, the following brief and statement of facts, with annexed exhibit." The remainder of paragraph III., found on pages 17 to 25 of the printed transcript of record, consists of a copy of the "defendants' brief on *res judicata* and the translation of what purport to be findings made in the judgment in the action pleaded as *res judicata*."

Paragraph IV. of the findings opens with the following statement:

"That thereupon, on July 27, 1908, counsel for plaintiff *filed, without first[129] submitting the same to the inspection of the counsel for defendants, the following brief and statement of facts with annexed exhibit."

Next follows a copy of a document en-

titled in the action, and styled, "Statements and Brief on Plea of *Res Judicata*," found on pages 25 to 38 of the printed transcript, subdivided into headings entitled "Facts," "Documentary Proof No. 1," "Documentary Proof No. 2," and "Translation of Exhibit A," an alleged cautionary notice of the institution of the prior suit.

The findings of fact thus concluded:

"V.

"That with the exception of said briefs and statements so filed as aforesaid, and the exhibit attached thereto, no other or further evidence was received, submitted, or considered in this cause, and no further hearing of this cause was had.

"IV.

"That counsel for plaintiff requested the court for a further hearing, and that evidence be taken by the court in support of the statements made by counsel for plaintiff and counsel for defendant in their respective briefs, and that the court refused to allow any further evidence in the premises other than that contained in the exhibits attached to said briefs and the relief map presented at the hearing."

Declaring that it had sufficient evidence before it to pass upon the question of *res judicata*, the court, thereupon, as a conclusion of law, found that the prior judgment was *res judicata* of the claims set up in the complaint, and concluded as follows:

"The foregoing statement of facts, in the nature of a special verdict, and the above conclusions of law, having been submitted by counsel for the respective parties and 130]*approved by the court, the same is signed and certified, at San Juan, Porto Rico, this 26th day of October, 1909, and the same, with a copy of the court's opinion in the case, will be transmitted to the Honorable the Supreme Court of the United States, according to law."

The assignments of error are eleven in number, and state in various forms of expression the contention that the judgment entered was erroneous because plaintiff was not accorded a proper hearing upon the issue of *res judicata*. The appellant did not, however, formally except to any ruling or decision of the court on the subject, and in consequence, even upon the assumption that the objection that want of regularity in the practice pursued might, under some circumstances, be available here (*Salina Stock Co. v. Salina Creek Irrig. Co.* 163 U. S. 109, 41 L. ed. 90, 16 Sup. Ct. Rep. 1036), it cannot on this record be availed of (*Apache County v. Barth*, 177 U. S. 538, 542, 44 L. ed. 878, 879, 20 Sup. Ct. Rep. 718).

There is nothing shown by the record which we can review, since what is denominated findings of fact is not such in legal

effect, and the record does not contain any rulings of the court, excepted to, upon the admission or rejection of evidence. By § 35 of the Porto Rican act of April 12, 1900, 31 Stat. at L. 85, chap. 191, writs of error and appeals from final decisions of the supreme court for the district of Porto Rico shall be allowed and may be taken to this court "in the same manner and under the same regulations . . . as from the supreme courts of the territories of the United States." Now, as held in *Young v. Amy*, 171 U. S. 179, 183, 43 L. ed. 127, 128, 18 Sup. Ct. Rep. 802:

"It is settled that, on error or appeal to the supreme court of a territory, this court is without power to re-examine the facts, and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony, when the action of the court in this regard has been duly excepted *to, and the right[131 to attack the same preserved on the record."

But whether the court adopts an agreed statement of facts or itself finds the facts, the agreed statement or findings must be of the ultimate facts, and if they be merely a recital of testimony or evidentiary facts, it brings nothing before this court for consideration. *Thompson v. Ferry*, 180 U. S. 484, 45 L. ed. 633, 21 Sup. Ct. Rep. 453; *United States Trust Co. v. New Mexico*, 183 U. S. 535, 540, 46 L. ed. 315, 319, 22 Sup. Ct. Rep. 172. As said in *Crowe v. Trickey*, 204 U. S. 228, 235, 51 L. ed. 454, 458, 27 Sup. Ct. Rep. 275, the statement of facts required by the statute should present clearly and precisely the ultimate facts, although, as further observed in the same case, a mere incorporation of unnecessary details may not be fatal if "a sufficient statement finally emerges." Under no possible view, however, of the findings we are considering, can they be held to constitute a compliance with the statute, since they merely embody conflicting statements of counsel concerning the facts as they suppose them to be, and their appreciation of the law which they deem applicable; there being, therefore, no attempt whatever to state the ultimate facts by a consideration of which we would be able to conclude whether or not the judgment was warranted. The case is analogous to that presented by the record in *Glenn v. Fant*, 134 U. S. 398, 33 L. ed. 969, 10 Sup. Ct. Rep. 583, where it was held that an agreement that the parties might refer to and rely upon all the grounds of action or defense to be found in the voluminous records of two equity cases in other courts, including the pleadings and findings and orders and de-

crees therein, could not take the place of a special verdict of a jury or the special findings of fact by the court, so as to enable this court to determine the questions of law thereon arising.

No error being apparent on the record, the judgment of the District Court of Porto Rico must be and it is affirmed.

132]*SPENCER S. WOOD, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 132-137.)

Navy — pay of aids to Admiral — assimilative statute.

The revival of the office of General of the Army, and the incidents relating thereto, made by the act of June 1, 1888 (25 Stat. at L. 165, chap. 338), which declared that such grade should cease upon the death of General Sheridan, did not have the effect of continuing after his death the provisions of U. S. Rev. Stat. § 1096, relating to aids to the General and their pay, so that upon the recreation of the office of Admiral by the act of March 2, 1899 (30 Stat. at L. 995, chap. 378, U. S. Comp. Stat. 1901, p. 981), such provisions could operate by virtue of the assimilative features of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, in favor of aids to the Admiral.

[For other cases, see Army and Navy, 60-83, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued November 16 and 17, 1911. Decided April 1, 1912.

APPEAL from the Court of Claims to review a judgment dismissing the claim of an aid to the Admiral for increased pay and allowances. Affirmed.

See same case below, 44 Ct. Cl. 611.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for appellant.

Assistant Attorney General Thompson argued the cause, and, with Mr. Frederick De C. Faust, filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

The office of Admiral of the Navy was re-established by the act of March 2, 1899, 30 Stat. at L. 995, chap. 378, U. S. Comp. Stat. 1901, p. 981, re-enacted in identical terms by a portion of the naval appropriation act of March 3, 1899, 30 Stat. at L. 1045, chap. 421. By another provision of

the same act (30 Stat. at L. 1024, 1025, chap. 421, U. S. Comp. Stat. 1901, p. 1073), the Admiral was given the same pay and allowances as had been received by the last General of the United States Army.

From October 17, 1904, until February 29, 1908, the claimant performed the duties prescribed by an order of the Secretary of the Navy, dated October 1, 1904, which directed him to "report to the Admiral of the Navy, . . . President of the General Board, . . . for duty as aid to the Admiral of the Navy, and for duty in connection with the General Board." During the period within which these services were performed the claimant received the pay belonging to his rank in the Navy, which, for the earlier portion of the time, was that of Lieutenant Commander, and during the remainder of the time that of Commander. He demanded the pay and allowances *of a Captain of the Navy, upon the theory that the Admiral of the Navy corresponded in rank with the General of the Army; that by Rev. Stat. § 1096, the General of the Army was entitled to aids, who received increased compensation as such aids by reason of the pay attached to the higher rank conferred upon them while serving as aids to the General, which higher pay the aid to the Admiral became entitled to receive by virtue of the clause of § 13 of the naval personnel act of March 3, 1899, 30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072, assimilating the pay of officers of the Navy to that of officers of the Army.

Section 1096, Rev. Stat., relied upon in connection with the assimilating provision just referred to, is as follows:

"Sec. 1096. The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry."

This appeal was taken from a judgment of the court of claims dismissing the claim.

Putting aside immaterial considerations, the question upon which the controversy turns is this: In March, 1899, when the office of Admiral was re-created, were the provisions of § 1096, Rev. Stat., existing, or had they been repealed, thereby causing it to come to pass that there was no law concerning aids to the General of the Army upon which the assimilating provisions of the act of 1899 could operate? We say this is the fundamental question, because it is patent that the act of 1899, which re-created the office of Admiral, did not, in and of itself, provide for aids to that officer, or fix extra compensation for such services. and therefore the right here asserted must depend exclusively upon the

existence of some law providing for aids to the General of the Army and their pay, which, in virtue of the application of the assimilating statute, became operative as to aids to the Admiral.

135] *While by § 1094, Rev. Stat., it was provided that the Army of the United States should consist, among other officers, of "one General," the section concluded with the following:

"Provided. That when a vacancy occurs in the office of General or Lieutenant General, such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed."

It is not questioned that § 1096, Rev. Stat., was a regulation concerning the office of General of the Army, and it is not disputed that that section was repealed prospectively by the proviso to § 1094, above quoted,—a repeal which became operative when the event provided for the cessation of the office of General occurred. It is, further, not disputed that years before the re-creation of the office of Admiral, in 1899, the result provided for in the proviso to § 1094 had taken place, and hence that § 1096, concerning aids to the General of the Army, had ceased to exist, as the result of the nonexistence of the grade of General of the Army to which the provisions of that section applied.

The primary contention is that § 1096 was revived as the result of the act of June 1, 1888, 25 Stat. at L. 165, chap. 338, by virtue of which Lieutenant General Sheridan was made for life the General of the Army. The secondary proposition is that the provisions of the section which it is contended were thus revived remained in force (although in abeyance) after the death of General Sheridan, and despite the fact that the act of 1888, which provided for his appointment as General, declared that the grade should cease on his death. The contention, however, in reason rests upon a plain misconception of the act of 1888, since it but insists that while the provisions of that act only revived the grade of General for a limited and specified purpose, nevertheless the effect of the act was to revive incidental provisions of law 136] concerning that *office, so as to cause them to continue to exist after the period during which alone the statute contemplated they should be in existence. But so to construe the statute would divide it against itself,—would presuppose that it contemplated that an effect should arise from its enactment plainly at war with the purpose which its text manifests Congress intended to accomplish by its adoption. When it is considered that the grade of General of the Army had ceased to exist long prior to

the act of 1888, and that the statutory incidents regulating that office, including 1096, Rev. Stat., had also passed out of existence, we think it results that the provisions of the act of 1888, reviving the office of General, and the incidents relating to that office, were all controlled by the limitation of time which that act imposed. In other words, we think that the office and its incidents were but revived for the sole purposes and for the limited period specified, and none other, and therefore no subject to which that act related can be said to have been generally re-enacted so as to survive the limitations which the act itself expressly contemplated.

The failure by Congress during the many years which have elapsed since the re-creation of the office of Admiral to make any provision concerning the pay of aids to that officer gives rise to the assumption of a legislative construction in accord with the view which we have expressed. The matter is not, however, left to mere inference resulting from silence, since, although Congress, in what is known as the new Navy pay act of May 13, 1908, 35 Stat. at L. 128, chap. 166, in terms specifically provided for the pay of every officer in the Navy, including the Admiral, and embracing extra compensation to aids to Rear Admirals, made no provision whatever for compensation for services which might be rendered by an officer acting as aid to the Admiral. The incongruity, if any, which it is suggested must result from providing for extra compensation *for an aid to[137 a Rear Admiral and none for aids to the higher officer, the Admiral, if admitted, would be but the consequence of legislative omission, and would not justify the exertion of judicial power for the purpose of re-creating a provision of law concerning aids to the General of the Army, which has long since ceased to exist, in order to afford a subject upon which the assimilating provision of the naval personnel act of 1899 might operate.

Affirmed.

GEORGE R. PLUMMER, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 137-145.)

Navy — pay of officers — acting assistant surgeon.

1. The changes in rank and pay of assistant surgeons in the Navy, made by the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, and the acts of June 7, 1900 (31 Stat. at L. 697, chap.

859, U. S. Comp. Stat. 1901, p. 990), March 2, 1907 (34 Stat. at L. 1167, chap. 2511), and May 13, 1908 (35 Stat. at L. 127, chap. 166, U. S. Comp. Stat. Supp. 1909, p. 359), inured to the benefit of acting assistant surgeons appointed under the act of May 4, 1898 (30 Stat. at L. 380, chap. 234, U. S. Comp. Stat. 1901, p. 990), which expressly gives to such appointees the relative rank and compensation of assistant surgeons,—although the Navy personnel act may be conceded to deal only with the standard of pay of the regular naval establishment. [For other cases, see *Army and Navy*, 60-70, in *Digest Sup. Ct.* 1908.]

Navy — longevity pay.

2. Congress, in using the words, "current yearly pay," as the basis of the computation of the longevity pay provided for by the act of May 13, 1908, must be deemed to have adopted its construction of those words as used in U. S. Rev. Stat. § 1262, U. S. Comp. Stat. 1901, p. 896, giving a 10 per cent longevity increase on "current yearly pay," which it declared by the act of June 30, 1882 (22 Stat. at L. 118, chap. 254, U. S. Comp. Stat. 1901, p. 896), should be computed on the yearly pay of the grade. [For other cases, see *Army and Navy*, 89-105, in *Digest Sup. Ct.* 1908.]

[No. 177.]

Argued February 29 and March 1, 1912.
Decided April 1, 1912.

APPEAL from the Court of Claims to review a judgment dismissing the petition of an acting assistant surgeon in the Navy for additional pay. Reversed and remanded for entry of judgment in favor of claimant.

See same case below, 45 Ct. Cl. 614.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Messrs. William B. King, William E. Harvey, and Archibald King, filed a brief for appellant:

The compensation of acting assistant surgeons appointed at any given time must be determined by the law in force for assistant surgeons at the same time.

Kugler's Appeal, 55 Pa. 123; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. ed. 1041, 1056, 21 Sup. Ct. Rep. 743.

Congress used the words "assistant surgeon" in the act of June 7, 1900, as descriptive of the whole class of assistant surgeons. This means acting assistant surgeons, as well as passed assistant surgeons.

United States v. Farenholt, 206 U. S. 226, 51 L. ed. 1036, 27 Sup. Ct. Rep. 629.

The fact that the commission was only for a limited period does not affect the status of the claimant as an officer in the Navy. Very few officers of the government hold for anything but a limited period.

Shurtleff v. United States, 189 U. S. 311, 316, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 535.

The title of an act furnishes little aid in the construction of its provisions. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

Hadden v. The Collector (*Hadden v. Barney*) 5 Wall. 107, 110, 18 L. ed. 518, 519.

The appointment of officers having the word "acting" preceding their official title has several times been authorized in the Army or the Navy, sometimes by Executive action only, sometimes with legislative authority. In all such cases an officer lawfully so appointed has had conceded to him the full rank and compensation of the office to which he was appointed as "acting."

United States v. White, Taney, 152, Fed. Cas. No. 16,684.

The government is bound by a species of equitable estoppel not to shift the ground and insist that a mistake was committed in the offer of compensation by its authorized officer.

Thurber v. United States, 40 Ct. Cl. 489; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306, affirming 25 Ct. Cl. 30.

The computation of the increase should be not merely upon the base pay of the grade, but upon that pay as increased by previous increases for length of service.

United States v. Tyler, 105 U. S. 244, 246, 26 L. ed. 985, 986; *United States v. Mills*, 197 U. S. 223, 49 L. ed. 732, 25 Sup. Ct. Rep. 434.

In enacting the new pay statute of 1908, Congress has employed the same words which were construed by this court in the Tyler Case, approved and followed in the Mills Case. As a matter of course, they must receive the same construction.

25 Ops. Atty. Gen. 309; *Sewing Mach. Cos. Case* (*Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.*) 18 Wall. 553, 584, 21 L. ed. 914, 921; *The Abbotsford*, 98 U. S. 440, 444, 25 L. ed. 168, 169.

Messrs. George A. King and William B. King also filed a separate brief for appellant:

There is no room for inference or construction when the same expression is repeated in a subsequent statute.

Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631, affirming 14 Ct. Cl. 162;

United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Sewing Mach. Cos. Case (Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.) 18 Wall. 553, 584, 21 L. ed. 914, 921.

Both reports and debates in Congress are either so inapplicable or so conflicting as to throw no light on the question.

Bates Refrigerating Co. v. Sulzberger, 157 U. S. 1, 41, 42, 39 L. ed. 601, 612, 613, 15 Sup. Ct. Rep. 508; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 318, 319, 41 L. ed. 1007, 1019, 1020, 17 Sup. Ct. Rep. 540.

Messrs. Hilary A. Herbert, Benjamin Micou, and Richard P. Whiteley filed a brief for parties interested with appellant:

While the intent of the legislature should be ascertained and determined by the court, it is equally true that in so doing the court should first look to the language used by the legislature, which, if plain, clear, and unambiguous, is the best evidence of legislative intent, and renders it the duty of the court to give effect to this language according to its plain and natural signification. If there be no inconsistency in the language used, no extraneous rules of construction can be resorted to either to extend or limit the plain meaning of the words employed.

Thornley v. United States, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; Beall v. Harwood, 2 Harr. & J. 167, 3 Am. Dec. 532; Dwarris, Stat. 144; Denn ex dem. Scott v. Reid, 10 Pet. 524, 9 L. ed. 519; Cearfoss v. State, 42 Md. 403, 1 Am. Crim. Rep. 460; Ohio Nat. Bank v. Berlin, 26 App. D. C. 218; Martin v. Martin & B. Co. 27 App. D. C. 59; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Southern R. Co. v. United States, 222 U. S. 20, ante, 72, 32 Sup. Ct. Rep. 2.

But one construction has ever been put by the courts upon the words "current yearly pay," and that construction must be given here.

United States v. Tyler, 105 U. S. 244, 26 L. ed. 985; Bowie v. United States, 45 Ct. Cl. 47; United States v. Mills, 197 U. S. 227, 49 L. ed. 734, 25 Sup. Ct. Rep. 434; Irwin v. United States, 38 Ct. Cl. 102.

Counsel has asked this court to go far beyond what is permissible, where the intention of the legislature, expressed or implied, in a statute, is doubtful, and to seek the intent not from prior and contem-

poraneous acts, but from expressions of individual members of the legislature and the motives assigned by them for supporting the measure.

Aldridge v. Williams, 3 How. 24, 11 L. ed. 475; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224.

Where the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two interpretations, they should be construed in favor of the officer.

Sutherland, Stat. Constr. § 419; United States v. Morse, 3 Story, 87, Fed. Cas. No. 15,820.

Mr. Frederick De Courcy Faust argued the cause, and, with Assistant Attorney General Thompson, filed a brief for appellee:

It cannot be assumed from the pay provision of the act of 1898, which contains no words or phrase of anticipation, that Congress intended to prescribe a rule for the future, and thereby to disable itself from increasing the rank and pay of officers in the permanent service, without increasing to the same extent the pay of the limited number of officers thus temporarily employed.

United States v. Thomas, 195 U. S. 418, 421, 49 L. ed. 260, 261, 25 Sup. Ct. Rep. 102.

The provisions of the Navy personnel act do not apply to an acting assistant surgeon appointed for temporary service in the Navy.

Taylor v. United States, 38 Ct. Cl. 155; Nelson v. United States, 41 Ct. Cl. 162.

The propriety of a reference to the title of an act to assist in determining the intent and meaning of the legislature is sustained by repeated decisions of this court.

Church of the Holy Trinity v. United States, 143 U. S. 462, 36 L. ed. 229, 12 Sup. Ct. Rep. 511; Price v. Forest, 173 U. S. 427, 43 L. ed. 755, 19 Sup. Ct. Rep. 434.

The law under which the appellant was appointed had been authoritatively and definitely construed by the court of claims in the case of Taylor v. United States, 38 Ct. Cl. 155, on January 5, 1903, or six months before the appellant accepted his first appointment, and he was, of course, charged not merely with full notice of the scope and effect of that decision, but also with knowledge of the compensation he would be entitled to receive under the law as therein construed.

The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval es-

establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others.

United States v. Symonds, 120 U. S. 49, 30 L. ed. 558, 7 Sup. Ct. Rep. 411.

The personnel act was passed in 1899 for the express purpose of equalizing the pay of naval officers (theretofore generally below that of officers of corresponding rank in the Army) with that of officers of the Army of equal rank, and Congress intended to make the act prospective in its application to future legislation.

United States v. Thomas, 195 U. S. 420, 49 L. ed. 260, 25 Sup. Ct. Rep. 102.

Mr. Chief Justice White delivered the opinion of the court:

This appeal is from a judgment of the court of claims denying the right to recover from the United States an alleged balance of compensation claimed to be due for services rendered as an acting assistant surgeon at the Naval Station, Key West, Florida, from July 1, 1903, to July 1, 1909.

[139]*By an act approved May 4, 1898, 30 Stat. at L. 380, chap. 234, U. S. Comp. Stat. 1901, p. 990, the president was authorized "to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons." When the act of 1898 was passed, the pay of officers in the naval service was generally regulated by § 1556, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1067), and the pay of an assistant surgeon for shore duty was fixed at \$1,400 a year. By § 13 of the naval personnel act of March 3, 1899, 30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072, it was provided that commissioned officers of the line of the Navy and of the medical and pay corps "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army;" and in a proviso it was declared: "That such officers, when on shore, shall receive the allowances, but fifteen per centum less pay than when on sea duty." The effect of this act was to increase the pay of naval officers generally, and therefore to enhance the pay of assistant surgeons.

The act of June 7, 1900, 31 Stat. at L. 697, chap. 859, U. S. Comp. Stat. 1901, p. 990, raised the rank of assistant surgeons in the Navy by providing that "assistant surgeons shall rank with assistant

surgeons in the Army." We say that this act raised the rank of assistant surgeons in the Navy for the following reasons: Prior to that act the rank of assistant surgeon in the Navy, upon entrance into the service, was that of ensign. Rev. Stat. § 1474, U. S. Comp. Stat. 1901, p. 1032. As by Rev. Stat. § 1168, the lowest rank of an assistant surgeon in the Army during the first three years of service was that of a lieutenant of cavalry, the effect of the act of 1900 was therefore to give to assistant surgeons in the Navy a higher rank; that is, to raise them from the rank of ensign to that of lieutenant, junior grade.

On December 29, 1902, the Surgeon General of the Navy published a circular soliciting applications for appointment "as acting assistant surgeons for three years *of service," and in the circular, [140 among other things, it was stated as follows:

"The Secretary of the Navy, in order to meet the exigencies of the service, has authorized the appointment of twenty-five acting assistant surgeons for three years' service, to have the same rank and pay as assistant surgeons in the regular service.

"The pay is as follows:

At sea..... \$1,650.00 a year
On shore, with quarters.... 1,402.50 a year
On shore, without quarters. 1,690 50 a year

Plummer applied for appointment, and was commissioned by the President as an acting assistant surgeon in the naval service, to serve for three years from July 1, 1903. After the expiration of the first appointment he was reappointed for another term of three years, and his commission under the first and second appointment stated his rank to be that of lieutenant, junior grade.

During Plummer's second three-year period of service two acts were passed which it is claimed enhanced the compensation of assistant surgeons, viz.: An act approved March 2, 1907, 34 Stat. at L. 1167, chap. 2511, and an act approved May 13, 1908, 35 Stat. at L. 127, 128, chap. 166, U. S. Comp. Stat. 1901, p. 359. By the act of 1907 assistant surgeons were allowed heat and light for quarters and commutation for the same. By the act of 1908, the pay of a lieutenant, junior grade, the relative rank of an assistant surgeon, was fixed at \$2,000.

During the term of both services Plummer was paid not at the rate provided by law for the pay of assistant surgeons at the time his services as acting assistant surgeon were rendered, but at the rate of pay which was fixed for assistant surgeons at the time the act of 1898 was passed. That is to say, despite the change in rank

and pay of assistant surgeons in the Navy, brought about by the legislation subsequent to 1898, Plummer was paid *upon the theory that those changes had no effect upon the pay of acting assistant surgeons, and therefore they were entitled only to the sum which was allowed by law (Rev. Stat. § 1556) at the time the appointment of acting assistant surgeons was provided for.

By an express finding of the court below, as to which there is no dispute, if Plummer had been paid at the rate fixed by law for assistant surgeons at the time his services as acting assistant surgeon were rendered, he would have been entitled, irrespective of the question of longevity pay, as to which there is dispute, to \$1,814.78 more pay than he received; to \$2,007.20 as commutation of quarters, and to \$341.88 for heat and light for quarters, under the act of March 2, 1907; in all, \$4,213.86. Whether, therefore, an acting assistant surgeon under the legislation to which we have referred was entitled to be paid as his services were performed at the rate then fixed by law as the pay and allowance of an assistant surgeon, and what was the proper basis for the calculation of longevity pay, are the two questions requiring solution.

The court below based its conclusion that the acting assistant surgeon was only entitled to the pay which was allowed assistant surgeons at the time of the passage of the act authorizing the appointment of acting assistant surgeons, and, hence, that acting assistant surgeons got no benefit from subsequent increases of the pay of assistant surgeons, upon two previous decisions to that effect,—James S. Taylor (38 Ct. Cl. 155) and Hugh T. Nelson (41 Ct. Cl. 157).

The reasoning of the court was thus expressed in the Taylor Case:

"In the act of March 3, 1899, we fail to find any express provision applying to officers of the Navy in the temporary service. That was 'An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and the Marine Corps of the United States,' evidently referring *to the officers of the regular Navy, as it certainly could not be contended that the Congress had in view the reorganization of the officers in the temporary service, or that by that act they intended to incorporate them into the permanent service. On the contrary, it was not until the act of June 7, 1900, that provision was made for continuing them in the service by permanent commissions. Those who received commissions in the permanent service prior to that act did so presumably after a proper examination and approval by the board of naval surgeons

designated by the Secretary of the Navy under the act of May 4, 1898."

But conceding the correctness of the premise upon which the reasoning just quoted rests,—that is, the purpose of the naval personnel act to deal with the standard of pay of the regular naval establishment,—we think it is not conclusive or even in any degree persuasive of the question here for decision, which is not what was the purpose of Congress in fixing a standard for the pay of the regular naval establishment, but whether that standard, as fixed, must be resorted to for the purpose of determining the pay of acting assistant surgeons. The solution of that question must primarily be found within the text of the act of 1898, and as that text expressly gives to the acting assistant surgeons whose appointment it provides for the relative rank and compensation allowed by law to assistant surgeons, it must follow that, in the absence of an express provision or a necessary implication to the contrary in the statute fixing the pay of assistant surgeons, such standard became the measure by which the pay of the officers provided for in the act of 1898 was to be ascertained and allowed. In other words, as the act of 1898 provided for a standard by which to determine the rank and pay of the acting assistant surgeons,—that is, the rank and compensation allowed assistant surgeons,—in the nature of things it provided not for the application *of a nonexisting[143 or obsolete standard, but for an existing standard,—that is, the rank and pay in force at the time when the services of the acting assistant surgeons were rendered. Looked at from a broader point of view,—that is, testing the subject from a consideration of the obvious intent and purpose of the act of 1898,—the same conclusion becomes necessary. It may not be doubted that the relation which the act of 1898 established between the rank and pay of acting assistant surgeons and assistant surgeons in reason must rest upon the substantial identity of the services to be rendered by the incumbents of both offices. This being true, it of course necessarily also is true that a mere increase of the compensation of assistant surgeons without any change between the duties of those officers and the duties of acting assistant surgeons cannot justify the implication, unless there was a clear manifestation of the purpose to do so, that it was the intention of Congress to create an inequality of compensation while leaving unmodified equality of rank and duty.

That the view which we take of the act of 1898 was also the contemporaneous administrative construction given to the act

plainly results from the circular of the Surgeon General under which Plummer was appointed, since the pay stated in that circular was not that fixed in § 1556, Rev. Stat., but was the sum fixed as the pay of assistant surgeons in the Navy at the time the circular was issued. Indeed, that such also must have been the view entertained by the President when Plummer was commissioned obviously is shown by the fact that Plummer was commissioned as a lieutenant, junior grade, the rank of an assistant surgeon at the time of his appointment, and not as an ensign, the rank accorded to assistant surgeons at the time when the act of 1898 was adopted.

The controversy as to the sum of longevity pay arises from a portion of the text of the act of May 13, 1908, 35 Stat. at L. 128, chap. 166, U. S. Comp. Stat. Supp. 1909, p. 359, reading as follows:

144] "There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and marine corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

It is insisted that as the words "current yearly pay," as employed in Rev. Stat. § 1262, U. S. Comp. Stat. 1901, p. 896, were construed in *United States v. Tyler*, 105 U. S. 244, 26 L. ed. 985, to require that the calculation of the longevity pay should be made not upon the sum of the base pay, but on the base pay and previous increases thereof, that the same rule must be applied to the words as used in the provision of the statute above quoted. But, subsequent to the *Tyler* Case, by the act of June 30, 1882, 22 Stat. at L. 118, chap. 254, U. S. Comp. Stat. 1901, p. 896, Congress expressly directed that the 10 per cent longevity increase provided for in § 1262, Rev. Stat., should be "computed on the yearly pay of the grade" That this act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted in the *Tyler* Case is not open to controversy. *United States v. Miller*, 208 U. S. 32, 38, 52 L. ed. 376, 379, 28 Sup. Ct. Rep. 199. Indeed, that from the date of the act of 1882 down to the present time the longevity pay of Army officers has been computed by the method directed by the act of 1882 is not controverted. In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the navy personnel act of 1899, and in all subsequent legislation as to such

pay, we think it plainly results that the provision relied upon must be held to have been adopted with reference to the settled rule prevailing for so many years,—a rule consequent upon the act of 1882. In other words, we think it may not be doubted that the intention of Congress in the provision relied upon was that the longevity pay therein prescribed should be computed "according to the methods then prevailing, and which had resulted from the enactment of the statute of 1882."

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for \$4,213.86.

J. W. CALNAN COMPANY, Appt.,

v.

HENRY A. DOHERTY et al.

(See S. C. Reporter's ed. 145-147.)

Appeal — from circuit court of appeals —bankruptcy case.

1. A decision of a circuit court of appeals which affirmed a ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, is not a final decision allowing or rejecting a claim within the meaning of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 25 b, governing appeals to the Federal Supreme Court.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals —bankruptcy case.

2. The right to a review in the Federal Supreme Court of a decision of a circuit court of appeals which affirmed the ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, must be found in the bankrupt act, and no such right is given by the provisions of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, governing the general appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

[No. 212.]

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On appeal and review in bankruptcy proceedings—see note to *Re Eggert*, 43 C. C. A. 9.

Argued March 14, 1912. Decided April 1, 1912.

A PPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a ruling of the District Court for the District of Massachusetts, that the petitioning creditors in a bankruptcy proceeding held provable claims. Dismissed for want of jurisdiction.

See same case below, 98 C. C. A. 130, 174 Fed. 222.

The facts are stated in the opinion.

Mr. Clarence F. Eldredge argued the cause and filed a brief for appellant.

The court declined to hear Messrs. John H. Blanchard and Hugh C. Blanchard for appellees.

146] *Memorandum opinion by direction of the court. By Mr. Chief Justice White: Involuntary proceedings in bankruptcy were commenced against the J. W. Calnan Company, appellant here, in the district court of the United States for the district of Massachusetts, by a creditor, owning claims aggregating \$713.86. After the filing of an answer by the alleged bankrupt, two creditors—one owning a judgment for \$1,038.71 and the other asserting a claim of \$963.75—intervened and joined in the petition.

The Calnan Company was adjudicated a bankrupt on May 13, 1909. Eight days afterwards an appeal was prayed for and allowed from that decision. In the assignment of errors, in addition to alleging that the court erred in adjudicating it a bankrupt, the Calnan Company alleged that the court erred in finding that the alleged creditors owning claims for \$713.86 and \$963.75, respectively, were creditors holding valid provable claims against it. In many forms of statement it was also alleged that the court erred in finding that the company had made an unlawful preferential payment to a creditor. The circuit court of appeals affirmed the judgment. 98 C. C. A. 130, 174 Fed. 222. Within thirty days after the denial of a petition for a rehearing this appeal was taken.

Section 25b and subparagraph 1 of the bankruptcy act [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432] are mainly relied upon by counsel for the appellant as conferring jurisdiction upon this court to review the judgment of the court of appeals. The clauses referred to authorize an appeal to this court in bankruptcy proceedings from any final decision of a court of appeals allowing or rejecting a claim "where the amount in controversy ex-

ceeds the sum of two thousand dollars and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state" to this court. The contention, however, is untenable. By § 25 (a) of *the bankruptcy [147 act appeals in bankruptcy proceedings are authorized to the circuit courts of appeals in three specified cases, two being: "(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;" and, "(3) from a judgment allowing or rejecting a debt or claim of \$500 or over." It is manifest that the ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims is not a judgment allowing or rejecting a debt or claim within the meaning of the section, and it is also evident that a decision by the court of appeals upon such a ruling is not a "final decision . . . allowing or rejecting a claim under this act," within the meaning of § 25b. See, in this connection, *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 300, 54 L. ed. 1047, 1048, 31 Sup. Ct. Rep. 25. Aside, however, from these considerations, the prerequisites for an appeal to this court, specified in subparagraph 1 of § 25 (b) do not exist, nor could the appeal be entertained, inasmuch as the court of appeals did not make the findings of fact and conclusions of law required by clause 3 of general order 36. *Chapman v. Bowen*, 207 U. S. 89, 90, 52 L. ed. 116, 117, 28 Sup. Ct. Rep. 32.

The further contention that jurisdiction may be exercised by virtue of § 6 of the judiciary act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], is shown to be without merit by our recent decision in *Tefft v. Munsuri*, 222 U. S. 114, ante, 118, 32 Sup. Ct. Rep. 67.

Appeal dismissed.

*CONSUMERS' COMPANY, Limit-[148
ed, Plff. in Err.,
v.

ALBERT L. HATCH.

(See S. C. Reporter's ed. 148-152.)

Constitutional law — impairing contract obligation — judicial decision.

1. The obligations of the charter of a water company are not unconstitutionally impaired by construing the charter in the light of the statute law and the decisions of the courts at the time the charter was

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v.*

granted, as requiring the company to bear the cost of making service connections.

[For other cases, see Constitutional Law, 1295-1307, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — confiscation.

2. Requiring a water company, upon the theory of an implied contract, to bear the cost of making the service connections which it was its duty, under its charter, to make, does not amount to confiscation and the consequent taking of the company's property without due process of law.

[For other cases, see Constitutional Law, 458-479, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — corporate charter.

3. A clause in the charter of a water company that it shall not be required to extend its distributing system in any ungraded street is not unconstitutionally impaired by requiring the company to make service connections to residents of such a street at its own expense, where it has voluntarily laid its mains in the street, and is supplying water therefrom.

[For other cases, see Constitutional Law, 1435-1439, in Digest Sup. Ct. 1908.]

[No. 184.]

Argued and submitted March 4, 1912. Decided April 1, 1912.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment requiring a water company to make service connections to consumers at its own expense. Affirmed.

See same case below, 17 Idaho, 204, — L.R.A. (N.S.) —, 104 Pac. 670.

The facts are stated in the opinion.

Mr. Myron A. Folsom argued the cause, and, with Messrs. Edward S. Elder and Robert H. Elder, filed a brief for plaintiff in error:

There is no foundation in law for the conclusion that the Consumers Company is compelled to lay service pipes and make service connections at its own expense for Hatch, and a reasonable regulation requiring all applicants for water to pay for the service connection and for the service pipes is proper.

McClougherty v. Bluefield Waterworks & Improv. Co. 67 W. Va. 285, 32 L.R.A. (N.S.) 229, 68 S. E. 28; Dill. Mun. Corp. § 56; Vinton-Roanoke Water Co. v. Roanoke, 110 Va. 661, 66 S. E. 835; Gleason v.

Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana

Waukesha County, 103 Wis. 225, 79 N. W. 249; Allentown v. Henry, 73 Pa. 404; Allen v. Drew, 44 Vt. 174; State ex rel. Foley v. Hillyard Water Co. 49 Wash. 232, 94 Pac. 1080; Jonas v. Cincinnati, 18 Ohio, 318; Creighton v. Scott, 14 Ohio St. 438; Ex parte Goodrich, 160 Cal. 410, 117 Pac. 451.

A right can no more be taken away by subsequent judicial decision than by subsequent legislation.

Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490.

To compel the water company to make private connections with its mains and laterals at its own expense is clearly a confiscation of its property.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Missouri P. R. Co. v. Nebraska, 217 U. S. 205, 54 L. ed. 730, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

Mr. Eugene V. Boughton submitted the cause for defendant in error. Mr. Frank W. Reed was on the brief:

Plaintiff in error is not being deprived of its property without due process of law. Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

The constitutional provision regarding the impairment of any alleged contract refers to state legislation or to an enactment of a legislative character, though by a municipal corporation, made subsequent to the contract, and which impairs its obligation.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 937, 22 Sup. Ct. Rep. 691; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

This court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state Constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute, either expressly or by necessary implication.

New Orleans Waterworks Co. v. Louisi-

Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to change of decision of state court as impairing obligation of contract—see notes to Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886; Mitchell v. Burlington, 18 L. ed. U. S. 351; Allen v. Allen, 16 L.R.A. 646; Swanson v. Ottumwa, 5 L.R.A. (N.S.) 860; and Crigler v. Shepherd, 23 L.R.A. (N.S.) 500.

ana, 185 U. S. 336, 46 L. ed. 937, 22 Sup. Ct. Rep. 691; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 19 L. ed. 997; Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

149] *Mr. Chief Justice **White** delivered the opinion of the court:

Omitting reference to matters not pertinent to the alleged Federal questions relied upon, the facts are these: Although it was optional with it to do so, the plaintiff in error, a water supply corporation, operating under a franchise granted in 1903, laid a water main in Third street, an ungraded street within the corporate limits of the then village—now city—of Cœur d'Alene, Idaho. While the company was supplying residents on the street with water for domestic use, upon payment of the regular monthly rates established by the water commission provided for by the statutes of Idaho, Albert L. Hatch, defendant in error, erected a dwelling upon a lot situated on the street, and laid a water pipe to the curb in front of his property. He then applied to the water company to connect the pipe at the curb line with its service main, so that a regular supply of water might be obtained. The water company, however, declined to make the desired connection because of the refusal to Hatch to pay, as required by the regulations of the company, \$8.50, the cost of making the connection, or to comply with alternative regulations adopted for the purpose of enabling the water company to recover such cost. This action in mandamus was then commenced in the supreme court of Idaho, and culminated in a judgment in substance finding the regulations requiring a consumer to pay for service connections unreasonable, and ordering the water company to make the connection at its own cost, and to supply water to the premises of Hatch upon payment of the established monthly rate. 17 Idaho, 204, — L.R.A. (N.S.) —, 104 Pac. 670. This writ of error was then prosecuted upon the assumption that rights of the water company, protected by the Constitution of the United States, had been wrongfully invaded.

The grounds for the claim in question 150] are in substance *that, as the water company was not required by its charter in express terms to make a service connection, and the benefits of such connection would inure solely to the house owner, to compel the water company to bear the cost of the connection would amount to a confiscation of its property, in violation of the 56 L. ed.

due-process clause of the 14th Amendment, and also would be to impair the obligation of its contract. A further claim of impairment of contract is based upon the contention that, as it was optional with the water company, under its franchise, to lay mains in ungraded streets, there was no duty to supply water from a main voluntarily placed in an ungraded street.

The contentions are devoid of merit. The charter of the company was construed by the court below in connection with the statutes in force at the time of the grant of the franchise, in the light of the construction given to those statutes in decisions made prior to such grant. We excerpt in the margin† a passage from the opinion in one of those cases.

*By thus interpreting the charter by[151 applying the settled meaning of the statutes which had been announced at the time the charter was granted to the water company, the court held that it was the duty of the company, under its charter, to make the service connections for Hatch at its own cost. This was based upon the view that, as it was clearly settled by both the statute law and decisions at the time the charter was granted that it was the duty of

†In *Pocatello Water Co. v. Standley* (1900) 7 Idaho, 155, 61 Pac. 518, considering obligations of a water supply company, and construing § 2712 of 1887 Revised Statutes of Idaho, substantially re-enacted in Revised Code of Idaho 1910, as § 2840, the supreme court of Idaho said:

"Under the said franchise the respondent has been granted the right to lay its mains and pipes 'over, along, and under' the streets, alleys, and highways of said city, for the purpose of supplying said city and its inhabitants with a sufficiency of pure water. It had the authority to lay all of the mains and pipes in said streets and alleys necessary to accomplish the purposes for which said franchise was granted. It is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits. The respondent has been granted a valuable right,—that of laying its mains and laterals in the streets and alleys of the city,—in consideration that it will furnish water to said city and its inhabitants. The company is under obligation to lay its pipes in the streets and alleys so as to make the water accessible to the citizen for his private use. It is given the right, within its franchise limits, to lay all pipes and make all connections with its mains and laterals. . . . Neither has the citizen any right to enter within the franchise limits of the company and in any manner interfere with its mains and pipes."

the water company to make service connections, and its further duty being to supply water to consumers, by necessary implication the charter imposed the obligation to pay the cost of the service connection which it was incumbent upon the company to make.

That the construction thus placed upon the charter by the court below, in the light of the state of the law at the time of its adoption, did not amount to an impairment of the obligations of the charter by subsequent legislation, is, we think, too clear for anything but statement. That the mere fact of holding that an obligation would be implied to pay for the doing of work to enable the corporation to perform a duty, when the duty to do such work was clearly the result of the state law and decisions thereon at the time the charter was granted, did not amount to confiscation, and the consequent taking of the property of the corporation without due process of law, in violation of the 14th Amendment, is also, we think, so obvious as not to necessitate further consideration of the proposition.

As respects the claim based upon the clause of the charter which provided that the water company should not be "required" to extend its distributing system in any ungraded street or alley within the then village (now city) of Cœur d'Alene, even 152] if it were possible to indulge in *the hypothesis that there was subsequent legislation, we think there is nothing supporting the claim of impairment of contract, because the supreme court of Idaho was clearly right in deciding that no contract provision was impaired, since the water company had voluntarily laid its main in the ungraded street in question, and was supplying water from such main to residents on the street, and its duty was to supply water "without distinction of persons."

Affirmed.

GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of Pittsburgh Industrial Iron Works, Bankrupt, Appt.,

v.

TITLE GUARANTY & SURETY COMPANY.

(See S. C. Reporter's ed. 152-160.)

Statutes — applicability to sovereign — bankruptcy act.

1. The United States as a sovereign is

not bound by the general language of a statute, and is therefore not bound by the provisions of a bankruptcy law unless specifically mentioned therein.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

Bankruptcy — priorities — labor claims — debts due United States.

2. The priority over claims for labor against a bankrupt estate which the United States possessed under U. S. Rev. Stat. § 3466, U. S. Comp. Stat. 1901, p. 2314, providing that in case of insolvency debts due to the United States shall be first satisfied, and the "like priority" which, under § 3468, was given to a surety which had paid to the United States the money due on the bankrupt's bond, no longer exist since the enactment of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 64, which declares that, with the exception of "taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality," claims for labor shall be preferred over "debts owing to any person who, by the laws of the states or the United States, is entitled to priority."

[For other cases, see Bankruptcy, X. c. 3; United States, V., in Digest Sup. Ct. 1908.]

[No. 188.]

Argued March 5, 1912. Decided April 1, 1912.

A PPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which, reversing a decree of the District Court for the Western District of Pennsylvania, sustained the claim of a surety who had paid the United States the money due on a bankrupt's bond, to be preferred over claims for labor. Reversed.

See same case below, 98 C. C. A. 603, 174 Fed. 385.

The facts are stated in the opinion.

Mr. R. T. M. McCready argued the cause and filed a brief for appellant:

The sovereign power is included by the general language of a statute where it appears by necessary implication, or is clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in the contemplation of the legislature.

United States v. Hoar, 2 Mason, 311, Fed. Cas. No. 15,373.

An intention to bind the United States may be inferred without an affirmative declaration that it shall be bound.

United States v. Herron, 20 Wall. 251, 22 L. ed. 275; Fink v. O'Neil, 106 U. S. 272, 27 L. ed. 196, 1 Sup. Ct. Rep. 325.

NOTE.—On priority of state or United States in payment from assets of a debtor—see notes to State v. Foster, 29 L.R.A.

227; Prince v. Bartlett, 3 L. ed. U. S. 614; and Field v. United States, 9 L. ed. U. S. 94.

The rule that presumably the law is for subjects only fails whenever an intention to embrace the government reasonably appears.

Magdalen College Case, 17 Coke, 66 b.

Out of considerations of public policy, the United States is bound by the general terms of an exemption law that does not extend to the United States in express terms.

Fink v. O'Neil, *supra*.

The purpose of the law in giving priority to wages is so manifest as to require and receive little discussion.

Heckman v. Tammen, 184 Ill. 144, 56 N. E. 361; Re McDavid Lumber Co. 27 Am. Bankr. Rep. 39.

Even where the consequences of an adverse construction would have been less disastrous and far-reaching, both this court and the courts of England have found little difficulty, in proper cases, in avoiding the rule that, generally speaking, the sovereign is not bound by a statute unless particularly mentioned therein.

Green v. United States, 9 Wall. 655, 19 L. ed. 806; Cook County Nat. Bank v. United States, 107 U. S. 445, 27 L. ed. 537, 2 Sup. Ct. Rep. 561; United States v. State Bank, 6 Pet. 29, 8 L. ed. 308.

Section 3466 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 2314) was enacted to operate only when insolvency or bankruptcy has been judicially declared.

United States v. Hooe, 3 Cranch, 73, 2 L. ed. 370.

Where there are two acts on the same subject the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.

United States v. Tynen, 11 Wall. 88, 20 L. ed. 153.

In the application of the rule in question, there is a plain distinction between cases of sovereign prerogative and cases where the sovereign power seeks to maintain some position of profit or advantage, conferred upon it by statute, and not essentially an attribute of sovereignty.

United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304.

Pro tanto, the bankruptcy act is *in pari materia* with the provision of U. S. Rev. Stat. § 3466, relating to payment of claims of the United States against bankrupt estates.

Ibid.

In Mott v. Maris, 2 Wash. C. C. 196, Fed. Cas. No. 9,880, the circuit court allowed the priority of a surety, under the 56 L. ed.

act of 1799, in view of the bankrupt law of 1800, only on the theory that the 62d section of the latter law expressly saved the debt itself from the operation of the law.

Mr. George J. Shaffer argued the cause, and, with Messrs. Walter Lyon and John P. Hunter, filed a brief for appellee:

Neither the United States nor any other sovereign is included by the general language of any statute, and is not bound by the provisions of any insolvent law, unless specifically mentioned therein.

Dollar Sav. Bank v. United States, 19 Wall. 239, 22 L. ed. 82; United States v. Herron, 20 Wall. 251, 260, 22 L. ed. 275, 278; Lewis v. United States, 92 U. S. 618, 23 L. ed. 513.

The right of the United States to priority under the act of 1799 is still in force and unaffected by the bankruptcy act of 1898.

Collier, Bankr. 1899 ed. p. 367, § 64, note; Collier, Bankr. 7th ed. p. 728; 29 Am. & Eng. Enc. Law, 155; Brandenburg, Bankr. 3d ed. §§ 1011-1013; Remington, Bankr. § 2190; Re Stoeber, 127 Fed. 394; United States v. Barnes, 31 Fed. 705.

It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed.

Logan v. United States, 144 U. S. 302, 36 L. ed. 442, 12 Sup. Ct. Rep. 617; United States v. Ryder, 110 U. S. 729, 28 L. ed. 308; 4 Sup. Ct. Rep. 196; United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co. 133 Fed. 933.

The appellant is in grave error in contending that § 64b, el. 5, of the bankruptcy act, is *in pari materia* with U. S. Rev. Stat. §§ 3466 and 3468, U. S. Comp. Stat. 1901, pp. 2314, 2315.

4 Words & Phrases, 3478; Re Stoeber, 127 Fed. 394.

Mr. Justice McKenna delivered the opinion of the court:

This case involves the consideration of the priority of payment out of the estate of a bankrupt of claims due the United States and claims for labor.

The United States is not a party to the action, but appellee brings itself into relation with them as subrogated to their rights by the payment of a judgment obtained against it as surety on a bond for the bankrupt. We shall assume that appellee may assert whatever priority the United States possessed.

After the payment of the judgment, appellee petitioned the district court having jurisdiction of the bankruptcy proceedings for an order directing the trustee in bank-

ruptcy to pay it the amount of the judgment before making any other distribution of the funds of the bankrupt. The referee in bankruptcy decided against the [154]priority, *and also decided that the claim had not been presented in time for allowance. Upon petition for review, and the questions having been certified to the district court, the report of the referee was confirmed. This action was reversed by the court of appeals, and the appellee awarded priority.

The priority of the United States is established, it is contended, by §§ 3466, 3467, and 3468 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 2314, 2315) which are, respectively, as follows:

Section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467. "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States or for so much thereof as may remain due and unpaid."

Section 3468. "Whenever the principal in any bond given to the United States is insolvent, or whenever such principal, being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such [155]surety, pays *to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the recovery of all moneys paid thereon."

The counter contention of appellant is

that those sections have been superseded by the provisions of the bankruptcy act of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418], which declare a different policy and give priority to labor claims. Those provisions we shall presently quote and consider.

The comprehensive objection is made to the applicability of the provisions that the United States, as a sovereign, is not bound by the general language of a statute, and is not bound by the provision of an insolvency law, unless specifically mentioned therein. This objection prevailed in the circuit court of appeals, and is said to be sustained by *Dollar Sav. Bank v. United States*, 19 Wall. 239, 22 L. ed. 82; *United States v. Herron*, 20 Wall. 251, 260, 22 L. ed. 275, 278; *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 513.

The proposition is established. The first case cited gives an illustration of it not connected with bankruptcy laws. In the other two cases it was applied to such laws.

United States v. Herron was an action brought on a bond executed by one Collins as principal and Herron and others as sureties. Herron pleaded a discharge in bankruptcy under the act of 1867. [14 Stat. at L. 517, chap. 176.] The question was therefore presented whether a discharge under the act barred a debt due to the United States. It was held that such a discharge was not a bar, although it was also held that the United States might have proved its debt and been given priority by the act.

The decision was expressly put upon the ground "that *the sovereign authority [156 of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign." There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said:

"Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or state, nor among the text writers of this country."

In *Lewis v. United States*, Lewis had been appointed trustee of the estates of Jay Cooke & Company, and as such received and held their separate individual estates and assets, and the estates and assets of the firm as well. The estates of

the bankrupts were insufficient to pay all their indebtedness. The United States claimed priority of payment of its debt out of the individual estates as against the creditors of the firm. Lewis denied the validity of the demand, but it was sustained.

As one of the elements in its decision the court considered the provision of the act of 1867 (§ 5101 of the Revised Statutes), that in the order for a dividend "all debts due to the United States, and all taxes and assessments under the laws thereof," should be "entitled to priority and preference." The court also considered as an element of its decision the act of March 3, 1797 (1 Stat. at L. 515, chap. 20, U. S. Comp. Stat. 1901, p. 2314), which provided as follows:

"That where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States [157]*shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The court decided that it was "almost too clear to admit of serious controversy" that under this act and the facts in the case the United States was entitled to the priority which they claimed, and passed to the contention against it based on the provisions of the bankruptcy act.

The court met the contention by the general declaration that "the United States are in no wise bound by the bankruptcy act." The disposing effect of the declaration was appreciated, for it was said, "that the claim of the United States was not proved in the bankruptcy proceedings in question was therefore quite immaterial." Citing *United States v. Herron*, 20 Wall. 251, 260, 22 L. ed. 275, 278, and *Harrison v. Sterry*, 5 Cranch, 289, 3 L. ed. 104.

The court, however, did consider the provisions of the bankruptcy act, and said of the clause which it had quoted that it was "*in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion." And, em-
56 L. ed.

phasizing the priority of the United States, it was pointed out (p. 623) that the bankruptcy law declared that the United States should be first paid, and that the act of 1867 gave the debts of the United States priority. "Neither statute," the court said, "contains any qualification, and we can interpolate none." The inference from the language of the court, it must be admitted, is quite strong, and the court of appeals considered that "in the light thereof the *omission in the act of 1898 of [158 words expressly giving priority to debts due to the United States had no more significance than the presence of such words in the act of 1867,"—that is, as we understand the reasoning, that § 3466 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2314), which is a reproduction of the statute of 1797, with immaterial changes, was all-sufficient to give priority, and that the rights it gave were only recognized and reaffirmed by the provisions for priority in the bankruptcy act of 1898. But, as we have seen, the decision in *Lewis v. United States* declared that the statute of 1797 and the bankruptcy act were to be regarded as *in pari materia*, and both were unqualified; or, as the court said, as neither contained any qualification, none could be interpolated. They being affirmations of each other, either would have been sufficient without the other. The bankruptcy act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of "all debts due to the United States, and all taxes and assessments under the laws thereof." The priority, therefore, given by the bankruptcy act, was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the bankruptcy act of the statute of 1797. But there is not such affirmation by the bankruptcy act of 1898 of that statute, which still exists, as we have said, as § 3466 of the Revised Statutes, *supra*. There is a change in provisions, and we come to the question if there is a change of purpose. A consideration of those provisions becomes necessary. We shall quote those only which affect the United States. They are as follows: "Section 1. . . . (9) 'Creditor' shall include anyone who owns a demand provable in bankruptcy." (Sec. 17.) A discharge in bankruptcy releases the bankrupt from all of his provable debts except such as are due as a tax levied by the United States. (Sec. 57-J.) Debts owing to the United States as a penalty or forfeiture shall not be allowed except for the *amount of the pecun-[159 iary loss sustained by the act, transaction,

or proceeding out of which the penalty arose.

Priority is provided for in § 64 as follows: (3) The court shall order the trustee to pay all taxes legally due the United States. (b) Debts to have priority, except as herein provided, are to be paid in full, . . . and the order of payment shall be: (4) wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who, by the laws of the states or the United States, is entitled to priority.

With these provisions we may compare §§ 5091 and 5101 of the Revised Statutes, which are reproductions of the act of 1867. Section 5091 provided that creditors whose debts were duly proved and allowed should be entitled to share *pro rata* without any priority or preference except as allowed in § 5101. The latter section (5101) provided as follows:

"In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

" . . . Second. All debts due to the United States, and all taxes and assessments under the laws thereof. . . . Fourth. Wages due to any operative clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this title had not been adopted. . . ."

It will be seen, therefore, that by the statute of 1797 (now § 3466) and § 5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative, 160] clerk, or house servant. A *different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is "taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality." These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. The policy which dictated it was

beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.

Reversed.

WESTERN UNION TELEGRAPH COMPANY, Appt.,

v.

CITY OF RICHMOND.

(See S. C. Reporter's ed. 160-173.)

Telegraphs — post roads — municipal regulation.

1. The right of a telegraph company accepting the provisions of the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 et seq., U. S. Comp. Stat. 1901, p. 3579), to construct, maintain, and operate lines over the post roads of the United States, such as the streets of Richmond, Virginia, are, is subject to reasonable municipal regulation.

[For other cases, see Telegraphs, I., in Digest Sup. Ct. 1908.]

Telegraphs — post roads — municipal regulation.

2. The municipal power to make reasonable regulations respecting the occupancy of the city streets by a telegraph company accepting the provisions of the act of July 24, 1866, giving the right to construct, maintain, and operate lines over the post

NOTE.—On the power of states to control or impose burdens upon interstate telegraph and telephone companies—see note to Postal Telegr. Cable Co. v. Baltimore, 24 L.R.A. 161.

On state law affecting telegraphs as regulation of interstate commerce—see note to Western U. Telegr. Co. v. Commercial Mill. Co. 36 L.R.A. (N.S.) 220.

On the validity of charges on telegraph and telephone poles and wires—see note to Western U. Telegr. Co. v. New Hope, 47 L. ed. U. S. 240.

On the right of telegraph and telephone companies to use the public streets—see note to St. Louis v. Western U. Telegr. Co. 37 L. ed. U. S. 810.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363; and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

roads of the United States, is not exceeded, as granting arbitrary discretion to municipal officers, by an ordinance which leaves to the determination of the city engineer the size, quality, character, number, condition, appearance, and manner of erection of poles and wires, and to the judgment of other officials the safety and suitability of poles, wires, attachments, insulations, etc., and which empowers the committee on streets to require permission to be given to others to place lighting wires upon the poles, where, in the committee's opinion, they will not interfere with the owner's business, and which authorizes such committee to pass upon underground plans, and invests other officials with supervisory powers over the carrying out of such plans, including the laying of conduits and the replacement of pavements.

[For other cases, see Telegraphs, I., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — municipal regulation of telegraph companies.

3. The property of a telegraph company accepting the provisions of the act of July 24, 1866, giving the right to construct, maintain, and operate, lines over the post roads of the United States, is not taken without due process of law by a municipal ordinance which demands as a condition of the establishment of poles and conduits in the city streets that positions shall be reserved upon the poles for the city's wires, and that underground conduits shall provide for 30 per cent increase, and shall carry the city's wires free of charge, one duct being reserved for them, and that space be left in the conduits for the wires of third parties, to be used on permission by the city and compensation, and which provides for moving the conduits when necessary, at the company's expense, and imposes a specific money charge for each pole or underground mile of wire.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — municipal charge on poles and wires.

4. An annual municipal charge of \$2 per pole, and the same sum for each mile of underground wire, which has been paid for many years without complaint, cannot be said to be so unreasonable as to deny due process of law to a telegraph company occupying the city streets under the authority of the act of July 24, 1866, giving the telegraph companies accepting its provisions the right to construct, maintain, and operate lines over the post roads of the United States.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

5. The possible invalidity under the Federal Constitution of the penalties prescribed by a municipal ordinance for violation of its provisions regulating the occupancy of the city streets by a telegraph company which has accepted the provisions of the

act of July 24, 1866, giving the right to construct, maintain, and operate lines over the post roads of the United States, does not defeat the other provisions, where the penalties are separable from the rest of the ordinance.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Telegraphs — post roads — municipal regulation.

6. Limiting by municipal ordinance the privilege of a telegraph company as to conduits to fifteen years, and providing that after that time the city may impose such restrictions, conditions, and charges as it sees fit, or may order the conduits removed, cannot be regarded as an attempt to make the telegraph company contract itself out of the benefit of the act of July 24, 1866, under which it has the right to construct, maintain, and operate lines over the post roads of the United States,—especially in view of an amendment to the ordinance, providing that none of its obligations shall interfere with rights under that act.

[For other cases, see Telegraphs, I., in Digest Sup. Ct. 1908.]

[No. 195.]

Argued March 6 and 7, 1912. Decided April 1, 1912.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia to review a decree dismissing a bill to restrain the enforcement of a municipal ordinance regulating the occupancy of the city streets by a telegraph company. Affirmed.

See same case below, 178 Fed. 310.

The facts are stated in the opinion.

Mr. Rush Taggart argued the cause, and, with Mr. A. L. Holladay, filed a brief for appellant:

The telegraph company has the right, under the act of Congress, to use every street within the city of Richmond. It is not, therefore, required to contract with the city for such right to use the street, nor is it required to be a suppliant to the city, nor to comply with every condition which the city may see fit to impose. It must pay taxes upon its property within the city the same as other persons or corporations owning property there.

Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

It may be required to pay reasonable compensation for the property occupied by its poles or appliances.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

It is subject to such necessary provisions respecting its buildings, poles, and wires

as the comfort and convenience of the community may require.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 359, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

It is not, however, exposed to the arbitrary discretion of any officer of the city with respect to the operation of its lines. Neither the city nor the state can prevent it from operating within their limits by any form of legislation whatever.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The city may not, with respect to any individual or corporation, subject it to the arbitrary discretion of an officer acting without any definite rule laid down for his guidance.

Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Winthrop v. New England Chocolate Co.* 180 Mass. 464, 62 N. E. 969; *Barthet v. New Orleans*, 24 Fed. 563; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; *Boyd v. Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; *Yick Wo v. Hopkins*, 118 U. S. 356, 371, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 8 L.R.A. (N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680; *Robison v. Miner*, 68 Mich. 549, 37 N. W. 21; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *May v. People*, 1 Colo. 157, 27 Pac. 1010; *Richmond v. Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *St. Louis v. Russell*, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Elkhart v. Murray*, 165 Ind. 304, 1 L.R.A. (N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748; *Montgomery v. West*, 149 Ala. 311, 9 L.R.A. (N.S.) 659, 123 Am. St. Rep. 33, 42 So. 1000, 13 Ann. Cas. 651.

The ordinance imposes excessive fines

and penalties for the failure to obey the arbitrary orders of the city officials in matters concerning which the company has no guide except the direction of these officers.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The ordinance requires the company to furnish to the city large and extensive facilities for the doing of the city's business without compensation or reward therefor, and such compulsion is not a legitimate exercise of the police power.

2 Dill. Mun. Corp. 5th ed. § 661; *State v. Bean*, 91 N. C. 554; *State, Benson, Prosecutor, v. Hoboken*, 33 N. J. L. 280; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *State, Mühlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Ft. Smith v. Ayers*, 43 Ark. 82; *New Haven v. New Haven Water Co.* 44 Conn. 106; *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367; *Vansant v. Harlem Stage Co.* 59 Md. 330; *Ottumwa v. Zckind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646; *New York v. Hexamer*, 59 App. Div. 4, 69 N. Y. Supp. 198; *State v. Glavin*, 67 Conn. 29, 34 Atl. 708; *Welch v. Hotchkiss*, 39 Conn. 143, 12 Am. Rep. 383; *New Haven v. New Haven Water Co.* 44 Conn. 108; *Chaddock v. Day*, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 468, 42 N. W. 977.

The ordinance seeks to put limits upon the right of the telegraph company to use the streets, and to require the abandonment of the use of the streets at the demand of the city, while the act of Congress secures to the telegraph company the full and unlimited right to use the streets, subject only to fair and reasonable regulations by the city.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Mr. H. R. Pollard argued the cause and filed a brief for appellee:

The primary control of public streets and roads is with the legislature of the state, with the right, however, to delegate a part or the whole of such control to the several municipalities in which the same are located.

Dill. Mun. Corp. 5th ed. §§ 1128, 1129:

Elliott, Roads & Streets, § 421; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990.

The ordinance complained of does impose rules sufficiently definite for the guidance of the appellant in the operation of its business, and does not expose its operations to the discretion of the officers of the city in any unreasonable degree.

Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505, 130 Mo. 10, 31 L.R.A. 798, 31 S. W. 594; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Fischer v. St. Louis*, 194 U. S. 361, 372, 48 L. ed. 1018, 1024, 24 Sup. Ct. Rep. 673; *Re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; *Marshall, Field & Co. v. Clark*, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495.

Where an ordinance is enacted in pursuance of express authority, the courts are powerless to investigate the question of the unreasonableness of the ordinance, while, on the other hand, where the ordinance is enacted in pursuance of an incidental or implied power, the same must be reasonable.

Dill. Mun. Corp. 5th ed. §§ 589, 600; *McQuillin, Mun. Ord.* §§ 181, 186.

It will be presumed that an ordinance is valid, and the burden to establish invalidity is on the person asserting it.

2 *Dill. Mun. Corp.* 5th ed. § 649; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Norfolk, P. & N. News Co. v. Norfolk*, 105 Va. 139, 52 S. E. 851; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204.

The requirements of the ordinance that the city shall have the right, through the board of fire commissioners, to run city wires needed for the fire alarm and police telegraph departments on appellant's poles, and that its conduits shall contain one duct for the accommodation of similar city wires, are not unreasonable and oppressive, so as to render the said requirements invalid.

Electric Improv. Co. v. San Francisco, 13 L.R.A. 131, 45 Fed. 593; *Postal Teleg. Cable Co. v. Chicopee*, 207 Mass. 341, 32 L.R.A. (N.S.) 997, 93 N. E. 927; *Dill. Mun. Corp.* § 1274; *Western U. Teleg. Co. v. New York*, 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; 56 L. ed.

New York ex rel. New York Electric Lines Co. v. Squires, 145 U. S. 175, 190, 36 L. ed. 666, 671, 12 Sup. Ct. Rep. 880.

Although telegraph companies are engaged in interstate commerce, yet municipalities in which they occupy the streets may require a fee or charge sufficient to cover any reasonably anticipated expenses incident to the proper inspection and supervision of their conduits, poles, and wires, as well as a charge in the nature of a rental for the use of the street occupied by the same.

Western U. Teleg. Co. v. New York, 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; *Memphis v. Postal Teleg. Cable Co.* 76 C. C. A. 292, 145 Fed. 602; *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 400, 15 Sup. Ct. Rep. 356; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 566, 49 L. ed. 321, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; *Ganz v. Ohio Postal Teleg. Cable Co.* 72 C. C. A. 186, 140 Fed. 692; *Michigan Teleph. Co. v. Charlotte*, 93 Fed. 11; *Toledo v. Western U. Teleg. Co.* 52 L.R.A. 730, 46 C. C. A. 111, 107 Fed. 10; 27 Am. & Eng. Enc. Law, 1007, 1021; *Chester City v. Western U. Teleg. Co.* 154 Pa. 464, 25 Atl. 1134; *Philadelphia v. American Union Teleg. Co.* 167 Pa. 406, 31 Atl. 628; *Philadelphia v. Postal Teleg. Cable Co.* 67 Hun, 21, 21 N. Y. Supp. 556; *Taylor v. Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128; *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; *Toledo v. Western U. Teleg. Co.* 52 L.R.A. 730, 46 C. C. A. 111, 107 Fed. 10.

Where a party has for years acquiesced in a requirement, it is too late to complain of its invalidity.

Emery v. Bradford, 29 Cal. 75; *Cochran v. Collins*, 29 Cal. 129; *Lux & L. Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014; *Holloran v. Mormam*, 27 Ind. App. 309, 59 N. E. 869; *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676; *Bloomington*

ton v. Phelps, 149 Ind. 596, 49 N. E. 581; Gorman v. State, 157 Ind. 205, 60 N. E. 1083; Cooley, Const. Lim. *181.

A municipality cannot, if it would, divest itself of its power to protect the lives and property of its inhabitants. Any attempt to do so would be *ultra vires*.

Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 72, 42 L. ed. 948, 953, 18 Sup. Ct. Rep. 513; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 53, 43 L. ed. 67, 71, 18 Sup. Ct. Rep. 732.

A company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.

Chicago v. Chicago Union Traction Co. 199 Ill. 270, 59 L.R.A. 666, 65 N. E. 243; Elliott, Roads & Streets, p. 801.

A requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligations of contracts.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 597, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1; Bacon v. Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Engel v. O'Malley, 219 U. S. 128, 136, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912a, 487; Mutual Loan Co. v. Martell, 222 U. S. 225, ante, 175, 32 Sup. Ct. Rep. 74; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734.

A party who has accepted and acted under a law will not be allowed to assail the law as invalid.

Cooley, Const. Lim. p. 214; Dewhurst v. Allegheny, 95 Pa. 437; Bidwell v. Pittsburgh, 85 Pa. 412, 27 Am. Rep. 662; Daniels v. Tearney, 102 U. S. 415, 421, 26 L. ed. 187, 189; Purcell v. Conrad, 84 Va. 557, 5 S. E. 545.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, filed on June 21, 1904, to restrain the enforcement of an ordinance of September 10, 1895, codified as chapter 88 of the ordinances of Richmond,

and amended March 15, 1902, and December 18, 1903. The plaintiff alleges that the ordinance infringes its rights under the act of July 24, 1866, chap. 230, 14 Stat. at L. 221 (Rev. Stat. §§ 5263 et seq., U. S. Comp. Stat. 1901, p. 3579), and under article 1, § 8 (the commerce clause), and the 14th Amendment of the Constitution of the United States. The circuit court dismissed the bill (178 Fed. 310), and the plaintiff appealed. The act of Congress gives to telegraph companies that accept its provisions the right to construct, maintain, and operate lines over the post roads of the United States, such as the streets of Richmond concerned are admitted to be. Rev. Stat. § 3964, act of March 1, 1884, *chap. 9, 23 Stat. at L. 3, U. S. [166 Comp. Stat. 1901, p. 2707. Some of the objections to the ordinance are based upon this statute and some are not; we take them as they come.

By § 1 poles and wires are not to be put up "until the city engineer shall have first determined the size, quality, character, number, location, condition, appearance, and manner of erection of" the same. By § 4 the committee on streets may require permission to be given to others to place upon the poles light current wires which, in the Committee's opinion, will not unreasonably interfere with the owners' business; terms, if not agreed upon, to be submitted to arbitration. By § 15 the chief of the fire department and the superintendent of fire alarm and police telegraph are to inspect poles and wires, and if a pole is unsafe, or the attachments or insulations, etc., are unsuitable or unsafe, are to require them to be altered or replaced and removed, with a fine for each day's failure to obey the order. By § 26 violation of any provision, or failure to obey any requirement made under the ordinance by the city engineer or the just-named superintendent or chief, if not specially fined, is to be fined from ten to five hundred dollars a day, by the police justice. Finally, by § 28, as amended in 1903, all overhead wires within a certain territory are to be removed, and within two months plans for conduits are to be submitted to the committee on streets and Shockoe creek, showing location, plan, size, construction, and material. These plans may be altered or amended by the committee, and when satisfactory to it are to be followed by the owner of the wires in a manner satisfactory to the city engineer. The pavements are to be replaced and kept in repair to his satisfaction and the city saved harmless from damages. The conduits are to provide for an increase of 30 per cent, not to be occupied by third parties without consent of the committee and compensation,

but the wires of the city to be carried free, 167] one duct being *reserved for them. The location, size, shape, and subdivision of the conduits, the material and manner of construction, must be satisfactory to the city engineer, and the work of laying underground conduits is to be under the direction and to the satisfaction of the superintendent of fire alarm and police telegraph.

All these provisions are objected to as subjecting the appellant to an arbitrary discretion,—in § 1, that of the city engineer as to the poles; in § 4, that of the committee on streets as to the use of the poles; in § 15, that of the chief and superintendent mentioned as to not only the safety of the poles and wires, but the unsuitableness of the latter, or their attachments, insulation, or appliances; in § 28, that of the committee on streets as to underground plans, that of the superintendent of fire alarm as to laying the conduits, and that of the city engineer as to the replacement of pavement in the streets, and the carrying out of the plans in all the details just stated. It is argued also that by § 26 the appellant is subjected to further requirements without limit from the officers named, but this argument may be dismissed, the requirements referred to being only those “made under this chapter;” that is, specifically authorized in the other sections to which we have referred. Again, the objections are not to be fortified by those decisions that turn on the power to delegate legislative functions. *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480. We have been shown no ground for supposing that the ordinance exceeded the power of the legislature to authorize, or of the city to enact, unless it interferes with some special paramount right of the appellant. The bill is brought wholly on the ground that the appellant has such rights that no state legislation can touch. Unless it has them, there is nothing in the Constitution of the United States to prevent the grant of these discretionary powers to the committees and officers named. *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Gundling v. 168*] **Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Fisher v. St. Louis*, 194 U. S. 361, 371, 48 L. ed. 1018, 1023, 24 Sup. Ct. Rep. 673; *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 225, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. 56 L. ed.

Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there need to be any. If the committee and officers do their duty, there is no room in the questions left to them for arbitrary whim. They are to exercise their judgment on the suitableness, safety, etc., of the places, poles, and wires by the criteria that would be applied by all persons skilled in such affairs who should seek to reconcile the welfare of the public and the instalment of the plant. The objection that other motives may come in is merely that which may be made to all authority,—that it may be dishonest,—an objection that would make government impossible if it prevailed. It is said that the ordinance should confine the committee and officers to finding whether required and specified facts exist. But not only is it impossible to set down beforehand every particular fact that may have to be taken into account, but, in case of dishonesty, it would do no good. We are of opinion that the ordinance is not unreasonable as a grant of arbitrary power. Regulations very like these were upheld, so far as they presented Federal questions, against a company assumed to have a right to use the streets, in *Missouri ex rel. Laeclde Gaslight Co. v. Murphy*, 170 U. S. 78, 99, 42 L. ed. 955, 964, 18 Sup. Ct. Rep. 505. See also *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317.

In view of what we have said and the appellant's admission that it is subject to reasonable regulation, it would be unnecessary to consider its rights under the act of *Congress but for some further com-[169] plaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has. The act of Congress, of course, conveyed no title, and did not attempt to found one by delegating the power to take by eminent domain. *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 574, 49 L. ed. 312, 324, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708. It has been held to prevent a state from stopping the operation of lines within the act by injunction for failure to pay taxes. *Western U. Teleg. Co. v.*

Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961. But except in this negative sense, the statute is only permissive, not a source of positive rights. The inability of the state to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the states, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners, or as against the city or state, where it owns the land. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 101, 37 L. ed. 380, 384, 13 Sup. Ct. Rep. 485. Any license that the city may 810, 13 Sup. Ct. Rep. 990; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 761, 771, 43 L. ed. 1162, 1166, 19 Sup. Ct. Rep. 778; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560.

The only ground of title disclosed by the appellant is the act of 1866, coupled, perhaps, with the fact that its lines are established. The rights of the city to the streets are left a little vague, but the bill assumes that they are such as to authorize the charge of a reasonable rental, on the principle of *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485. Any license that the city may 170] have *granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the city's title is infringed by the appellant, nothing appears to limit the city's right to insist upon it, as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights.

When the appellants, without the right to exercise the power of eminent domain, desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. If it demands, as a condition of its assent, as it does by § 6, that positions shall be reserved upon the poles for the city, and by § 28, that provision shall be made for 30 per cent increase, and that the city's wires shall be carried free of charge, one duct being reserved for them,

it is within its rights. Even assuming, as seems to be implied by some of the language in *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 104, 105, 37 L. ed. 380, 385, 386, 13 Sup. Ct. Rep. 485; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, that, in consequence of the act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable, in view of the position of the parties. The city must use these poles and conduits or others, and it is not unfair that it should avoid the expense and additional burden of a separate system, and insist on getting the help it needs from the system already there. See *Postal Teleg. Cable Co. v. Chicopee*, 207 Mass. 341, 32 L.R.A.(N.S.) 997, 93 N. E. 927. It is no sufficient objection that, from the point of view of rental, the burden on certain poles may vary in a proportion different from the value *of [171 those poles. The notion of rental cannot be used thus to restrict the conditions that may be imposed. The conditions are reasonable with reference to the occupation of the streets, considered as a whole, and are not made otherwise by the fact that there is also a specific money charge for each pole or underground mile of wire.

The requirement that space be left in the conduits for wires of third parties, to be used upon permission by the city and compensation (§§ 4, 28), is merely another incident of the necessity for insisting upon a single system. It would seem not to be unreasonable for legislation, apart from any question of property rights, to require that a single conduit should contain all the wires under a street. When the legislature also is fixing the terms on which it will yield a property right, the validity of the condition becomes doubly clear. So, a provision in § 28 for moving or altering conduits at the appellant's expense, upon notice from the city that the change is necessary for the construction or repair of gas, sewer, or water mains. These items seem to us as easily justified as the order to put the wires underground, the legality of which the appellant fully admits.

The money charges of \$2 per pole and the same sum per mile of underground wire are found fault with. §§ 10, 32. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the state would be bad under the Constitution and act of Congress,—not upon the suggestion that the city of Richmond is acting *ultra vires*. If

the city could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question, so limited, we agree with the court below that after the appellant, as is found, has paid the charges without complaint, for many years, it would require something 172] more *than a mere protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 104, 37 L. ed. 380, 385, 13 Sup. Ct. Rep. 485, s. c. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; *Memphis v. Postal Teleg. & Cable Co.* 91 C. C. A. 135, 164 Fed. 600, 16 A. & E. Ann. Cas. 342.

There is the frequently recurring contention that the ordinance is void because of the great penalties that may be incurred in the time necessary to test its legality. Especially mentioned is § 27, as amended in 1902, which imposes a fine of from \$100 to \$500 for each pole remaining after the time set for their removal, and of from \$100 to \$500 for every week thereafter. It does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Federal courts, nor do we apprehend that an attempt will be made to enforce them in respect to the past. But the penalties are separable from the rest of the ordinance, and if an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535.

One more objection to the ordinance is found in § 31, which limits the privilege as to the conduits to fifteen years, and provides that after that time the city may put such restrictions, conditions and charges as it sees fit, or may order the conduits removed. It seems to be thought that this is an attempt to make the appellant contract itself out of the benefit of the act of Congress. What we have said will show some reason for not so regarding the ordinance; and as an amendment, § 34, adopted since the bill was filed, provides that none of the obligations, etc., of the chapter, shall interfere with rights under the act of 1866, the appellant's position would be no worse by reason of its complying with what it cannot help. We 173] think it *unnecessary to discuss the bill in greater detail to show that it cannot be maintained.

Decree dismissing bill affirmed.

56 L. ed.

WORLD'S FAIR MINING COMPANY,
Plff. in Err.,

v.

FRANK POWERS and Josephine Powers.

(See S. C. Reporter's ed. 173-180.)

Contracts — performance — conditions.

1. The deposit of the net proceeds from ores in a designated bank, to be credited on the purchase price, as stipulated in a contract for the sale of mines, under which the purchaser was given possession and the deed was placed in escrow, to be delivered upon performance of his undertakings, is a condition concurrent with the obligation of the vendor to allow the purchaser to remain in possession, and precedent to the vendor's obligation to convey.

[For other cases, see *Contracts*, V. d, in *Digest Sup. Ct.* 1908.]

Vendor and purchaser — breach by purchaser — excuse.

2. The purchaser in possession under a contract for the sale of mines by which the deed was placed in escrow, and the purchaser required to deposit in a designated bank the net proceeds from the ores, to be credited upon the purchase price, cannot claim damages for his dispossession by the vendor because of the failure to make such deposits, without showing a valid excuse therefor.

[For other cases, see *Vendor and Purchaser*, II. a, in *Digest Sup. Ct.* 1908.]

Contracts — excuse for failure to perform.

3. The breach by the purchaser in possession under a contract for the sale of mines, of his agreement to deposit the net proceeds from the ores in a designated bank, to be credited upon the purchase price, is not excused by attachment proceedings and other acts of the vendor, hindering, but not preventing, performance.

[For other cases, see *Contracts*, V. b, in *Digest Sup. Ct.* 1908.]

[No. 207.]

Argued March 11 and 12, 1912. Decided
April 1, 1912.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of the First Judicial District in that territory, directing a verdict for the defendants in an action by a purchaser of mines to recover damages for dispossession by the vendors. Affirmed.

See same case below, 12 *Ariz.* 285, 100 *Pac.* 957.

The facts are stated in the opinion.

NOTE.—On the right to rescind or abandon contract because of other party's default—see note to *Lake Shore & M. S. R. Co. v. Richards*, 30 *L.R.A.* 33.

Mr. Frank H. Hereford argued the cause, and, with Mr. F. E. Curley, filed a brief for plaintiff in error:

The allegations of an answer may supply any omitted allegations in the complaint, and thus aided, the defect in the complaint is cured.

Hill v. George, 5 Tex. 87; McFarland v. Mooring, 56 Tex. 118; International & G. N. R. Co. v. Sein, 11 Tex. Civ. App. 386, 33 S. W. 558; United States v. Morris, 10 Wheat. 246-283, 6 L. ed. 314-323; 31 Cyc. 714-717.

To permit the use of the technical law of pleading, formulated to facilitate trials and to render more certain the administration of justice, to defeat a hearing and determination of what is justice, is wholly inconsistent with the spirit and policy of our law, which seeks a determination of every case upon a trial of the merits.

Boudreaux v. Tucson Gas, E. L. & P. Co. 13 Ariz. 361, 33 L.R.A.(N.S.) 196, 114 Pac. 552.

Pleadings will be construed most favorably towards the pleader in determining whether or not the allegations therein contained are sufficient to apprise the opposite party of the questions of fact that the pleader will seek to establish on the trial.

4 Enc. Pl. & Pr. 756; United States v. Parker, 120 U. S. 89-97, 30 L. ed. 601-605, 7 Sup. Ct. Rep. 454.

An even greater liberality is allowed after answer filed and on trial.

4 Enc. Pl. & Pr. 758.

The rule *expressio unius est exclusio alterius*, as applied to contracts, has been recognized and adopted by this court.

Douglass v. Lewis, 131 U. S. 75, 33 L. ed. 53, 9 Sup. Ct. Rep. 634; Tucker v. Alexandroff, 183 U. S. 424-436, 46 L. ed. 264-270, 22 Sup. Ct. Rep. 195.

The contract did not make the deposit of the proceeds of the ore a condition precedent.

New Orleans v. Texas & P. R. Co. 171 U. S. 334, 43 L. ed. 186, 18 Sup. Ct. Rep. 875.

The escrow instructions were plainly for the benefit of plaintiff in error, in that they enabled the latter to get the deeds deposited in escrow. The penalties provided for in the escrow instructions were therefore necessarily to be construed more strongly against defendants in error than against plaintiff in error.

7 Enc. U. S. Sup. Ct. Rep. 264; 4 Enc. U. S. Sup. Ct. Rep. 573.

The escrow instructions did not modify or become a part of the original contract.

Powers v. World's Fair Min. Co. 10 Ariz. 5, 86 Pac. 15, 12 Ariz. 281, 100 Pac. 956.

It is a principle recognized and acted

upon as a cardinal rule by all the courts of justice in the construction of contracts, whether under seal or not, that the intention of the parties at the time of making the contract is to be inquired into, and, if not forbidden by law, is to be effectuated.

4 Enc. U. S. Sup. Ct. Rep. 570.

What is implied is as effectual as what is expressed. The intent of the parties as manifested is the contract.

Equitable Safety Ins. Co. v. Hearne, 20 Wall. 494, 496, 22 L. ed. 398, 399; United States v. Babbitt, 95 U. S. 334, 336, 24 L. ed. 480, 481.

But even if deposits to the credit of defendants in error of the proceeds of ore shipped were a condition precedent in the contract, then before the time for its performance, defendants in error had elected not so to consider such conditions; had waived the condition precedent, and had elected to consider the contract unbroken by plaintiff in error's failure to perform.

15 Cyc. 258, 259, 262, 263; New Orleans v. Texas & P. R. Co. 171 U. S. 313, 334, 43 L. ed. 178, 186, 18 Sup. Ct. Rep. 875.

A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused.

Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98.

If a party to a contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise dispenses with, or by any act of his own prevents, the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the nonperformance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.

District of Columbia v. Camden Iron Works, 181 U. S. 453, 461, 462, 45 L. ed. 948, 953, 954, 21 Sup. Ct. Rep. 680.

The so-called condition precedent was satisfied and complied with nine days before the time for complying with it had arrived.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54-77, 26 L. ed. 693-703.

Mr. Eugene S. Ives argued the cause and filed a brief for defendants in error:

The company's obligation to deposit the money was a condition precedent; and it must allege and prove the fulfilment of the condition, or a legal excuse for its non-performance.

9 Cyc. pp. 642-644, note, 60, p. 720, note, 466; Milligan v. Keyser, 52 Fla. 331, 42 So. 371; Kane v. Hood, 13 Pick. 281; Graves v. White, 87 N. Y. 463; Dermott v. Jones, 23 How. 220, 16 L. ed. 442; Fancher v. Goodman, 29 Barb. 315; Chicago, B. & Q. R. Co. v. Cochran, 42 Neb. 531, 60 N. W. 894; McColl v. Frith, 101 N. Y. 677, 5 N. E. 429.

Power's cause of action for the \$6,400 accrued immediately upon receipt of the smelter returns by the company.

Green v. Robertson, 64 Cal. 75, 28 Pac. 446; Hoch v. Bass, 126 Pa. 13, 17 Atl. 512.

The institution of the action by defendants in error on June 11, 1904, was no excuse for nonperformance.

Mitchell v. Silver Lake Lodge, 29 Or. 294, 45 Pac. 798; Frantz v. Hanford, 87 Iowa, 469, 54 N. W. 474; 4 Cyc. 845.

Defendants in error had the right to rescind the contract and dispossess plaintiff in error for nonperformance.

Norrington v. Wright, 5 Fed. 768, 115 U. S. 188, 205, 29 L. ed. 366, 369, 6 Sup. Ct. Rep. 12; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298.

Plaintiff in error having elected to continue under the contract after the alleged acts of interference and hindrance on the 11th of June, 1904, was bound to perform its covenants, and therefore having failed to deposit the money on the 21st day of June, 1904, is precluded from recovering in this action.

Norrington v. Wright, 115 U. S. 205, 29 L. ed. 369, 6 Sup. Ct. Rep. 12; Mill Dam Foundery v. Hovey, 21 Pick. 444; McGregor v. Ross, 96 Mich. 103, 55 N. W. 653; Robinson v. Lake Shore & M. S. R. Co. 103 Mich. 607, 61 N. W. 1014; Rodermund v. Clark, 46 N. Y. 357; Robb v. Voss, 155 U. S. 13, 39, 42, 39 L. ed. 52, 62, 63, 15 Sup. Ct. Rep. 4; Keedy v. Long, 71 Md. 385, 5 L.R.A. 759, 18 Atl. 704; Goodsell v. Western U. Teleg. Co. 23 Jones & S. 183; Pakas v. Hollingshead, 184 N. Y. 211, 3 L.R.A. (N.S.) 1042, 112 Am. St. Rep. 601, 77 N. E. 40, 6 Ann. Cas. 60.

One seeking to excuse nonperformance by reason of the conduct of the other party must affirmatively allege in his pleading a
56 L. ed.

sufficient excuse for nonperformance, and must set forth the facts constituting the excuse.

9 Cyc. 719, 720, 722; Dermott v. Jones, 23 How. 220, 16 L. ed. 442; Buchanan v. Layne, 95 Mo. App. 148, 68 S. W. 952; Stern v. McKee, 70 App. Div. 142, 75 N. Y. Supp. 157; Purdue v. Noffsinger, 15 Ind. 386; Jones v. Singer Mfg. Co. 38 W. Va. 147, 18 S. E. 478.

Even had there been an allegation of performance, an excuse for nonperformance could not be shown.

White v. Mitchell, 30 Ind. App. 342, 65 N. E. 1061.

The defendants were entitled to treat the contract as ended and retake possession of the property, and such resumption of possession could not be the basis of a recovery of damages.

Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298.

*Mr. Justice Holmes delivered the [176 opinion of the court:

This is an action brought by the plaintiff in error upon a contract made by the defendants in error, hereafter called Powers, with one Ferguson, and assigned to the plaintiff in error. The contract was for the sale of some mines known as the World's Fair Group. Powers agreed to place a deed of the mines in escrow in the Arizona National Bank of Tucson within ninety days, to be delivered on performance of the undertakings on the other side. Ferguson was to begin work within ninety days, and to go on at a minimum rate until 1,000 feet had been done. All ore taken or stoped out below the main level, and all ores then on the dumps, were to be milled, concentrated, or leached on the grounds, \$12 per ton being allowed to Ferguson for such treatment. On all ores, if any should be extracted, better adapted to be shipped directly to a smelter, and upon all concentrates, a further allowance to the extent of the shipping and smelting charges was to be made. Ferguson agreed to ship the products "and after the deduction of the said shipping and smelter charges, to deposit in trust in the Arizona National Bank, Tucson, Arizona, the net proceeds therefrom, the same to remain in trust in said bank until the expiration of this agreement, which shall be upon the completion of the aforesaid 1,000 feet of work, or until such time" as Ferguson should pay Powers \$450,000 and deliver to him one quarter of the full-paid stock of a company that Ferguson agreed to form for

working the mines, the moneys deposited in trust thereupon to be Ferguson's. The agreement was to be void if Ferguson did not begin and prosecute the work in the manner and at the rate agreed upon, and in that event all permanent improvements were to belong to Powers.

By a subsequent modification of April 15, 1904, it was agreed that the money deposited [177] in the Arizona National Bank should at once belong to and be at the disposal of Powers, and be credited upon the \$450,000, the other party being released from further liability upon the amounts. On the same date deeds from Powers to Ferguson, and from Ferguson and the London & Glasgow Development Company, his assignee, to the World's Fair Mining Company, were placed in escrow by Powers and Ferguson in the Arizona National Bank, with instructions that upon demand by Powers in writing the bank should appoint a person to ascertain whether there had been a breach of agreement on the other side, and if he should certify other breaches or a failure to deposit the returns from ores, less the allowances, for more than fifteen days after the receipt of the returns, then Powers's deed was to be given back and the other deed destroyed. There were also provisions that, in case of performance, the bank should deliver the deeds. Before April 15, Ferguson and his assignee had been in possession and at work. Shortly after that date the World's Fair Mining Company went on with the business. On June 6, 1904, it received several thousand dollars proceeds from ores, and deposited them in the First National Bank of Nogales, to its own account. The money not having been deposited in the Arizona National Bank, and Powers being dissatisfied with the conduct of the plaintiff's predecessors, who also seem to have failed to deposit as agreed, on June 11 he brought suit and garnished the Nogales account. The company kept on at work, but on July 25 Powers took forcible possession of the mines. Subsequently this action was brought.

At the trial the plaintiff offered in evidence the record of the attachment suit, but the court excluded it and directed a verdict for the defendant on the ground that the deposit in the Arizona National Bank was a condition concurrent with or precedent to the obligation of Powers to go on with the contract, and that the declaration [178] did not disclose an excuse for the plaintiff's breach; that it did not purport to admit a failure or to allege that such failure was due to Powers. The supreme court of the territory took the same view and affirmed the judgment, as the plaintiff,

on its attention being called to the matter at the trial, had not seen fit to amend.

The exclusion of the evidence and the direction to the jury both turn on the same point, and call for an analysis of the pleadings so far as material. The declaration states the contracts, assignments, and escrow, and the other facts that we have mentioned; that Powers brought the suit with the intent to break and abrogate the contract; that therein he alleged a debt of the London & Glasgow Development Company for \$6,617, and one of the present plaintiff for \$8,000; that by his garnishment and an injunction that he obtained for a time he sought to prevent the plaintiff from carrying out its contract, and that after the injunction was dissolved Powers proceeded with the litigation, threatening to attach any other funds brought into the territory, and "continued to harass, impede, and defeat the efforts of the plaintiff to carry out the terms of its said contracts." The plaintiff relies upon the foregoing allegations, and especially the word "defeat," as showing that Powers prevented its performance by his acts. But the declaration goes on that these acts made the plaintiff fear that if it brought any more money into the territory, that also would be attached; that they crippled and impeded it; and that "when plaintiff had finally succeeded in overcoming the conditions" thus occasioned, Powers took possession of the mine.

The declaration admits, therefore, that the acts of Powers were not sufficient to prevent the plaintiff from keeping its undertaking. It implies, also, that the plaintiff had other money out of the territory, and in no way shows that it could not have made the required deposit in the Arizona Bank. The garnishment of the sum in the *Nogales Bank did not prevent putting [179] other money into the Arizona Bank if the World's Fair Company did not see fit to release the attachment, and if the deposit had been made in time and to the right amount, the source from which it came would not have mattered. The deposit never was made, and therefore it is unnecessary to consider whether there had not been a breach by the failure to deposit at once before Powers attached. The plaintiff argues from the escrow that it had fifteen days; but as it also contends for other purposes that the escrow did not modify the contract, the argument is weakened. But it is enough that on the record the plaintiff discloses an unexcused breach. There is nothing in the answer to better the case thus made. We agree with the courts below that the depositing in the Arizona Bank was a condition concurrent with the obligation of Powers to allow the plaintiff to continue in

possession, and precedent to Powers's obligation to convey.

The escrow instructions treat making the deposits as a condition to the plaintiff's rights. The plaintiff's argument that the instructions do not modify the contract is only effective to exclude the introduction of an allowance of fifteen days for making the deposit, as the instructions are not needed to make the meaning of the contract clear. For even if the express condition of avoidance for failure to prosecute the work "in the manner and at the rate agreed upon" does not certainly extend to this, it is not to be supposed that the plaintiff was to be allowed to go on converting the proceeds of the mine into money, and at the same time appropriate the whole, instead of turning the net amount over to Powers.

Another matter might, perhaps, have caused a difficulty with different pleadings. It is suggested that the previous suit of Powers against the World's Fair Mining Company was a suit for the proceeds of ore that should have been deposited. It might be argued that Powers had no right to 180] *that money unless the contract was to be carried through; that he might have declined to go further, and have sued the company for the breach (*Anvil Min. Co. v. Humble*, 153 U. S. 540, 552, 38 L. ed. 814, 818, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98), but that he could not claim part of the purchase price, as such, unless he was content to go on, and thus, that Powers had elected against the termination of the contract before he attempted it. But no such election is pleaded, and not enough appears to show that if it had been, it could have been proved. The precise nature of the former suit does not appear, nor whether it had been proceeded with far enough to conclude Powers's right of choice. Moreover, if Powers terminated the contract, he would not affirm it by suing for proceeds of ore belonging to him in that event. No error appears in the judgment below, and it is affirmed.

Judgment affirmed.

CHARLES SWANSON, Plff. in Err.,
v.

JOHN T. SEARS and Nancy M. Kettler.

(See S. C. Reporter's ed. 180-182.)

Mines — conflicting claims — relocation.

An attempted location of a mining claim, based upon a discovery within a then valid

and subsisting claim, is absolutely void for the purpose of founding an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work.

[For other cases, see *Mines*, 58-64, in *Digest Sup. Ct.* 1908.]

[No. 217.]

Argued March 15, 1912. Decided April 1 1912.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court of Blaine County, in that state, in favor of defendant in a suit over the right of possession of a mining claim. Affirmed.

See same case below, 17 Idaho, 321, 105 Pac. 1059; on rehearing, 17 Idaho, 339, 105 Pac. 1065.

The facts are stated in the opinion.

Mr. John M. Zane argued the cause and filed a brief for plaintiff in error:

A location requires three things: 1, discovery of the vein; 2, proper location notice; 3, marking upon the ground. A claim is not complete until discovery, but the order in which the acts are performed is immaterial, provided the three things concur in the claim before it is insisted upon as a mining claim duly located.

Creede & C. C. Min. & Mill Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266.

There was no objection to a junior locator laying the lines of his claim across the surface of a senior claim, provided his entry was peaceable, and upon his doing so he obtained all of the vein that his marked claim gave him, except what was taken by the senior claim, and if that should cease to exist, the junior claim would get all that the senior claim theretofore had.

Del Monte Min. & Mill Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

This conclusion that the conflict inures to the junior claim upon forfeiture of the senior claim also results from a consideration of the statute as to adverse claim and protest suit; for if the owner of the senior claim waives his rights, or fails to set them up, or fails to prosecute an adverse claim, the conflict area is patented to the junior locator in his claim.

Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; *Gwil-*

NOTE.—On location of mining claim—see notes to *Dwinnell v. Dyer*, 7 L.R.A. (N.S.) 763; *Last Chance Min. Co. v. Tyler Min. Co.* 39 L. ed.

U. S. 859; and *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 42 L. ed. U. S. 96.

lim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266.

Every evil urged by the courts of Nevada and Utah as resulting from the allowing of the conflict area to inure to the junior claim, upon the forfeiture of the senior claim if there are any such evils, has already been permitted by the rule in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. supra*, and by the constant practice of the Land Department, which allows such inuring.

Mutual Min. & Mill Co. v. Currency Co. 27 Land Dec. 191; *Gowdy v. Kismet Gold Min. Co.* 22 Land Dec. 624; *American Consol. Min. & Mill. Co. v. DeWitt*, 26 Land Dec. 580; *Burnside v. O'Connor*, 30 Land Dec. 67.

The fact that the conflict area contains the discovery of the senior claim is immaterial.

Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; *Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059.

If the junior locator, after locating his claim, had made another discovery outside the conflict area, his whole claim would have become good without relocation, even in Utah, upon the forfeiture of the senior claim.

Silver City Gold & S. Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11, 20 Mor. Min. Rep. 55; *Bingham Amalgamated Copper Co. v. Ute Copper Co.* 181 Fed. 748; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482.

If the relocation of the senior claim is eliminated from the discussion, there is no question but that the junior claim, upon the forfeiture of the senior claim, is a valid claim against the United States, and must be therefore against its grantee.

Costigan, Min. Law, 153, note, 25, 160, note, 51; *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266.

Similarly, if the relocation is eliminated from the discussion, even if the junior claim had no discovery at all, it would have become good upon a discovery within its limits without any relocation for everything except the area conflicting with the older claim, and upon that claim being forfeited, the junior claim would have had its whole surface. So much is admitted by all the authorities.

The decision in *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep.

716, was correct when it decided that the relocater of a claim could not show, as against a junior claim, that his conflict area with an older claim was itself in a still older claim when the location was made, but which afterwards became forfeited. That case agrees with all the analogies of the mining law; it does not create, but avoids, an irreconcilable conflict with *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. supra*; and with *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. supra*, and the Land Office practice; it is not contrary to *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510.

It agrees with the rule that if the owner of the older claim had drawn in his line so as not to conflict with the junior claim, that claim would have at once become good without relocation, even if the discovery was within the conflict area.

Tonopah & S. L. Min. Co. v. Tonopah Min. Co. 125 Fed. 408.

The whole difficulty on the point under consideration results from a misapplication of the language of the court in *Belk v. Meagher, supra*.

The word "relocation" is properly applied to an actual relocation where a junior locator enters to appropriate the work, the boundaries, the marking, and the discovery of a prior locator. Such an entry must be wrongful and unlawful, and cannot be innocent when such senior claim is still subsisting. In such case it is proper to hold that a relocation is void unless the senior claim, which is being relocated, has passed away. Such is the situation described in *Belk v. Meagher, supra*, and *Brown v. Gurney*, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509.

But the word "relocation" is improperly applied to a junior location which merely conflicts with a senior location, but is made upon a different discovery, different location, and different markings. The latter kind of double location for a part of a claim often arises and is properly and laudably made as in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. supra*.

In *Farrell v. Lockhart*, 210 U. S. 142, 52 L. ed. 994, 16 L.R.A.(N.S.) 162, 28 Sup. Ct. Rep. 681, guarded language is used, which simply qualifies *Lavagnino v. Uhlig*, so that it will not apply to a relocation pure and simple; the qualification is not intended to render doubtful its application to a mere conflict in locations, where the junior locator was not attempting to appropriate the senior locator's discovery, location boundaries, and work.

Brown v. Gurney, supra, does not con-

tradict the rule which we contend for (1) because it was a relocation pure and simple, and therefore belongs to the class of *Belk v. Meagher*, and (2) the ground was *sub judice*, and motives of policy would require it for the time being to be nonlocatable.

All the evils foretold from the rule in *Lavagnino v. Uhlig* are wholly fanciful.

Costigan, "The Doctrine of Farrell v. Lockhart," 11 Columbia L. Rev. 733, 738; Costigan, Min. Law, 313, note, 60.

The second question, as to the relocation by defendant in error Kettler of her own claim being void as an evasion of the statutory labor statute, is answered by the authorities to the effect that such a relocation is void.

1 Lindley, Mines, 2d ed. § 405; Shamel, Min. Law, 128, 129; Morrison, Min. Rights, 13th ed. 124, 125; Costigan, Min. Law, 327-330.

Mr. Frank Reeves argued the cause and filed a brief for defendants in error:

When plaintiff posted his notice and made his discovery for Independence No. 2, January 3, 1889, on ground that was then embraced within a valid and subsisting mining claim belonging to and in possession of another, the attempted location was absolutely void, not merely voidable. It conferred no rights, either present or prospective. It was void not only as against the owner of the claim upon which such attempted location was made, but as against the whole world.

Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; 1 Lindley, Mines, 1897 ed. §§ 363-367; Barringer & A. Mines & Mining, p. 306; 1 Snyder, Mines, § 572; Martin, Min. Law & Land Office Proc. §§ 197-282; Costigan, Min. Law, 151; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370; *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 226, 48 L. ed. 949, 24 Sup. Ct. Rep. 632; *Brown v. Gurney*, 201 U. S. 182, 50 L. ed. 717, 26 Sup. Ct. Rep. 509; *Farrell v. Lockhart*, 210 U. S. 142, 52 L. ed. 994, 16 L.R.A.(N.S.) 162, 28 Sup. Ct. Rep. 681; *Book v. Justice Min. Co.* 58 Fed. 128, 17 Mor. Min. Rep. 617; *Oscamp v. Crystal River Min. Co.* 7 C. C. A. 233, 19 U. S. App. 18, 58 Fed. 295, 17 Mor. Min. Rep. 651; *Perigo v. Erwin*, 85 Fed. 904, 19 Mor. Min. Rep. 269; *McCulloch v. Murphy*, 125 Fed. 153; *Zerres v. Vanina*, 134 Fed. 614; *Malone v. Jackson*, 70 C. C. A. 216, 137 Fed. 878; *Rose v. Richmond Min. Co.* 17 Nev. 25, 27 Pac. 1110; *John-*
56 L. ed.

son v. Young, 18 Colo. 625, 34 Pac. 173; *Jordan v. Duke*, 6 Ariz. 55, 53 Pac. 197; *Conn v. Oberto*, 32 Colo. 313, 76 Pac. 369; *Shattuck v. Costello*, 8 Ariz. 22, 68 Pac. 529, 22 Mor. Min. Rep. 136; *Peoria & C. Mill. & Min. Co. v. Turner*, 20 Colo. App. 474, 79 Pac. 915; *Anderson v. Caughey*, 3 Cal. App. 22, 84 Pac. 223; *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054; *Lockhart v. Farrell*, 31 Utah, 155, 86 Pac. 1077; *Nash v. McNamara*, 30 Nev. 114, 16 L.R.A. (N.S.) 168, 133 Am. St. Rep. 694, 93 Pac. 405; *Moorhead v. Erie Min. & Mill. Co.* 43 Colo. 408, 96 Pac. 253; *Lozar v. Neill*, 37 Mont. 287, 96 Pac. 343; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93, 15 Mor. Min. Rep. 492; *Souter v. Maguire*, 78 Cal. 545, 21 Pac. 183; *Quigley v. Gillett*, 101 Cal. 469, 35 Pac. 1040, 18 Mor. Min. Rep. 68; *Wilson v. Freeman*, 68 L.R.A. 836, note; *Montagne v. Labay*, 2 Alaska, 575.

The above authorities seem to hold the attempted location would be void (as to overlapping portion) even though the location notice and discovery were not posted and made on any portion of a valid and subsisting claim, but merely included a portion thereof.

The following authorities deal with cases where the discovery was made within a valid and subsisting mining claim, and hold any attempted location based on such discovery to be absolutely void:

1 Lindley, Mines, §§ 337-339; Martin, Min. Law, § 282; Barringer & A. Mines & Mining, pp. 216-222; Morrison, Min. Rights, 36; Costigan, Min. Law, 152; 27 Cyc. 557; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608; *Crown Point Min. Co. v. Buck*, 38 C. C. A. 278, 97 Fed. 465; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064; *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054; *Sierra Blanca Min. & Reduction Co. v. Winchell*, 35 Colo. 13, 83 Pac. 628; *Anderson v. Caughey*, 3 Cal. App. 22, 84 Pac. 223; *Hoban v. Boyer*, 37 Colo. 185, 85 Pac. 837; *Lockhart v. Farrell*, 31 Utah, 155, 86 Pac. 1077; *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 585, 66 Pac. 863, 21 Mor. Min. Rep. 678; *Russell v. Dufresne*, 1 Alaska, 486; *Atkins v. Hendree*, 1 Idaho, 95, 2 Mor. Min. Rep. 328.

Abandonment by senior locator of area conflicting with junior locator will not inure to benefit of the latter.

Lindley, Mines, §§ 363-396; *Belk v. Meagher*, 104 U. S. 279-285, 26 L. ed. 735-738, 1 Mor. Min. Rep. 510; *Oscamp v. Crystal River Min. Co.* 7 C. C. A. 233, 19 U. S. App. 18, 58 Fed. 293, 17 Mor. Min. Rep.

651; *Pralus v. Pacific Gold & S. Min. Co.* 35 Cal. 35, 12 Mor. Min. Rep. 478.

A party cannot make a valid relocation of lands legally possessed by another until the owner's rights have been abandoned, forfeited, or otherwise ended.

Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413, 16 Mor. Min. Rep. 16.

After the senior's location has been forfeited, the junior should file an amended certificate if he wishes to take in part of an abandoned claim.

Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 22 Mor. Min. Rep. 69; *Moorhead v. Erie Min. & Mill. Co.* 43 Colo. 408, 96 Pac. 253.

A junior locator may, subsequent to the abandonment or forfeiture of the conflict area by the senior, amend his location and include the overlapping surface; but without some act on his part manifesting an intention to make a new appropriation or acquire a new right after the abandonment or forfeiture became effectual, this area would not, by mere gravity, become a part of the junior location.

1 *Lindley, Mines*, 1st ed. §§ 363-396; *Morrison, Min. Rights*, 102; *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173; *Oscamp v. Crystal River Min. Co.* 7 C. C. A. 233, 19 U. S. App. 18, 58 Fed. 293, 17 Mor. Min. Rep. 651.

If the discovery of a junior location is on a valid subsisting claim, or if, for any reason, the senior location was wholly void, an amended certificate would not be sufficient to cure the imperfection or to take in the area in conflict, but a relocation would have to be made.

Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054; *Brown v. Gurney*, 201 U. S. 184, 50 L. ed. 718, 26 Sup. Ct. Rep. 509.

181] *Mr. Justice Holmes delivered the opinion of the court:

The defendant in error Kettler applied for a patent for a mining claim. The plaintiff in error filed an adverse claim under Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, and then brought this complaint to establish his right of possession to the area in dispute. The facts are these: In 1881 the defendant's claim, then called Emma No. 2, was located, running north and south. In 1889 the plaintiff's claim, Independence No. 2, was located, running east and west, its westerly end overlapping the southerly end of Emma No. 2, and the discovery being within the overlapping part. Kettler, who then had Emma No. 2, failed, because of the illness of her daughter, to do the assessment work upon it for 1903, and, supposing that to be the only way to hold the ground, relocated it on January 1, 1904,

as Malta No. 1, since which time she has done the required annual work. The only question is whether, on the failure of the defendant, as stated, for 1903, the plaintiff's location attached, or whether it was wholly void. The state courts gave judgment for the defendant (17 Idaho, 322, 105 Pac. 1059), and the plaintiff brought the case to this court.

The argument for the plaintiff is a vain attempt to reopen what has been established by the decisions. A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482. This doctrine was not qualified in its proper meaning by *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the apex of which was within the second and outside of the first,—rights consistent with all those acquired by the first location. See *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 342, 49 L. ed. 501, 505, 25 Sup. Ct. Rep. 266. The principle of *Belk v. Meagher* was reaffirmed (171 U. S. 78, 79, 43 L. ed. 82, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370), as it was again in *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 226, 227, 48 L. ed. 944, 949, 950, 24 Sup. Ct. Rep. 632, and in *Brown v. Gurney*, 201 U. S. 184, 193, 50 L. ed. 717, 722, 26 Sup. Ct. Rep. 509. It is true that there is reasoning to the contrary in *Lavagnino v. Uhlig*, 198 U. S. 453, 49 L. ed. 1123, 25 Sup. Ct. Rep. 716, but in *Farrell v. Lockhart*, 210 U. S. 142, 146, 147, 52 L. ed. 994, 996, 997, 16 L.R.A.(N.S.) 162, 28 Sup. Ct. Rep. 681, that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinctions attempted by the plaintiff between location and relocation, voidable and void claims, etc., as the very foundation of his right, the offer and permission of the United States under Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, was wanting when he did the acts intended to erect it. His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good.

There was some attempt before us to recede from the concession made below, that the defendant had a right to relocate under Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p.

1426. We do not see how it could help the plaintiff if the proposition were incorrect, or any sufficient reason for listening to the argument in this case.

Judgment affirmed.

183]*IN THE MATTER OF THE PETITION OF H. H. LOVING, Trustee.

(See S. C. Reporter's ed. 183-188.)

Bankruptcy — review — revisory proceedings.

An order establishing as a lien against the bankrupt estate a claim, the validity of which as a general claim the trustee does not contest, is not reviewable by a circuit court of appeals, in the exercise of its power under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 24b, to superintend and revise in matter of law the proceedings of inferior courts of bankruptcy, since this revisory proceeding is not intended as a substitute for the appeal which would lie under § 25a, giving appellate jurisdiction to the circuit courts of appeals in bankruptcy proceedings.

[For other cases, see Bankruptcy, XIII., in Digest Sup. Ct. 1908.]

[No. 216.]

Submitted March 15, 1912. Decided April 1, 1912.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, presenting the question as to the right of that court to review by revisory petition an order establishing a claim as a lien against a bankrupt estate. Answered in the negative.

The facts are stated in the opinion.

Mr. James Denis Mocquot submitted the cause for Loving, trustee.

Mr. W. F. Bradshaw, Jr., submitted the cause for the American-German National Bank.

Mr. Justice Day delivered the opinion of the court:

This case is here upon certificate from the circuit court of appeals for the sixth circuit.

184] *From the statement in the certificate preceding the question asked of this court, it appears that Loving, trustee in bankruptcy of the Starks-Ullman Saddlery Company, filed a petition in the circuit court of appeals to revise in matter of law

an order of the district court adjudging that the American-German National Bank of Paducah, Kentucky, had a lien under the statutes of Kentucky upon the property and effects of the bankrupt, in the sum of \$10,125, and interest. The facts are stated as follows:

"On December 4, 1908, after the Saddlery Company had been adjudged a bankrupt, and the cause had been referred to the referee in bankruptcy, the bank filed before the referee its proof of claim, verified by its cashier, in which it alleged that the bankrupt was indebted to it in the sum of \$11,125, evidenced by two notes, one for \$2,000, dated April 20, 1908, and due four months after date, and the other for \$8,000, dated July 25, 1908, and due two months after date, each of which provided for a reasonable attorneys' fee, and executed by the bankrupt for unmanufactured leather sold to it for use in carrying on its manufacturing business. After setting forth the nature of this indebtedness, the proof of claim concluded as follows: 'Deponent says that . . . by and under the provision of §§ 2487-2490 of the Kentucky statutes, the claimant has a lien upon all the property and effects of the bankrupt involved in its business, and upon all the accessories connected therewith, used in its business, to secure the payment of its said indebtedness; and deponent now asserts its claim and lien upon all such property and effects, to secure the payment of its said debt, including interest upon the notes from maturity thereof, and an attorneys' fee, as provided in said notes, of 10 per cent for the collection thereof by legal process.'

"Wherefore, the affiant prays that the claimant's debt be allowed as a lien claim against the assets of *this bankrupt[185 estate, and for all other proper and equitable relief.'

"The trustee in bankruptcy thereupon filed exceptions to the allowance of this claim in so far as it was made for any sum in excess of \$10,000 at the time of the adjudication of bankruptcy, for various reasons set out in the exceptions, and also further objected and excepted to the allowance of any part of the said claim as a lien in favor of the bank against the estate of the bankrupt, for various reasons set forth in the exceptions. These exceptions of the trustee concluded as follows:

"Wherefore, he prays that said claim be disallowed as a lien against the property of the aforesaid bankrupt, and that it be allowed as a general claim only for the sum of two thousand (\$2,000) dollars, with interest from August 20, 1908, and for eight thousand (\$8,000) dollars, with interest from September 25, 1908.'

NOTE.—On appeal and review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

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The referee, having heard the case upon an agreed statement of facts, ordered that the exceptions of the trustee be overruled, and the claim of the bank was established and allowed as a lien against the estate of the bankrupt. The trustee in bankruptcy thereupon filed his petition for review of the order of the referee in the district court. The district court affirmed the order of the referee, and adjudged the claim to be in the amount found, with a lien for the security thereof, as reported by the referee. More than ten days thereafter, on June 30, 1909, the trustee in bankruptcy filed his petition for the revision of the order of the district court in the circuit court of appeals, his petition reciting:

"That said order was erroneous in matter of law, in that it adjudged a dismissal of your petitioner's petition, and in that it adjudged that the American-German National Bank of Paducah had any lien upon any of the property or effects of the aforesaid bankrupt by virtue of the statutes of 186] the state of Kentucky in such *cases made and provided, or by virtue of any law or contract.

"Wherefore your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by this honorable court of appeals of the United States for the sixth circuit, as provided in § 24b of the bankruptcy law of 1898 [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432] and the rules and practice in such cases provided."

In this certificate it is said:

"In the brief filed in this court in behalf of the trustee, in support of the petition, no question is made as to the allowance of the claim of the bank as a general claim against the bank(rupt), or as to its amount, the sole contention of the trustee on the merits being that the district court was in error in matter of law in adjudging that, under the Kentucky statutes, the claim was secured by a lien upon the property and effects of the bankrupt."

The circuit court of appeals propounds the question whether it has jurisdiction to revise the order of the district court upon the petition for revision filed under § 24b of the bankruptcy act.

The bankruptcy act of 1898, § 24, gives appellate jurisdiction to the circuit court of appeals and to this court of controversies arising in bankruptcy proceedings, and in paragraph b provides:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall

be exercised on due notice and petition by any party aggrieved."

Section 25 provides for appeals and writs of error in bankruptcy proceedings to the circuit court of appeals and to this court. These sections of the bankruptcy act were under consideration in this court in the case of *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008, and it was there held *con-[187] troversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, were appealable to the circuit court of appeals under the court of appeals act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488]; that where a claim alleged to be secured by a lien upon the bankrupt's estate was filed against a bankrupt for allowance, an appeal was given under § 25a to the circuit court of appeals, as from a judgment allowing or rejecting a claim of \$500 or over, and that from any final decision of the circuit court of appeals allowing or rejecting a claim coming within § 25b, a further appeal was given to this court. Under the decision of this court in that case there can be no doubt that the bank in this case instituted a proceeding in bankruptcy, which was appealable under § 25a to the circuit court of appeals. The fact that after the adjudication of the claim the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, made no difference as to the appellate character of the controversy. A bankruptcy proceeding was instituted as to the claim and its alleged lien, as distinguished from a controversy arising in a bankruptcy proceeding, and the appeal was under § 25a to the circuit court of appeals. *Coder v. Arts*, supra.

The question now propounded is: Was the trustee also entitled to a review in the circuit court of appeals, under § 24b, by petition for review? Under that section authority, either interlocutory or final, is given to the circuit court of appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under § 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the circuit court of appeals, and, in certain cases, in *this court. The proceeding[188] under § 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under § 25. *Coder v.*

Arts, supra, p. 233. Under § 24b a question of law only is taken to the circuit court of appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under § 25 a review by petition under § 24b. The object of § 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

In our judgment the rule was well stated in *Re Mueller*, 68 C. C. A. 349, 135 Fed. 711, by Mr. Justice Lurton, then Circuit Judge (p. 715):

"The 'proceedings' reviewable [under § 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under [§] 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under [§] 24a."

We answer the question certified in the negative.

189]. *RACHEL B. BROWN, Plff. in Err.,
v.

THOMAS O. SELFRIDGE.

(See S. C. Reporter's ed. 189-193.)

Evidence — burden of proof — malicious prosecution — malice — probable cause.

1. The burden of proving malice and want of probable cause rests upon the plaintiff in an action for malicious prosecution. [For other cases, see Evidence, II. e, 6, in Digest Sup. Ct. 1908.]

Evidence — malicious prosecution — probable cause — prima facie case.

2. A prima facie showing of want of probable cause for swearing out a search warrant charging that certain property stolen by persons unknown was concealed upon defendant's premises is not made by evidence as to the prosecution and the circumstances under which the unsuccessful search was made and the dismissal of the proceedings, together with testimony tending to show defendant's good reputation for honesty and integrity, and the injury to her health and occupation.

[For other cases, see Evidence, II. n; XII. f, in Digest Sup. Ct. 1908.]

NOTE.—As to when malice may be inferred in an action for malicious prosecution—see note to *Jenkins v. Gilligan*, 9 L.R.A.(N.S.) 1087.
56 L. ed.

Trial — questions of law and fact — want of probable cause.

3. In clear cases the question of want of probable cause for instituting a criminal prosecution is one of law for the court.

[For other cases, see Trial, VI. c, 14, in Digest Sup. Ct. 1908.]

[No. 214.]

Argued March 14, 1912. Decided April 1, 1912.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, directing a judgment in favor of defendant in an action for malicious prosecution. Affirmed.

See same case below, 34 App. D. C. 242.

The facts are stated in the opinion.

Mr. Wilton J. Lambert argued the cause and filed a brief for plaintiff in error:

In the nature of things, a less amount and different class of evidence is required to establish a negative than an affirmative.

Jones, Ev. § 178; *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914.

The question of malice is one exclusively for the jury.

Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116; *Staples v. Johnson*, 25 App. D. C. 159.

Mr. Henry E. Davis argued the cause, and, with Messrs. William A. Gordon and J. Holdsworth Gordon, filed a brief for defendant in error:

Unless both want of probable cause and malice are shown to exist, the case must fall, and the *onus probandi* is upon the plaintiff to show each.

Wheeler v. Nesbitt, 24 How. 544, 549, 550, 16 L. ed. 765, 768, 769; *Stone v. Crocker*, 24 Pick. 83.

The fact that the case was nolle prossed in the police court, while a necessary item of proof in the chain of claim of the plaintiff, as evidence to meet the requirements of the law as to the malicious character of the act of the defendant, has no value.

Stewart v. Sonneborn, 98 U. S. 195, 25 L. ed. 119.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error brought suit in the supreme court of the District of Columbia against the defendant, to recover damages for malicious prosecution. Judgment was entered in favor of the defendant, and upon appeal to the court of appeals of the District of Columbia this judgment was affirmed. 34 App. D. C. 242. The case was

then brought to this court upon proceedings in error.

The facts as to the prosecution are, in substance: That the plaintiff, being the keeper of a boarding house in the city of Washington, on or about the 26th day of December, 1907, and occupying certain premises known as 717 Eighth street northwest, and one Mary Levy, were named as defendants in a proceeding commenced by Selfridge in the police court of the District of Columbia, in which he swore out a search warrant for certain of his property, namely, twelve curtains, of the value of \$300, which, he averred, had, within two hundred days last past, by some person or persons unknown, been stolen, taken, and carried away out of his possession, and which he had probable cause to suspect, and did suspect, were concealed in the premises of plaintiff and Mary Levy, on Eighth street; that, under authority of the search warrant, certain officers, accompanied by the defendant, proceeded to search the premises, but did not find the goods in question, and that, upon return of that fact being made, the proceedings against the plaintiff and Mrs. Levy were nolle and the case thus ended.

At the trial of the case in the supreme court, the plaintiff introduced testimony as to the prosecution and the circumstances under which the search was made, and also testimony tending to show her good reputation for honesty and integrity, and the injury to her health and occupation. At the conclusion of the plaintiff's proof, the court instructed the jury to return a verdict for the defendant, upon the ground that the plaintiff had failed to make a prima facie showing of want of probable cause, and judgment was entered accordingly.

The question involved, therefore, is: Was there sufficient proof of the want of probable cause to carry the case to the jury?

The testimony shows that when the defendant and *officers executing the search warrant visited the house of Miss Brown, the plaintiff, search was made of the premises and also of the trunks of the plaintiff and of Mrs. Levy, who, it seems, was at the time stopping with Miss Brown. As we have said, the officers found nothing.

The charge upon which the search warrant was issued did not accuse either Miss Brown or Mrs. Levy of stealing or wrongfully taking the property from the defendant, but stated that such property was thus appropriated by some person unknown, within two hundred days before the warrant was sworn out, and the belief of the

defendant was alleged that the property was concealed within the premises of the persons named.

There was testimony in the record tending to show that Miss Brown had not taken the property mentioned or other property from the house of the defendant; that she was in his employ for a number of years, and was trusted with monetary transactions, and otherwise treated as worthy of his confidence. The plaintiff testified in her own behalf, and Mrs. Levy was called as a witness in support of her case.

The plaintiff did not show that, with her knowledge or consent, the alleged stolen property was not in her house or upon the premises within the time named in the search warrant. Mrs. Levy, evidently not an unwilling witness, did not testify that she had never taken the goods, or that, so far as she knew, they were never upon the premises of the plaintiff.

It is settled law that, in an action of this kind, the burden of proving malice and the want of probable cause is upon the plaintiff. This has been the recognized law of this court and was distinctly stated in the case of *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765, often cited in cases of this character, where Mr. Justice Clifford, speaking for the court, said (p. 551):

"The plaintiff must show that the defendant acted from *malicious motives[192 in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities, from a very early period to the present time. *Golding v. Crowle*, Sayer, 1; *Farmer v. Darling*, 4 Burr. 1974; 1 Hilliard, Torts, 460.

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell v. MacNamara*, 9 East, 361, 1 Campb. 199, 9 Revised Rep. 578; *Willans v. Taylor*, 6 Bing. 184, 3 Moore & P. 350, 7 L. J. C. P. 250, 31 Revised Rep. 379; *Johnstone v. Sutton*, 1 T. R. 544, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 766; Add. on W. and R. 435; *Turner v. Ambler*, 10 Q. B.

257, 16 L. J. Q. B. N. S. 158, 6 Jur. 346."

While it is true that the want of probable cause is required to be shown by the plaintiff, and the burden of proof is upon her in this respect, such proof must necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. 1 Greenl. Ev. § 78. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise, as are affirmatively within her control, and which she might fairly be expected to be able to produce. As Mr. Justice Clifford put it, in *Wheeler v. Nesbitt*, supra, 193] "the plaintiff must prove this part of the case "affirmatively, by circumstances or otherwise, as he may be able."

It is contended by the learned counsel for the plaintiff in error that Miss Brown produced all the testimony in the case which she might reasonably be expected to control, and it is pertinently asked, What more could she prove? We think an inspection of the record furnishes an answer to the question. With respect to the search warrant, the charge was not that the plaintiff and Mrs. Levy stole or wrongfully took the property of the defendant, but the belief of the defendant was averred that the property had been by someone thus taken, and was concealed in or about the premises of the plaintiff and Mrs. Levy. The plaintiff could readily have shown that, within the time named in the search warrant, so far as she knew, with the means which she had of information, the property in question had never been upon her premises. She could have shown by Mrs. Levy, whom she produced as a witness, that Mrs. Levy did not take the property from the premises of the defendant, and that the property was not upon the premises of Miss Brown at any time, so far as her knowledge and opportunity of knowing extended.

Failing to adduce proof of the facts to which we have called attention, and, in clear cases, the question of probable cause being one of law, for the court, we think that there was no error in taking the case from the jury.

Judgment of the District Court of Appeals is affirmed.

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*INTERSTATE COMMERCE COM-[194
MISSION et al., Appts.,

v.
GOODRICH TRANSIT COMPANY. (No.
879.)

INTERSTATE COMMERCE COMMISSION
et al., Appts.,

v.
GOODRICH TRANSIT COMPANY. (No.
880.)

UNITED STATES et al., Appts.,
v.

WHITE STAR LINE. (No. 881.)

UNITED STATES et al., Appts.,
v.

WHITE STAR LINE. (No. 882.)

(See S. C. Reporter's ed. 194-216.)

Interstate Commerce Commission —
powers — accounting — reports.

1. The Interstate Commerce Commission did not exceed its authority under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), to prescribe a uniform system of bookkeeping and accounting for, and to call for annual reports from, common carriers by water upon the Great Lakes, which, being engaged in the transportation of passengers and property, partly by railroad and partly by water, under a joint arrangement for a continuous carriage or shipment, are, by § 1 of that act, brought within its terms, because such accounting system and reports are not limited to the joint rail and water business, but are required to embrace as well the other business of the carriers, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks.

[For other cases, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On delegation of legislative power to railroad commissions—see note to Railroad Commission v. Central R. Co. 95 C. C. A. 132.

On delegation by legislature of power to regulate carriers—see note to State v. Atlantic Coast Line R. Co. 32 L.R.A. (N.S.) 639.

Commerce — Federal regulation — carriers — accounting — reports.

2. Congress did not exceed its power under the commerce clause by enacting the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, under which common carriers by water upon the Great Lakes, engaged in the transportation of passengers and property partly by water, under a joint arrangement for the continuous carriage or shipment, may be required by the Interstate Commerce Commission to adopt a uniform system of accounting and bookkeeping, and to make annual reports, which shall embrace not only the joint rail and water business, but the other business of the carriers as well, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power — Interstate Commerce Commission.

3. Leaving to the Interstate Commerce Commission the carrying out of details in the exercise of its discretion under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, does not render such section invalid as a delegation of legislative authority.

[For other cases, see Constitutional Law, 153-166, in Digest Sup. Ct. 1908.]

Commerce — Federal regulation — carriers — accounting — reports.

4. Corporations organized under state laws, engaged in interstate carriage, could validly be subjected to regulation and control by the Interstate Commerce Commission, in the exercise of its power, under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping, and to require annual reports.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

[Nos. 879, 880, 881, and 882.]

Argued February 20 and 21, 1912. Decided April 1, 1912.

FOUR APPEALS from the United States Commerce Court to review decrees enjoining in part the enforcement of orders of the Interstate Commerce Commission prescribing a uniform system of accounting and bookkeeping for carriers by water upon the Great Lakes, and calling for annual reports from such carriers. Reversed.

See same case below, 190 Fed. 943.

The facts are stated in the opinion.

Mr. Charles W. Needham argued the cause and filed a brief for the Interstate Commerce Commission:

The provisions of § 20 of the interstate commerce act have a real and substantial

relation to the execution of the powers and the attainment of the purposes of the act to regulate commerce; therefore Congress has power to require statistical reports from, and a uniform system of bookkeeping by, every common carrier subject to the act, and the Interstate Commerce Commission acted within its statutory power in requiring such reports from, and classification of accounts by, such carriers.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 506, 42 L. ed. 255, 17 Sup. Ct. Rep. 896; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 438, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Adair v. United States*, 208 U. S. 178, 52 L. ed. 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618-622, 55 L. ed. 878, 882-884, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 222 U. S. 20, 24, 26, 27, ante, 72-74, 32 Sup. Ct. Rep. 2; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70.

The relation of a carrier to a particular traffic, or to instrumentalities which are under the regulating power of Congress, determines whether such a carrier is subject to the act.

Oyster Police Steamers, 31 Fed. 763; *The Daniel Ball*, 10 Wall. 557-566, 19 L. ed. 999-1002; *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 497, 52 L. ed. 308, 28 Sup. Ct. Rep. 141.

The legislative branch of the government exercises exclusive discretion when adopting any means intended to accomplish the purposes in view in a legislative act.

McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

Congress has not granted to the Commission legislative powers in violation of the fundamental law.

Buttfield v. Stranahan, 192 U. S. 496, 497, 48 L. ed. 535, 536, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*,

224 U. S.

204 U. S. 377, 51 L. ed. 530, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

The constitutional rights of the appellees are not invaded by the publicity given their business.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

The commerce court erred in holding that "a recast of the forms of reports should be made by the Commission, acting in conformity with the views herein expressed," thereby requiring that the reports and classification of accounts should only include business partly by railroad and partly by water.

Southern R. Co. v. United States, 222 U. S. 20, ante, 72, 32 Sup. Ct. Rep. 2.

Assistant to the Attorney General Fowler argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States:

Information concerning the entire business of a carrier subject to the provisions of the act has such a real and substantial relation to interstate commerce as to authorize Congress to require its production before the Commission.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Smith v. Alabama, 124 U. S. 465, 479, 480, 31 L. ed. 508, 512, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Northern Securities Co. v. United States, 193 U. S. 197, 335, 48 L. ed. 679, 699, 24 Sup. Ct. Rep. 436; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; Southern R. Co. v. United States, 222 U. S. 20, 26, ante, 72, 74, 32 Sup. Ct. Rep. 2; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612-618, 55 L. ed. 878-883, 31 Sup. Ct. Rep. 621.

Information concerning the entire business of a carrier subject to the provisions of the act is essential to its proper enforcement, and Congress has the power to require its production at the instance of the Commission.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 465, 470, 472, 38 L. ed. 1047, 1053-1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; M'Culloch v. Maryland, 4 Wheat. 316, 421, 423, 56 L. ed.

4 L. ed. 579, 605; Interstate Commerce Commission v. Baird, 194 U. S. 25, 43, 44, 48 L. ed. 860, 868, 869, 24 Sup. Ct. Rep. 563; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342.

Section 20 of the interstate commerce act is not unconstitutional on the ground that it authorizes unreasonable searches and seizures.

Hale v. Henkel, 201 U. S. 43-77, 50 L. ed. 652-667, 26 Sup. Ct. Rep. 370; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621.

Mr. Ralph M. Shaw argued the cause, and, with Messrs. John Barton Payne, Silas H. Strawn, and Garrard B. Winston, filed a brief for appellees:

The rules laid down by the courts for the interpretation of the act to regulate commerce preclude the interpretation placed upon it by the Commission in the case at bar.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 218, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; Camden Iron Works v. United States, 85 C. C. A. 585, 158 Fed. 561; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; Blake v. National City Bank, 23 Wall. 307, 319, 23 L. ed. 119, 120; Smith v. Townsend, 148 U. S. 490, 494, 37 L. ed. 533, 534, 13 Sup. Ct. Rep. 634.

One engaged in intrastate business, who also engages in interstate business, does not thereby subject all his intrastate business to the regulating power of Congress.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 502, 52 L. ed. 310, 28 Sup. Ct. Rep. 141; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

An act of Congress or the order of an officer of the Federal government, or a subordinate body created by an act of Congress, or a decree of a Federal court, which, under the guise or the pretense of regulating interstate commerce, is so broad in its scope as in fact to regulate or interfere with intrastate commerce, is void.

Under such circumstances, especially

when the act is penal, the court will not introduce words of limitation, and thus by judicial interpretation attempt to make good that which in its essence is void.

Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 247, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 492, 498, 499, 502, 52 L. ed. 306, 309, 310, 28 Sup. Ct. Rep. 141; *United States v. Reese*, 92 U. S. 214, 221, 23 L. ed. 563, 565; *Trade Mark Cases*, 100 U. S. 82, 99, 25 L. ed. 550, 553; *United States v. Ju Toy*, 198 U. S. 253, 262, 263, 49 L. ed. 1040, 1043, 1044, 25 Sup. Ct. Rep. 644.

Section 20 of the act to regulate commerce is void because it is an unlawful delegation of legislative power:

(1) The law gives the Commission discretion to determine whether it will legislate or not.

(2) The law also confers discretionary power upon the Commission to determine what (if any) the legislation shall be.

Marshall, Field & Co. v. Clark, 143 U. S. 649, 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; *Wayman v. Southard*, 10 Wheat. 1, 43, 6 L. ed. 253, 262; *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 418, 53 L. ed. 253, 262, 29 Sup. Ct. Rep. 115; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; *King v. Concordia F. Ins. Co.* 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87.

On this point the cases at bar are not, for several reasons, controlled by either *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480, or *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

1. A conspicuous reason is that, in the cases at bar, Congress did not determine or legislate that there should or ought to be any rules or regulations respecting bookkeeping methods, or any uniformity therein. On the contrary, Congress left it to the Commission in their discretion to determine:

(a) Whether there should be any legislation on the subject at all; and (b) If so, to enact such legislation.

2. It was thus a complete divestiture or delegation of legislative power.

Whether or not a power claimed but not granted is a necessary incident to the

power granted is (where the facts are not conceded) to be determined by the court.

If, under the pretense of exercising a power granted, Congress or a subordinate body goes beyond that which is necessary, then such action on the part of Congress or its subordinate body is void.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Union P. R. Co.* 222 U. S. 541, ante, 308, 32 Sup. Ct. Rep. 108.

Under our dual form of government the Federal government is supreme in the field of interstate commerce, and the state governments are supreme in the field of intrastate commerce.

M'Culloch v. Maryland, 4 Wheat. 412, 4 L. ed. 602; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 498, 52 L. ed. 297, 309, 28 Sup. Ct. Rep. 141; *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 28, 48 L. ed. 328, 24 Sup. Ct. Rep. 202; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 617, 618, 621, 55 L. ed. 878, 882-884, 31 Sup. Ct. Rep. 621.

Section 20 of the act to regulate commerce and the orders of the Commission, both *in re* "Special Accounting Methods," and *in re* "Special Report Series Circular No. 10," are void:

(1) They are not a regulation of the rates on which interstate commerce moves.

(2) They are not a regulation of the roadbed over which interstate commerce moves.

(3) They are not a regulation of the vehicles in which interstate commerce is carried.

(4) They are not a regulation of the employees engaged in handling interstate commerce.

(5) They are not a regulation of interstate commerce itself. On the contrary, they are an interference with the internal affairs of the appellees.

(6) They prohibit the appellees from keeping for their corporate purposes such

books as, in their own judgment, the corporate necessities may require.

(7) They prohibit a common carrier engaged as to any part of its business in interstate commerce from keeping any books or memoranda not prescribed by the Commission with respect to any business which is not under the act to regulate interstate commerce.

McCulloch v. Maryland, 4 Wheat. 412, 4 L. ed. 602; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 498, 52 L. ed. 297, 309, 28 Sup. Ct. Rep. 141; *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 28, 48 L. ed. 328, 24 Sup. Ct. Rep. 202; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 617, 618, 621, 55 L. ed. 878, 882-884, 31 Sup. Ct. Rep. 621.

Congress has no power to make a general inquisitorial excursion or examination into the internal affairs of a corporation organized under the laws of one of the states.

Angell & A. Priv. Corp. § 687; *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 Ann. Cas. 433; *Sinking Fund Cases*, 99 U. S. 720, 25 L. ed. 501; *Northern Securities Co. v. United States*, 193 U. S. 348, 48 L. ed. 704, 24 Sup. Ct. Rep. 436; *Hale v. Henkel*, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; *Re Pacific R. Commission*, 32 Fed. 241; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Wilson v. United States*, 221 U. S. 361, 384, 55 L. ed. 771, 780, 31 Sup. Ct. Rep. 538.

Congress may not inquire into the internal affairs of a state corporation except for certain specific purposes.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677; *Interstate Commerce Commission v. Brimson*, 154 U. S. 478, 38 L. ed. 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 417, 53 L. ed. 253, 262, 29 Sup. Ct. Rep. 115; *Wilson v. United States*, 221 U. S. 361, 384, 55 L. ed. 771, 780, 31 Sup. Ct. Rep. 538.

Mr. Justice Day delivered the opinion of the court:

The appellees in these four cases are corporations organized under state laws, and engaged in the carriage of passengers and freight by water upon the Great Lakes. 56 L. ed.

They filed bills in the United States circuit court for the northern district of Illinois to enjoin the enforcement of certain orders of the Interstate Commerce Commission. The cases were afterwards transferred to the United States commerce court.

The orders of the Commission complained of comprise: First, an order prescribing the method of accounts and *book-[204 keeping as to the operating expenses of the carriers, and a similar order as to bookkeeping concerning the operating revenues of the carriers; and, second, an order requiring a report of the carriers respecting their corporate organization, financial condition, etc.

The government of the United States intervened and filed an answer in each case, but the cases were practically heard on demurrer, as the record discloses, and therefore the allegations of the bills, well pleaded, must be deemed to be true. The bills contain many conclusions and argumentative deductions as to the effect of the orders upon the carriers, which, under the rules of pleading, are not considered as admitted. *United States v. Ames*, 99 U. S. 35, 45, 25 L. ed. 295, 300.

The pertinent averments necessary to a decision of the cases, as we view them, show that the carriers are corporations organized under the laws of certain states of the Union; that they carry passengers and freight upon the Great Lakes between ports in different states, which they designate as their port-to-port interstate business; that they carry passengers and freight wholly within a state, which they designate as their port-to-port intrastate business; and that they also carry passengers and property in interstate commerce under joint tariffs in connection with certain railroad carriers of the United States with whom they have agreed upon joint through rates, which they designate as their joint rail and water business. As to the Goodrich Transit Company, it is averred that 80 per cent of its gross revenue is derived from its port-to-port interstate and intrastate business, and less than 20 per cent of its gross earnings is derived from its joint rail and water business. A like averment is made with respect to the White Star Line, except that it is said that in its business the revenue derived from joint rail and water traffic, as aforesaid, is less than 1 per cent of its entire revenue.

*It is averred that the bookkeeping[205 and accounting methods required by the orders of the Commission differ from those prescribed and now kept by the companies; that the orders of the Commission make no difference between the intrastate port-

to-port business and the interstate port-to-port business and the joint rail and water business; and that the orders entered by the Commission prohibit the companies from keeping any accounts, records, or memoranda other than those prescribed by the Commission in such orders.

In the White Star Line cases the bills contain an additional averment that that company operates two amusement parks, one at Tashmoo and one at Sugar island, both in the state of Michigan, and in connection therewith owns, operates, and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bath houses, etc., and collects admission fees from people entering the parks. It complains that its business concerning said parks is included within the accounting methods prescribed by the Commission.

As to the report called for by the order of the Commission, it is averred that such report was not required because of any complaint filed against the corporations for the violation of the act to regulate commerce; that there is no statute requiring the report to be kept secret, and, if it is made public, the affairs of the companies will be thrown open to inspection, to their injury; that a large number of the inquiries contained in the order of the Commission relate to details of the companies' business solely intrastate, or that which is from port to port; and that the report is not limited to the joint rail and water business of complainants.

There are also averments that the orders were unconstitutional, because the Commission, in undertaking to put in force such requirements, exceeded its authority in so far as the power was asserted to examine **206** into the affairs *of the companies not relating to their joint rail and water business, and having reference, as it was alleged, to their domestic business, or interstate business not within the terms of the act.

The commerce court enjoined the execution of the orders (190 Fed. 943), declaring that:

"It [the Commission] acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one state to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business; and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as

the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful."

The court held that the orders concerning the report and auditing would be lawful respecting the interstate business done by the carriers in connection with railroads, as provided by the act, but, in requiring a report concerning the other business of the companies, and prescribing bookkeeping methods therefor, the Commission exceeded its authority, and the court granted the prayers of the petitioners for the orders of injunction, ordered a recast of the form of report in conformity with its opinion, and remanded the cases to the Commission for that purpose.

Whether this order of the commerce court was correct *or not primarily depends[**207** upon the construction of the interstate commerce act and the extent to which, in the respect involved in these cases, the carriers herein interested are within the terms of the law. The terms of the act of Congress, as amended June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), and in force at the time when these orders were made, are plain and simple, and, we think, not difficult to comprehend. They are: "The provisions of this act [to regulate commerce] shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia to any other state or territory of the United States, etc." The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one state was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic. The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were

common carriers engaged in the transportation of passengers and property partly by railroad and partly by water, under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water, under a common arrangement for a continuous carriage or shipment, are as specifically within the terms of the act as any other carrier 208] named therein. *It may be that certain provisions of the act are in their nature applicable to some carriers and not to others; but we are only concerned to inquire in this case whether the carriers thus broadly brought within the terms of the act by § 1 thereof are subject to the provisions of the statute by the authority of which the Commission undertook to require the system of accounting and the report as to the organization and business of the corporations, and whether, if within the terms of the act, the orders are constitutionally made.

Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission, the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism, and other practices denounced in the various sections of the act. They are undoubtedly subject to the provisions of § 12 of the act, which permits the Commission to inquire into the management of the business of all common carriers subject to the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers the full and complete information necessary to enable the Commission to carry out the objects for which it was created. The joint rates established are subject to revision by the Commission under § 15 of the act. We must remember, also, in this connection, that, under § 21 of the act, the Commission is required to make a report each year to the Congress, containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

As to annual reports, the power conferred 209] in § 20 of the *act extends to all com-
56 L. ed.

mon carriers subject to the provisions of the act. The Commission is vested with authority to prescribe the manner in which such reports shall be made, and to require specific answers to all questions as to which the Commission may need information. The report required in these cases was declared to be needed to enable the Commission to procure full information of the scope and character of the business of carriers by water within the jurisdiction of the Commission, and of the extent of their operations, such as would enable the Commission to determine the form for annual report which would best give the information required by the Commission, and at the same time conform as nearly as may be to the accounting systems of carriers by water.

The form of report adopted by the Commission required a showing as to the corporate organization of each carrier by water subject to the act, the companies owned by it, and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and securities owned by it, together with all special funds and current assets and liabilities, as well as its funded indebtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind, or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows: The routes of the carrier and their mileage; a general description of the equipment owned, leased, or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported, *showing also whether originating on[210 the carrier's line or received from a connecting line; and a general description of any separate business carried on by the carrier. But such report is no broader than the annual report of such carriers, as prescribed by the act, for § 20 provides that:

"Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon;

the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same, as the Commission may require."

As to the accounts, the statute permits the Commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The Commission may, the statute further provides, in its discretion, prescribe the forms of all accounts, records, and memoranda to be kept by the common carriers, to which accounts the Commission shall have access. And the act makes it unlawful for the carriers to keep any accounts, records, or memoranda other than those prescribed by the Commission.

211] *We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders, and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature, and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness, and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see,

and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in its accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way, and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission, and has been the subject of great consideration. It caused the employment *of those **[212]** skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them.

There is nothing in the case of *Harri-man v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115, contrary to the conclusion herein announced. That case dealt with the authority of the Commission to compel the attendance and testimony of witnesses in cases where complaints had not been made. The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court. 211 U. S. pp. 421, 422.

The necessity of such accounts is emphasized under the English practice, and accounts and reports are required in great detail under the laws of that country.

In the report of the committee appointed by the board of trade under the railway regulation acts, to make inquiries with respect to the form and scope of the accounts and statistical returns rendered by railway companies, the omission of the former law to make provision for any prescribed and uniform system of accounts is pointed out, and it is said:

"It is obviously of the first importance, from the point of view of comparison between the different railway companies, that there should be uniformity of practice among all the companies with regard to the keeping of accounts and statistics; that is to say, that every heading, both in the accounts and in the statistics, should bear precisely the same meaning in the case of

all railways,—should, in effect, be standardized.”

The railway companies (accounts and returns) act 1911, 1 and 2 Geo. V. cap. 34, the act to amend the laws with respect to accounts and returns of railway companies, contains requirements as to financial 213] *accounts and statistical returns which call for a uniform system of accounting, showing the organization and workings of the companies in great detail, together with statistical returns as to their business, subdivided so as to include all the operations of the companies as carriers, and in all other enterprises in which they may engage.

The learned commerce court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us, with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense,—at least, it would seem impracticable to separate it into its items, so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress; and, conceding for this purpose that the regulating power of the Commission is limited, so far as rates are concerned, to joint rates of the character named in § 1, it is still essential 214] that, to *enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it should be informed as to the matters contained in the report. Congress, in § 20, has authorized the Commission to inquire as to the business which

the carrier does, and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power.

It is contended that this construction of the statute enables the Commission not only to regulate the interstate business, but as well the wholly intrastate business of the complaining corporations, and is, therefore, beyond the power of Congress. Such cases are cited and relied upon by complainants as the Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, and *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153. In those cases acts of Congress and orders of executive departments were held void because they undertook to regulate matters wholly intrastate, as distinguished from those matters of an interstate character and within the legislative power of Congress. And what we have already said as to the character of these orders is enough to indicate that in our opinion they are not regulations of intrastate commerce.

Furthermore, it is said that such construction of § 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in *this court, and needs no amplification—[215] tion here. *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

In § 20, Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so

conferred. This, we think, is not a delegation of legislative authority.

And it is argued that Congress has no visitatorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court from *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, to its most recent deliverances. In *Hale v. Henkel*, 201 U. S. 43, 75, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370, while general visitatorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the general government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

As to one of the corporations, it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the *business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts, and whether charges of expense are made against one part of a business which ought to be made against another.

Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part, at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority.

We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under § 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law. It therefore follows that the commerce court erred in granting the injunctions and in remanding the cases to the

Commission with instructions to recast its orders.

Judgments reversed.

Dissenting, Mr. Justice Lurton and Mr. Justice Lamar.

*CHARLES N. HASKELL, Charles West, John J. Shea, et al., Appts.,
v.

KANSAS NATURAL GAS COMPANY,
Marnet Mining Company, and A. W. Lewis.

(See S. C. Reporter's ed. 217-224.)

Appeal — judgment of affirmance — modification of decree below.

1. The affirmance by the Federal Supreme Court of a decree enjoining the enforcement of certain state legislation, upon the ground that its main and controlling purpose was to prohibit the transportation of natural gas in the lawful channels of interstate commerce, does not require a modification of such decree so as to except from its operation certain provisions of such legislation which, while they might be valid as statutory regulations as to individuals and domestic corporations engaged in transporting gas wholly within the state, are not by their very terms made applicable to interstate commerce.

[For other cases, see Appeal and Error, IX. 1; IX. j, in Digest Sup. Ct. 1908.]

Injunction — against state legislation — construction of decree.

2. A decree of a Federal circuit court, enjoining the enforcement of certain state legislation which undertook to prohibit the transportation of natural gas outside the state, or any interference with complainants' pipe lines by reason of any other state law or statute, should not be construed as preventing the enforcement of legitimate state legislation passed in the exercise of the police power, and not conflicting with rights protected by the Federal Constitution, where such a broad construction of the decree would disregard the issues made by the pleadings, and the fact that such decree was affirmed in the Federal Supreme Court on the grounds that complainants had the right, in the conduct of interstate commerce, to take natural gas out of the state, that a state could not prohibit the transportation of such product beyond its borders, and that the main purpose and effect of the legislation in question were to prohibit the exercise of lawful rights secured by the Federal Constitution. [For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 914.]

NOTE.—On the right of a state to forbid the exportation of natural resources—see note to *West v. Kansas Natural Gas Co.* 35 L.R.A. (N.S.) 1193.

Submitted February 23, 1912. Decided
April 1, 1912.

APPEAL from the Circuit Court of the United States for the Eastern District of Oklahoma to review an order refusing to modify a decree enjoining the enforcement of state legislation which undertook to prohibit the transportation of natural gas outside the state, which decree had been affirmed in the Federal Supreme Court on a prior appeal. Affirmed.

The facts are stated in the opinion.

Mr. Charles West, Attorney General of Oklahoma, submitted the cause for appellants.

Messrs. E. L. Scarritt, John J. Jones, John G. Johnson, and D. T. Watson submitted the cause for appellees.

Mr. Justice Day delivered the opinion of the court:

The appellees in this case brought suit in the circuit court of the United States for the eastern district of Oklahoma against the appellants, who were the governor, attorney general, deputy attorney general, county attorney and deputy county attorney of Washington county, corporation commissioners and mine inspector, of the state of Oklahoma, to enjoin the enforcement of certain statutes of the state of Oklahoma, which undertook to prevent the complainants, now appellees, from transporting natural gas in interstate commerce beyond the borders of the state of Oklahoma. Upon final hearing in that court such statutes were held void, as against the Constitution of the United States, and the enforcement thereof was enjoined. The case came to this court on appeal, and was argued and decided at the October Term, 1910, being reported in 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564.

On May 29, 1911, the last day of the term, a motion was made in this court by the attorney general of Oklahoma to modify the affirmance of the decree in the court below. The parts objected to are 219]found in the margin.† *This motion was overruled, with leave to either party to apply to the circuit court from whence the

case came for such modification of the decree as would make it conform to the opinion of this court. Thereafter, the present proceeding was instituted by the attorney general's filing a motion in the circuit court of the United States for the eastern district of Oklahoma for the modification of such decree. The former complainants, defendants in this proceeding, appeared and filed a motion in the nature of a demurrer, and also filed an answer in the case. The circuit court, treating the pleadings of the defendants as in the nature of a demurrer, without hearing evidence in support of or against the granting of the motion, and without considering the affidavits or exhibits filed, overruled *the same, and ordered [220 the mandate of this court, affirming the former decree, to be spread upon the records. Thereupon this appeal was prosecuted.

In order to properly consider this motion, it is necessary to notice the holding in the case in 221 U. S. supra. The original proceeding was brought to enjoin the officers of the state of Oklahoma from preventing the carriage in interstate commerce, beyond the lines of the state, of natural gas which had been severed from the earth by the owners of such gas, and particularly to enjoin the enforcement of a certain statute of the state, passed in 1907, known as chapter 67 of the Session Laws of Oklahoma, 1907-08, which is inserted in full in the margin of the report of the case in 221 U. S., at page 239. This court held that natural gas after severance is a commodity which might be dealt in like other products of the earth, as coal and other minerals, and is a legitimate subject of interstate commerce; and that no state, by such laws as were involved in the case, can prohibit its transportation in interstate commerce beyond the lines of that state. The court held, after considering and construing the provisions of the act of 1907, that it was, upon its face, a law undertaking to prohibit the transmission or transportation in interstate commerce of natural gas to points beyond the state; that it was an unconstitutional interference with the rights of the complainants, who were legitimately engaged in that commerce, and that therefore the act was null and void.

†3. The court doth find the issues and equities herein in favor of the plaintiff, and that the plaintiff is entitled to the relief prayed for in the bill of complaint herein; and doth find, adjudge, and decree that chapter 67 of the Session Laws of the state of Oklahoma of 1907-08, passed and enacted by the legislature of said state of Oklahoma, and approved by the governor of said state on the 21st day of December, 1907, and referred to in plaintiff's bill of 56 L. ed.

complaint herein, is unreasonable, unconstitutional, invalid, and void, and of no force or effect whatever.

4. The temporary injunction heretofore ordered and entered herein is hereby made permanent and perpetual, and the defendants and each and every of them, their representatives, agents, servants, attorneys, workmen, and employees, and all other persons whomsoever, advised, inspired, influenced, incited, or prompted by them, or

In the course of the opinion the court recognized the right of the state by proper legislation to regulate the removal from the earth of natural gas by the owner thereof, so as to prevent its undue waste, but maintained the decree of the court below, declaring this particular act unconstitutional, upon the grounds of its prohibitory character in attempting to prevent the transmission from the state through the pipe 221]lines of the complainants of a *legitimate subject of interstate commerce. As to the provisions of the statute concerning the right to use the highways of the state, the court declined to discuss the extent of the rights of public or private ownership therein in the state of Oklahoma, but placed the decision in this respect upon the manifest attempt to discriminate against the appellees, engaged in interstate commerce, in giving to domestic corporations engaged in intrastate transportation of natural gas the right to the use of the highways—even longitudinally—while denying to corporations transporting the gas in interstate commerce the right to pass under or over them, and this in the face of the admission in the pleadings that the greater use given to domestic corporations is no obstruction to the highways.

The particular parts of the Oklahoma act of 1907 which it is now contended should be excepted from the operation of the decree are comprised in §§ 5, 6, and 7 of chapter 67, which read as follows:

"Sec. 5. The laying, constructing, building, and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across, or through the highways, roads, bridges, streets, or alleys in this state, or of any county, city, municipal corporation, of any other private or public premises within this state, is hereby declared an additional burden upon said highway, bridge, road, street, or alley, and any other private or public premises, may only be done when the right is granted by ex-

press charter from the state, and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

"Sec. 6. All pipe lines for the transportation or transmission of natural gas in this state shall be laid under the direction and inspection of proper persons skilled in such business, to be designated by the chief mining inspector for such duty, and the expenses of such inspection and *su-[222]pervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

"Sec. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than 300 pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe lines for the transportation or transmission of natural gas, or used on or in any gas well within this state;" and also in the act of March 27, 1909, Compiled Laws of Oklahoma, 1909, article 3, chapter 75, § 11, regulating domestic corporations, which prohibits the use of pumps or other artificial means in the transmission of gas, when used to the injury of other corporations, consumers, and producers, producing or consuming natural gas in the same gas district.

It is contended for the appellants herein that each and all of these sections of the law are constitutionally valid; and can be enforced consistently with the opinion of this court when the case was here upon its merits. Without entering upon a discussion of these sections, it is sufficient to say that in so far as they are part of the statute, the main and controlling purpose of which was to prohibit the transportation of natural gas in the lawful channels of interstate commerce, they were for that reason condemned and held void by the former opinion of this court, affirming the circuit court.

either of them, are hereby forever restrained and enjoined from committing any of the acts complained of by complainant in its, or his, bill of complaint, and from tearing up or destroying, or in any way interfering with, the laying, building, and construction of complainant's pipe lines, or any of the pipe lines referred to in the prayer of complainant's bill of complaint, in, through, or out of the state of Oklahoma, by reason of any of the terms or provisions or contents of chapter 67 of the Session Laws of 1907-1908, passed and enacted by the legislature of the state of Oklahoma, or by reason of any other claimed authority or statute of said state, or common-law right, rule of action, or unwritten law what-

soever; and from in any manner instituting, prosecuting, or conducting any suits, or suing out any writs of process in any of the state courts of the state of Oklahoma against the complainants, or anyone representing it or him, for the purpose of enjoining, restraining, or interfering with either of them in the laying, building, construction, maintenance, or operation of any gas pipe line, either under the authority of said legislative act contained in said chapter 67 of the Session Laws of Oklahoma, 1907-08, above referred to, or under any other law or statute of the state of Oklahoma, or under any common-law right, rule of action, or unwritten law of the state of Oklahoma.

Furthermore, if the laws named (§§ 5, 6, and 7 of the act of 1907 and the act of March 27, 1909) might be valid as statutory regulations, as to individuals and domestic corporations engaged in transporting gas wholly within the state, they are not, by the very terms of these statutes, made applicable to foreign corporations, such as the defendants, engaged in interstate commerce. Such corporations and such commerce are forbidden by the act. We see, therefore, no reason to modify the decree so 223]as to except *from its provisions the sections of the act of 1907 and the act of 1909, and thus apply them to those which the act itself excludes.

It is furthermore objected that that part of the decree which undertakes to enjoin not only the execution of the statute law of Oklahoma, chapter 67, in controversy, but prevents interference with the pipe lines of complainants "by reason of any other claimed authority or statute of said state, or common-law right, rule of action, or unwritten law whatsoever; and from in any manner instituting, prosecuting, or conducting any suits, or suing out any writs of process in any of the state courts of the state of Oklahoma . . . under the authority of said legislative act . . . or under any other law or statute of the state of Oklahoma, or under any common-law right, rule of action, or unwritten law of the state of Oklahoma," is so broad as to prevent the state from enforcing any of its lawful enactments at any time passed or to be passed under authority of the state, or from taking any action whatsoever for protecting the lawful authority of the commonwealth. But the decree must be read in view of the issues made and the relief sought and granted. Looking to the pleadings, and reading the opinion of this court in the case when it was considered upon its merits, and thus construing the decree, we are of opinion that it cannot be given any such broad construction as is intimated by the attorney general, and will not prevent the enforcement of legitimate legislation of the state of Oklahoma, if such is passed in the exercise of its police powers, and not conflicting with rights protected by the Federal Constitution. As we have said, this court in its decision affirmed the right of the complainants, in the conduct of interstate commerce, to take natural gas out of the state, and declared that a state could not prohibit the transportation of such product beyond its borders, and that the legislative act in question was an act the main purpose and effect of 224]*which were to prohibit the exercise of lawful rights secured by the Federal Constitution.

56 L. ed.

Construing the decree as we do, we think there is no occasion to modify its terms. The order in this proceeding will therefore be affirmed.

ALEXANDER D. JOHNSON, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, et al.,† Appts.

v.

WASHINGTON LOAN & TRUST COMPANY.

(See S. C. Reporter's ed. 224-241.)

Wills — remainders — vested or contingent — condition subsequent.

The daughters surviving the testator took at his death a vested remainder in fee in the homestead, to take effect in possession upon the marriage of all of them, or the death of the last unmarried daughter, which remainder was not defeasible as to any one of them by her death, leaving descendants, before the expiration of the preceding estates, where the testator, after making separate provisions for his sons and daughters, devised the homestead to his wife for life, with remainder over to his daughters, "being single and unmarried, and to the survivor and survivors of them so long as they shall be and remain single and unmarried," and directed that upon the death or marriage of the last of them, the property should be sold and the proceeds distributed "among my daughters living at my death, and their children and descendants (*per stirpes*)."

[For other cases, see Wills, 151-158, 206-216, in Digest Sup. Ct. 1908.]

[No. 40.]

Argued December 8, 1911. Decided April 1, 1912.

APPPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Su-

†Death of John A. Berry, one of the appellants herein, suggested October 27, 1911, by Mr. A. S. Worthington for the appellants.

Appearance of Nannie Delia Berry, individually and as next friend of Rosalie Eugenia Berry and Natalie West Berry, as a party appellant herein, November 13, 1911.

NOTE.—As to the time for ascertaining member of class described as testator's "heirs," "next of kin," "relations," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift—see note to Welch v. Blanchard, 33 L.R.A.(N.S.) 1.

On conditions precedent and subsequent in will—see note to Taylor v. Mason, 6 L. ed. U. S. 101.

preme Court of the District, in favor of complainant in a suit to quiet title. Affirmed.

See same case below, 33 App. D. C. 242. The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause and filed a brief for appellants:

The language of this will is so plain that no resort is necessary to rules of construction adopted in construing ambiguous devises.

Clarke v. Boorman (Clarke v. Johnston) 18 Wall. 502, 21 L. ed. 906; Robison v. Female Orphan Asylum, 123 U. S. 702, 707, 31 L. ed. 293, 295, 8 Sup. Ct. Rep. 327; Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563; Line's Estate, 221 Pa. 374, 19 L.R.A.(N.S.) 293, 70 Atl. 791; Hood v. Pennsylvania Soc. 221 Pa. 474, 70 Atl. 845.

The contention of the appellants on all the principal points involved in this discussion is clearly and forcibly stated in a case very closely resembling it in the court of appeals of Kentucky.

Burnsides v. Wall, 9 B. Mon. 318.

When in a will there is no direct gift of property to the beneficiaries, but merely a direction that after the termination of a preceding life, or other particular estate, it shall be divided among or paid to certain classes of beneficiaries, in the absence of anything in the instrument to indicate a different intention, only those of the classes described who survive till the time fixed for the distribution will participate therein.

2 Williams, Exrs. 6th Am. ed. pp. 1232, 1233; 1 Jarman, Wills, 6th Am. ed. *757, note, 2; Hoghton v. Whitgreave, 1 Jac. & W. 146, 20 Revised Rep. 259; Brograve v. Winder, 2 Ves. Jr. 638; Jones v. Colbeck, 8 Ves. Jr. 38, 6 Revised Rep. 207; Nichols v. Guthrie, 109 Tenn. 536, 73 S. W. 107; Richey v. Johnson, 30 Ohio St. 296; 2 Williams, Exrs. 514; Hawkins, Wills, 232; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Beach, Wills, § 120; McClain v. Capper, 98 Iowa, 145, 67 N. W. 102; Re Moran, 118 Wis. 177, 96 N. W. 367; Benner v. Mauer, 133 Wis. 325, 113 N. W. 663; 2 Jarman, Wills, 6th Am. ed. 455, 457, *797; McCartney v. Osburn, 118 Ill. 423, 9 N. E. 210; Bates v. Gillett, 132 Ill. 299, 24 N. E. 611; Storrs v. Burgess, 101 Me. 34, 62 Atl. 730; Re Baer, 147 N. Y. 348, 41 N. E. 702; Dougherty v. Thompson, 167 N. Y. 472, 60 N. E. 760; Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239; Re Hogarty, 34 Misc. 610, 70 N. Y. Supp. 428, affirmed in 62 App. Div. 79, 70 N. Y. Supp. 839; Hale v. Hobson, 167 Mass. 397, 45 N. E. 913; Hobson v. Hale, 95 N. Y.

588; Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654; Dary v. Grau, 190 Mass. 482, 77 N. E. 507; Reilly v. Bristow, 105 Md. 326, 66 Atl. 262; Rosengarten v. Ashton, 228 Pa. 389, 77 Atl. 562.

That a remainder is vested on the death of the testator does not necessarily determine that the devisee, his heirs or assigns, shall be entitled to the property which is the subject of the gift, since the estate so vested may be divested by the death of the devisee before the determination of the preceding particular estate.

Myers v. Adler, 1 L.R.A. 432, 6 Mackey, 515; Richardson v. Penicks, 1 App. D. C. 261; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869; Blanchard v. Blanchard, 1 Allen, 227; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; United States use of Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782.

The only difference (at common law) between a remainder that vests at once, subject to defeasance by the death of the devisee before the right of possession accrues, and one that does not vest at all unless the devisee survives till that time, seems to be that in the first case the interest is alienable by grant or devise or otherwise, and may be attached by creditors, while in the second case the interest is regarded as too uncertain to be transferable in any way.

2 Washb. Real Prop. **263, 530; 24 Am. & Eng. Enc. Law, 405; Young v. Young, 23 L.R.A. 642 and note, 89 Va. 675, 75 S. E. 475; Clarke v. Fay, 27 L.R.A.(N.S.) 454 and note, 205 Mass. 228, 91 N. E. 328.

It is better to stick to the text of the will than to conjure up doubts by applying formulas intended for use only when there is no other way open.

Mitchell v. Mitchell, 126 Wis. 49, 105 N. W. 216.

Unless there is something in the particular will under consideration to lead to a contrary conclusion, the rule as to early vesting relied on by the appellee does not apply where, after the determination of a precedent estate, real estate is to be sold and the proceeds in the form of money paid over to certain classes of legatees.

Cripps v. Wolcott, 4 Madd. Ch. 12, 20 Revised Rep. 268, 25 Eng. Rul. Cas. 727; Hearn v. Baker, 2 Kay & J. 386; Stevenson v. Gullan, 18 Beav. 590; Knight v. Poole, 32 Beav. 548; Hoghton v. Whit-

greave, 1 Jac. & W. 146, 20 Revised Rep. 259; 1 Jarman, Wills, 6th Am. ed. *547; Peter v. Beverly, 10 Pet. 532, 563, 9 L. ed. 522, 534; Cropley v. Cooper, 19 Wall. 167, 174, 22 L. ed. 109, 113; Robertson v. Guenther, 25 L.R.A.(N.S.) 887, note; O'Brien v. Dougherty, 1 App. D. C. 148.

The language of a will which gives property to certain persons and to their children upon the happening of a future event should not be distorted into a gift to those persons to the exclusion of their children, because of the possibility that they may not have any children.

Augustus v. Seabolt, 3 Met. (Ky.) 155; Re Disney, 190 N. Y. 128, 82 N. E. 1093.

When there is a devise to parent and children—as to parent and descendants—without more, the parent takes a life estate, with remainder to such children or descendants.

Ward v. Grey, 26 Beav. 485, 29 L. J. Ch. N. S. 74, 7 Week. Rep. 569; Jeffery v. De Vitre, 24 Beav. 296; Jeffery v. Honywood, 4 Madd. Ch. 398; Hall v. Hall, 84 Vt. 259, 33 L.R.A.(N.S.) 191, 78 Atl. 971; Noe v. Miller, 31 N. J. Eq. 234; Stiles v. Cummings, 122 Ga. 635, 50 S. E. 484; Lynn v. Hall, 101 Ky. 738, 72 Am. St. Rep. 439, 43 S. W. 402; Ballantine v. Ballantine, 152 Fed. 775; Forest Oil Co. v. Crawford, 23 C. C. A. 55, 39 U. S. App. 408, 77 Fed. 106; Crawford v. Forest Oil Co. 208 Pa. 5, 57 Atl. 47; Barclay v. Platt, 170 Ill. 384, 48 N. E. 972; Kuhn v. Kuhn, 24 Ky. L. Rep. 112, 68 S. W. 16; Sims v. Skinner, 118 Ky. 573, 81 S. W. 703.

Mr. B. F. Leighton argued the cause and filed a brief for appellee:

The direction for a sale of the property and a division of the proceeds among his daughters living at his death was equivalent to a limitation of the title in fee to them, and they could have elected, on testator's death, to take the property instead of the proceeds to be derived from its sale.

Doe ex dem. Poor v. Considine, 6 Wall. 472, 18 L. ed. 873; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109; Hauptman v. Carpenter, 16 App. D. C. 524.

According to the contention of the appellants, if one or more of testator's daughters had married and died between the date of the will and the death of testator, leaving lawful issue her or them surviving and living at the time of his death, such issue would have taken no interest under testator's will,—a construction not to be given unless the language of the will imperatively compels it.

Goodlittle ex dem. Hayward v. Whitby, 1 Burr. 232.

The legal presumption arising from the 56 L. ed.

making of the will itself is, that the testator intended to dispose of all of his property, and not die intestate as to any of it. This presumption must prevail unless overborne by the terms of the will itself.

Given v. Hilton, 95 U. S. 591, 24 L. ed. 458; Snyder v. Baker, 5 Mackey, 455.

The first taker is always the favorite object of testator's bounty, and, as such, entitled to every implication.

Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 100, 41 L. ed. 933, 17 Sup. Ct. Rep. 488.

Effect must be given to a general intent, although to do so may render ineffective some particular intent.

Inglis v. Sailor's Snug Harbor, 3 Pet. 118, 7 L. ed. 624; Sheriff v. Brown, 5 Mackey, 172.

Where the distribution is to be *per stirpes*, the principle of representation will be applied to all degrees; children never take concurrently with their parents.

2 Jarman, Wills, 5th ed. p. 100.

By the use of the words "children and descendants," testator intended to provide against the contingency of the death of one or more of his daughters, leaving issue at the time his will became effective at his death. If these words were not used as words of substitution, they were used as words of limitation, and the daughters took a fee tail estate, which is the legal equivalent in this jurisdiction of an estate in fee simple.

Dengel v. Brown, 1 App. D. C. 423.

The birth of the first grandchild occurred after the death of the testator. This brought the case clearly within the rule of construction laid down in Wild's Case, 6 Coke, 17.

3 Jarman, Wills, 5th Am. ed. 174-182; Vanzant v. Morris, 25 Ala. 292; Akers v. Akers, 23 N. J. Eq. 26; Nightingale v. Burrell, 15 Pick. 104; Moore v. Leach, 50 N. C. (5 Jones, L.) 88; Jones v. Jones, 13 N. J. Eq. 236; Johnson v. Johnson, McMull. Eq. 347; Reeder v. Spcarman, 6 Rich. Eq. 91; Chrystie v. Phyfe, 19 N. Y. 354.

A descendant is one who proceeds from the body of another, however remotely. The word is coextensive with issue, but does not embrace others not of issue.

Hamlin v. Osgood, 1 Redf. 411; Torrance v. Torrance, 4 Md. 11; Baker v. Baker, 8 Gray, 120; Barstow v. Goodwin, 2 Bradf. 416; Bates v. Gillett, 132 Ill. 297, 24 N. E. 611; Tichenor v. Brewer, 98 Ky. 349.

The remainders were vested.

Hauptman v. Carpenter, 16 App. D. C. 524; Doe ex dem. Poor v. Considine, 6 Wall. 458, 475, 476, 18 L. ed. 869, 874, 875; Cropley v. Cooper, 19 Wall. 167, 22

L. ed. 109; Myers v. Adler, 6 Mackey, 515, 1 L.R.A. 432; O'Brien v. Dougherty, 1 App. D. C. 148; Richardson v. Penicks, 1 App. D. C. 261; Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Williamson v. Field, 2 Sandf. Ch. 533; Croxall v. Shererd, 5 Wall. 288, 18 L. ed. 579; Linton v. Laycock, 33 Ohio St. 128; Tayloc v. Mosher, 29 Md. 454; Fairfax v. Brown, 60 Md. 50; Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 100, 41 L. ed. 933, 17 Sup. Ct. Rep. 448; Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, which affirmed a decree in favor of the complainant, the Washington Loan & Trust Company. The suit was brought to quiet title, and the question concerns the construction of the fifth clause of the will of Washington Berry, who died in 1856. This clause relates to the testator's homestead,—the property known as Metropolis View, containing about 410 acres, in the District of Columbia,—and is as follows:

"Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefor first after the death of my wife will and devise the said estate to my said daughters, being single and unmarried, and to the survivor and survivors of them so long as they shall 233] be and remain single and *unmarried, and on the death or marriage of the last of them, then I direct that the said estate shall be sold by my executors, and the proceeds thereof be distributed by my said executors among my daughters living at my death, and their children and descendants (*per stirpes*), and I hereby reserve to my heirs the family vault and burial ground, embracing half an acre of ground, and having the said vault as a center, and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of these sons to purchase the said homestead, that it may be kept in the family."

The will was executed in 1852. The testator had three sons and five daughters, all of whom were living at that time; and they, with his wife, survived him. Four of the daughters married and had children; only one of them was married before the testator's death, and her children were born subsequently. One daughter, Eliza Thomas Berry, remained single and survived all her

sisters, dying in 1903. The testator appointed his wife and one of his sons executors and trustees; the widow acted as executrix, but the son declined.

Soon after the death of the testator, the widow removed from the homestead, and neither she nor any of her unmarried daughters occupied it again. During the War the estate suffered much injury; the vault was destroyed and it was necessary to remove the bodies it had contained; the rent and profits were not sufficient to pay taxes or to provide for repairs, and the property fell into a dilapidated condition.

The testator's widow died in 1864. In the following year a suit was brought by three of the married daughters and their husbands in the supreme court of the District of Columbia to have the property sold and the proceeds divided among the daughters, save the proceeds of the burial ground and vault, which the bill asked to have distributed among the heirs at law. The other children *of the testator, with the spouses of [234] those that were married, were parties defendant. There were, then living, three grandchildren, by the daughters, but they were not parties or represented. All the defendants, save one married daughter,—who was a minor and answered by guardian, submitting her rights to the court,—consented to the decree. Eliza Thomas Berry, the unmarried daughter, stated in her answer that she relinquished "upon the sale of the estate in the bill mentioned her right to the possession and enjoyment thereof whilst unmarried," and consented "to the distribution of the proceeds of sale as prayed." The case was referred to the auditor to take testimony and report whether the sale would be for the advantage of the infant defendant. He reported that the property was an unfit residence for the unmarried daughter; that the land generally was poor and unproductive as a farm; that the testator had used it as a mere place of residence, and it was fit only, as a whole, for a man of fortune; that the burial place had been demolished and the buildings and fences were out of repair; and that it was a fit case for a sale.

In October, 1865, the court entered a decree for sale, appointing for that purpose two trustees, who were authorized to divide the estate and to sell it in parcels if this were found advisable. The division was made accordingly, and certain lots were sold at public auction. Subsequently, upon the petition of two of the daughters and their husbands, stating that they had children to support, and were in need of the money that would come from the sale, the court ordered the trustees to sell the residue of the estate,

and sales were made at public auction, which were confirmed by the court in October, 1868, and the proceeds were distributed among the five daughters of the testator. In the long period of years since that time the property has been divided into many separate parcels, which have been the 235]subject of conveyances, *it being assumed that a valid title passed under the court's decree.

In 1906, suit was brought in the supreme court of the District of Columbia by the children of the daughters of the testator, against the children of the deceased sons, averring that, on the death of the unmarried daughter, Eliza T. Berry, in 1903, the entire equitable interest in the property vested in fee simple in the complainants; that their rights and interests had not been affected by the decree in the former suit or by the sales that had been made under it. It was prayed that trustees might be appointed in the place of those named in the testator's will, to whom the legal title should be transferred. Decree was passed and trustees were appointed by the court on February, 20, 1907.

Thereupon Henry P. Sanders brought this suit against all the parties in the suit above mentioned,—including the trustees,—to quiet the title to a portion of the land which he had derived, by mesne conveyances, through the sale made under the decree passed in 1868; and he alleged that he, and those under whom he claimed, had been for thirty-five years in exclusive and continuous possession, relying upon the validity of their title acquired bona fide for a valuable consideration. Mr. Sanders died in 1907, appointing the Washington Loan & Trust Company executor and trustee of his last will and testament, by which the real property in question was devised, and an order was made substituting this company as complainant.

It is contended by the appellants that, under the provision of the fifth item of the will, the proceeds of the sale, which the testator directed to be made of the property, should be distributed "among his daughters and their children and descendants, as those classes should exist when all of the daughters should be dead or married." The appellee insists that, at the death of 236]the testator, the *daughters took a vested remainder in fee, "to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter."

On examining the scheme of the will, we find that the testator made separate provision for his three sons, on the one hand, and for his five daughters, on the other. While he contemplated the marriage of his

children, and the birth of issue, he did not seek to tie up his property for the benefit of his children's descendants. The testator made no provision whatever for grandchildren or for the descendants of his children, save as it was made in the clause in question and in the residuary clause.

To each of his sons he devised a tract of land. The devise was to the son, his heirs and assigns. In the case of two of the sons, it was made on condition that the son and his heirs should convey to the testator's daughters the son's interest in certain real estate, and in case the conveyance were not made within two years, the devise was not to take effect, and the property was to go to his daughters living at his death, share and share alike. There was a slight difference in the wording of the conditional devises to the daughters; in the one, they were described as "my daughters living," and in the other as "my daughters living at my death." After thus providing for the sons in the first three items of the will, the testator adds that he annexes to their several estates "this limitation, that if either of them shall die without leaving lawful issue, that the estate of each one, or both, if more than one, shall go to the survivor or survivors, his and their heirs." We have no occasion to consider the effect of this provision upon the devises to the sons, but it may be noted that there was no gift to the children or descendants of the sons, nor did the testator undertake, in case all the sons died without leaving issue, to devise the property to the children or descendants of his daughters.

By the fourth item of the will, the testator gave to his *wife for life, in case[237 she survived him, the homestead estate,—the property here in question,—together with certain money and securities, subject to the maintenance and education of his five daughters, while unmarried, and to the provision that each daughter, on marriage and birth of issue, should receive one-sixth part of the personal property bequeathed. When the condition was satisfied by birth of issue, the daughter took her share absolutely. Then followed the fifth clause above quoted, under which this controversy has arisen. And to this was added the residuary clause,—item sixth,—providing as follows: "I direct that my executors shall divide and distribute all the rest, residue, and remainder of my personal estate among my children at my death, and the descendants of such as may have died during my life to take a parent's part.

In the disposition of the homestead, the testator explicitly states his purpose. He was planning for the protection of his daughters. He desired the property to be the home of his widow so long as she lived.

and that after her death it should continue to be the home of his daughters while they remained unmarried. When this object had been attained, the property was to be sold and the proceeds divided.

These avails were to be distributed "among my daughters living at my death, and their children and descendants (*per stirpes*).²³⁹" The words "living at my death" may not be disregarded. They are not to be eliminated in the interest of a construction which would leave the clause as though it read, "among my daughters who shall be living at the time of the death or marriage of my last unmarried daughter and the children and descendants (*per stirpes*) of such of my daughters as may previously died." At the time of the death of the testator, his five daughters were living, and none of them had children or descendants. By the definite language of the 238]*clause, these daughters were then ascertained and identified as those entitled to the immediate enjoyment of the property on the termination of the preceding estates. They, therefore, had a vested remainder in fee. *Croxall v. Shererd*, 5 Wall. 268, 288, 18 L. ed. 572, 579; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 474-477, 18 L. ed. 869, 874, 875; *Cropley v. Cooper*, 19 Wall. 167, 175, 22 L. ed. 109, 113; *McArthur v. Scott*, 113 U. S. 340, 380, 28 L. ed. 1015, 1027, 5 Sup. Ct. Rep. 652; *Hallifax v. Wilson*, 16 Ves. Jr. 171, 10 Revised Rep. 146. The fact that the property was directed to be sold, and that they were described as distributees of the proceeds, did not postpone the vesting of the interest. "For many reasons," said this court by Mr. Justice Gray in *McArthur v. Scott*, supra (pp. 378, 380), "not the least of which are that testators usually have in mind the actual enjoyment, rather than the technical ownership, of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. . . . Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. . . .

So, a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest." In *Cropley v. Cooper*, supra, the testator bequeathed the rent of his house to his daughter for her life, and it was provided that at her decease the property should "be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance." When the testator *died, his daughter, who[239 survived him, had one son about three years old. It was held that the son took a vested interest at the death of the testator. The court said: "A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate or to let in some other interest. . . . In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest. A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons, and vests at the death of the testator."

The question remains, whether the interest vested in the daughters was defeasible on condition subsequent. That is, whether, on death of a daughter before the determination of the preceeding estate, leaving descendants, her interest was to be divested and her descendants were to take by substitution.

What, then, was the intent of the testator in providing for the children and descendants of daughters *per stirpes*? If the clause be considered to import a condition subsequent, providing for a divesting of the interest of the daughters who survived him, and a substitution of their children and descendants, it would necessarily follow that the children and descendants of daughters who died before him would be excluded from participation. It is difficult to suppose that this was his purpose. That his daughters might marry and die, leaving children, before he died, was undoubtedly contemplated. At the time of his death, one of his daughters had already married. If she survived him, she was to have a share in the property. Did the testator intend that if she died after his death, and before the time for distribution, her interest was to be divested in favor of her children and descendants, and if she died before the testator, her children and descend-

240]ants were *to be barred? Or if it had happened that three of the daughters had married and died during the testator's lifetime, having children, and another daughter had married and died after the testator, were the children of the latter daughter to share in the avails of the property, on the death of the last daughter, unmarried, to the exclusion of all the other daughters' children? It is not to be thought that the testator designed such a purely arbitrary selection unless the words forbid a different interpretation.

The language of the clause is not of this imperative character. As well might it be said that it required the conclusion that the daughters and their respective children and descendants were to take concurrently. But this would not be a sensible construction, and it would seem to be equally contrary to the intention of the testator to imply a condition subsequent, and thus not only to make defeasible the interest which passed to the daughters, but to shut out the children and descendants of daughters who predeceased him.

The clause is obviously elliptical, and the provision for representation is not fully expressed. Taking the context and the entire plan of the will into consideration, we believe that what the testator had in mind was to establish the right of his daughters, who survived him, as of the time of his death, and to provide for the representation of any of his daughters, who might previously die, by her children and descendants. So construed, the disposition is a natural one, and representation of the same sort is accorded as that provided for in the next paragraph, when, in giving to his children the residuary personal estate, the testator fully defined the representation intended by stating that "the descendants of such as may have died during my life" were "to take a parent's part."

We are of the opinion that the remainder in fee which vested in the daughters, all of whom survived the testator, was not defeasible as to any of them by her death, leaving 241]*descendants, before the expiration of the preceding estates. As already stated, all the daughters were parties to the suit brought in 1865, and all consented to the decree, save the married daughter who was under age, and whose interests were duly protected by the court. It follows that the purchasers under the decree acquired a good title.

The complainant was entitled to the relief sought.

Decree affirmed.

56 L. ed.

C. R. SHARPE et al., Appts.,
v.

E. W. BONHAM et al.

(See S. C. Reporter's ed. 241-243.)

Federal courts — jurisdiction — diversity of citizenship — alignment of parties.

The trustees holding the legal title to church property need not, when testing the jurisdiction of a Federal circuit court, invoked on the ground of diversity of citizenship, be aligned on the side of complainants in a controversy between two religious societies over the right to control the church property, growing out of proceedings to consolidate the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America, but, as mere title holders, such trustees are properly made parties defendant.

[For other cases, see Courts, 721-769, in Digest Sup. Ct. 1908.]

[No. 396.]

Submitted March 12, 1912. Decided April 1, 1912.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee to review a decree dismissing, for want of jurisdiction, a suit between two religious societies, growing out of the proceedings to consolidate the Cumberland and Presbyterian Churches, over the right to control certain church property. Reversed.

The facts are stated in the opinion.

Mr. John M. Gaut submitted the cause for appellants:

The cases of *Watson v. Jones*, 13 Wall. 679, 720, 20 L. ed. 666, 672, and *Helm v. Zarecor*, 222 U. S. 32, ante, 77, 32 Sup. Ct. Rep. 10, are conclusive of this case.

Mr. W. C. Caldwell submitted the cause for appellees. Messrs. Frank Slemmons, Z. H. Zarecor, and W. B. Lamb were on the brief:

The averments of fact in the plea to the jurisdiction were admitted to be true by the motion to disallow the plea for insufficiency in law.

Farley v. Kittson, 120 U. S. 303, 314, 30 L. ed. 684, 688, 7 Sup. Ct. Rep. 534; *Unit-*

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 108; *Myers v. Murray, N. & Co.* 11 L.R.A. 216; *Emory v. Greenough*, 1 L. ed. U. S. 640; *Strawbridge v. Curtiss*, 2 L. ed. U. S. 435; *M'Donald v. Smalley*, 7 L. ed. U. S. 287; and *Roberts v. Lewis*, 36 L. ed. U. S. 579.

ed States v. California & O. Land Co. 148 U. S. 31, 39, 37 L. ed. 354, 359, 13 Sup. Ct. Rep. 458; United States v. American Bell Teleph. Co. 29 Fed. 33; Kellner v. Mutual L. Ins. Co. 43 Fed. 623; Burrell v. Hackley, 35 Fed. 833; Stephens v. Smartt, 172 Fed. 466; Stewart v. Mitchell, 172 Fed. 907; 1 Beach, Modern Law of Eq. Pr. § 36, p. 348.

In a case where the jurisdiction of the court depends alone on diversity of citizenship, the court will arrange the parties to the litigation as their interest may appear from the allegations of the bill, or from the admitted averments of the plea, as in this instance, or from the proof; and if, under such arrangement, citizens of the same state be found on opposite sides of the controversy, the court can proceed no further, but must dismiss the suit for want of jurisdiction.

Removal Cases, 100 U. S. 457, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Harter Twp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Wilson v. Oswego Twp. 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Evers v. Watson, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Steele v. Culver, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; Southern Realty Invest. Co. v. Walker, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. Rep. 211; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 573; Stephens v. Smartt, 172 Fed. 466; Stewart v. Mitchell, 172 Fed. 907.

Among the many cases emphasizing the duty of the court, under the second clause of § 5 of the judiciary act of 1875, to dismiss the suit whenever and however it may appear that parties have been improperly or collusively made or joined for the purpose of creating a case cognizable in the circuit court, are:

Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Farmington v. Pillsbury, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 340, 40 L. ed. 449, 16 Sup. Ct. Rep. 307; Miller & Lux v. East Side Canal & Irrig. Co. 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. Rep. 111; Southern Realty Invest. Co. v. Walker, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. Rep. 211; Steele v.

Culver, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

An arrangement of parties which is merely a contrivance between friends to found jurisdiction on diverse citizenship will not avail; and when it is obvious that a party who is really on the complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening, in the United States courts, a controversy already decided in the state courts, the court will look beyond the pleadings, and arrange the parties according to their actual sides in the dispute.

Dawson v. Columbia Ave. Sav. Fund S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

Memorandum opinion by direction of the court. By Mr. Justice Hughes:

Appeal from decree dismissing the bill for want of jurisdiction.

*The suit was brought by members[242 of a religious society in Nashville, Tennessee, known as Grace Church, citizens of states other than Tennessee, against the pastor and elders of another religious society calling itself Grace Cumberland Presbyterian Church, and also against three individuals described as trustees, who hold the legal title to certain land and a house of worship, all the defendants being citizens of Tennessee. The controversy grew out of the proceedings to consolidate the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America. It was alleged in the bill that the union had been legally effected, and the complainants sought decree that the church property be declared to be held in trust for the congregation which adhered to the alleged united body.

The defendants, other than the trustees, filed a plea to the jurisdiction, alleging that the trustees, "who are alleged to hold the legal title of the property described and involved, are indispensable parties complainant, and yet, as these defendants aver, those persons are improperly and collusively joined as defendants for the purpose of creating a case cognizable in this honorable court;" and it was also asserted that parties had been improperly and collusively omitted for the same purpose. The court dismissed the bill, and in its certificate states that the dismissal was upon the ground that the three defendants, trustees, were not antagonistic to the complainants, and should be aligned upon the same side of the controversy; and, therefore, as some of the complainants and some of the

defendants were citizens of the same state, the court was without jurisdiction.

The case is not to be distinguished from *Helm v. Zarecor*, 222 U. S. 32, ante, 77, 32 Sup. Ct. Rep. 10. There the controversy arising from the same proceedings, having in view the union of the two religious bodies, related to the property and management of an incorporated committee of publication, or publishing agency, known as the Board of Publication of the Cumberland Presbyterian Church. It was held that to align the corporation itself with the complainants was virtually to decide the merits in their favor; that the corporation was simply a title holder,—an instrumentality, the mastery of which was in dispute; and that it was properly made a party defendant.

As, in that case, the controversy embraced the fundamental question of the rights of the religious associations, said to be represented by the respective parties, to control the corporate agency, and to have the benefit in their denominational work of the corporate property, so here the controversy is with respect to the control of the church property which the three trustees hold in trust. These trustees were not indispensable parties complainant, as alleged in the plea, and, as mere title holders, they were properly made parties defendant. The court erred in aligning them with the complainants.

Decree reversed.

THEODORE R. CONVERSE, Receiver, Plff.
in Err.,
v.

CAROLINE A. HAMILTON. (No. 42.)

THEODORE R. CONVERSE, Receiver, Plff.
in Err.,
v.

JENEVA S. McCAULEY. (No. 43.)

(See S. C. Reporter's ed. 243-261.)

Judgment — full faith and credit — stockholders' liability.

The refusal of the Wisconsin courts to permit an action to enforce the double liability of the stockholders in an insolvent Minnesota corporation to be maintained by the receiver of such corporation, who, by

the proceedings in a sequestration suit brought conformably to Minn. Laws 1899, chap. 272, became a quasi assignee and representative of the creditors, and charged with the enforcement of the stockholders' liability in the Minnesota courts and elsewhere, denies the constitutional full faith and credit to the laws of Minnesota and the judicial proceedings in that state upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders, even though not made parties to the sequestration suit, and not notified otherwise than by publication or by mail of the applications for the orders levying the assessments, were bound. [For other cases, see Judgment, 975-981, 1025-1029, in Digest Sup. Ct. 1908.]

[Nos. 42 and 43.]

Argued November 7, 1911. Decided April 1, 1912.

TWO WRITS OF ERROR to the Supreme Court of the State of Wisconsin to review judgments which affirmed judgments of the Circuit Court of Dane County, in that State, sustaining demurrers to and dismissing the complaints in actions brought by a receiver of an insolvent Minnesota corporation to enforce the stockholders' liability. Reversed and remanded for further proceedings.

See same case below, No. 42, 136 Wis. 589, 118 N. W. 190; No. 43, 136 Wis. 594, 118 N. W. 192.

The facts are stated in the opinion.

Mr. Cordenio A. Severance argued the cause, and, with Messrs. Burr W. Jones, E. J. B. Schubring, Frank B. Kellogg, and Robert E. Olds, filed a brief for plaintiff in error:

The Minnesota Thresher Manufacturing Company is not exclusively a manufacturing or mechanical corporation, and hence the stockholders are liable.

Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co. 90 Minn. 144, 95 N. W. 767; Bernheimer v. Converse, 206 U. S. 516, 524, 51 L. ed. 1163, 1172, 27 Sup. Ct. Rep. 755.

The plaintiff receiver under chap. 272 of the General Laws of Minnesota for 1899, and §§ 3184 to 3190, inclusive, of the Revised Laws of 1905, is a representative of the corporation and of its creditors, and has title to the assessments sued upon, and

NOTE.—On the right of a receiver to enforce the liability of a corporate stockholder outside the state of his appointment—see notes to *Hale v. Allinson*, 47 L. ed. U. S. 380; and *Fowler v. Osgood*, 4 L.R.A. (N.S.) 824.

As to full faith and credit to be given to state records and judicial proceedings—see notes to *Lindley v. O'Reilly*, 1 L.R.A. 56 L. ed.

79; *Cummington v. Belchertown*, 4 L.R.A. 131; *Rand v. Hanson*, 12 L.R.A. 574; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; *Mills v. Duryee*, 3 L. ed. U. S. 411; *D'Arcy v. Ketchum*, 13 L. ed. U. S. 648; and *Huntington v. Attrill*, 36 L. ed. U. S. 1123.

is authorized to enforce such assessments by proper proceedings either in the state of Minnesota or elsewhere.

Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98.

Prior to the enactment of chap. 272 of the Laws of 1899, the receiver did not have such title, being nothing but the ordinary chancery receiver, and hence he could not maintain an action to recover stockholders' liability outside the state of Minnesota.

Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Finney v. Guy*, 106 Wis. 256, 49 L.R.A. 486, 82 N. W. 595.

Chapter 272 of the General Laws of 1899 and §§ 3184-3190 of the Revised Laws of 1905 merely changed and enlarged the remedy for the enforcement of stockholders' liability, and did not change the substantive right, and hence the said laws are constitutional.

Bernheimer v. Converse and *Converse v. Ayer*, *supra*; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 125, 83 N. W. 36; *London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co.* 84 Minn. 144, 86 N. W. 872.

The judgment at law against the thrasher company in the state court of Minnesota, and the decree in the subsequent suit based thereon, by which decree the receiver was appointed, cannot be collaterally attacked.

Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 170, 34 L.R.A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Hinckley v. Kettle River R. Co.* 80 Minn. 32, 82 N. W. 1088; *Parker v. Stoughton Mill Co.* 91 Wis. 181, 51 Am. St. Rep. 881, 64 N. W. 751.

Chapter 272 of the General Laws of 1899 and §§ 3184-3190 of the Revised Laws of 1905 both declare that assessments levied pursuant to their provisions, which the demurrer admits were followed in this case, are conclusive upon stockholders wherever they may be.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 136, 83 N. W. 36; *Bernheimer v. Converse*, 206 U. S. 532, 533, 51 L. ed. 1175, 1176, 27 Sup. Ct. Rep. 755; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 100.

Full faith and credit must be given in all courts to the interlocutory decrees of the district court of Washington county,

Minnesota, levying the assessment in question.

Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

There is no question of comity in this case.

Bernheimer v. Converse, *supra*.

Mr. Charles E. Buell argued the cause, and, with Messrs. Chauncey E. Blake and John B. Sanborn, filed a brief for defendants in error:

An assessment made by the court upon the stock of an insolvent Minnesota corporation and upon the stockholders thereof in an action to sequester the assets of the corporation is not such a judgment against the stockholders as to come within the full faith and credit clause of the Federal Constitution.

Hale v. Allinson, 188 U. S. 56, 80, 47 L. ed. 380, 393, 23 Sup. Ct. Rep. 244.

The corporation is not the representative of the stockholder in the sense that it can represent him in making an assessment upon his stock so as to establish a personal liability.

Ibid.; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867; *Lagerman v. Casserly*, 107 Minn. 494, 23 L.R.A. (N.S.) 673, 131 Am. St. Rep. 506, 120 N. W. 1086; *Finney v. Guy*, 106 Wis. 256, 49 L.R.A. 486, 82 N. W. 595; *Danforth v. National Chemical Co.* 68 Minn. 308, 71 N. W. 274; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 76, 77, 33 L. ed. 564, 567, 568, 10 Sup. Ct. Rep. 238.

It has always been the law of Wisconsin, and was always the law of Minnesota until the enactment of chap. 272, Laws of 1899, that upon the insolvency of a corporation whose stockholders were subject to a double liability the only remedy the creditors had to enforce that liability was by an action brought by all the creditors, or by one or more creditors on behalf of all, against the corporation and all of the stockholders, to wind up the corporation, sequester its assets, and enforce the double liability of the stockholders; and that the judgment as to such double liability bound only such of the stockholders as could be personally served with process within the jurisdiction of the court, or should voluntarily appear in the action, and that no other action could be brought to enforce such liability either in the state in which the insolvent corporation was located or elsewhere.

Re Martin, 56 Minn. 420, 57 N. W. 1065; Allen v. Walsh, 25 Minn. 543; Merchants' Nat. Bank v. Bailey Mfg. Co. 34 Minn. 323, 25 N. W. 639; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L.R.A. 415, 69 N. W. 331; Hanson v. Davison, 73 Minn. 454, 76 N. W. 254; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Cleveland v. Marine Bank, 17 Wis. 546; Merchants' Bank v. Chandler, 19 Wis. 435; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852; Terry v. Chandler, 23 Wis. 456; Gianella v. Bigelow, 96 Wis. 185, 71 N. W. 111; Booth v. Dear, 96 Wis. 516, 71 N. W. 816; Gager v. Marsden, 101 Wis. 598, 77 N. W. 922; Foster v. Posson, 105 Wis. 99, 81 N. W. 123; Finney v. Guy, 106 Wis. 260, 49 L.R.A. 486, 82 N. W. 595; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Hunt v. Whewell, 122 Wis. 33, 99 N. W. 599; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

Chapter 272, Laws of Minnesota for the year 1899, and the amendments thereto, have not changed the legal aspect of this case.

Finney v. Guy, 106 Wis. 260, 49 L.R.A. 486, 82 N. W. 595.

Whether or not a right exists depends on the law of the state where it was created; the remedy for enforcing such right depends upon the law of the forum where it is sought to be enforced.

Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Northern P. R. Co. v. Babcock, 154 U. S. 190, 197, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978; Marshall v. Sherman, 148 N. Y. 9, 34 L.R.A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; Leucke v. Tredway, 45 Mo. App. 507.

A receiver has no extraterritorial jurisdiction or power of official action and is not entitled, as matter of right, to sue in a foreign jurisdiction; and the refusal of another state to entertain such suit does not amount to failure to give full faith and credit to the laws and judgments of the state of appointment, within the meaning of the Federal Constitution.

High, Receivers, § 239; Booth v. Clark, 17 How. 322, 15 L. ed. 164; Filkins v. Nunemacher, 81 Wis. 91, 51 N. W. 79; Farmers' & M. Ins. Co. v. Needles, 52 Mo. 17; Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874; Hazard v. Durant, 19 Fed. 471.

The statutes of a state have no extraterritorial force. A foreign receiver cannot, as matter of right, maintain an action outside of the state of his appointment. He is often permitted through com-

ity, or the courtesy of a sister state, to maintain an action therein; but never where the courts of such sister state have declared the maintenance of such action to be against the public policy of that state, or that the rights of its citizens would be thereby jeopardized or impaired.

High, Receivers, § 241; Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713; Mercantile Nat. Bank v. Macfarlane, 71 Minn. 497, 70 Am. St. Rep. 352, 74 N. W. 287; Hanson v. Davison, 73 Minn. 455, 76 N. W. 254; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 13, 47 Am. Rep. 771, 16 N. W. 413; New Haven Horse Nail Co. v. Linden Spring Co. 142 Mass. 349, 7 N. E. 773; Post & Co. v. Toledo, C. & St. L. R. Co. 144 Mass. 345, 59 Am. Rep. 86, 11 N. E. 540; Higgins v. Central New England & W. R. Co. 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; Howarth v. Lombard, 175 Mass. 573, 49 L.R.A. 301, 56 N. E. 888; Smith v. Mutual L. Ins. Co. 14 Allen, 336; Rice v. Merrimack Hosiery Co. 56 N. H. 127; Nimick v. Mingo Iron Works Co. 25 W. Va. 184; Rorer, Interstate Law, 167, 168, 226; Foster v. Glazener, 27 Ala. 391; Stevens v. Brown, 20 W. Va. 460; Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 23 L.R.A. 52, 36 Am. St. Rep. 899, 54 N. W. 395; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 15 L.R.A. (N.S.) 1045, 115 Am. St. Rep. 1063, 106 N. W. 821; Bagby v. Atlantic, M. & O. R. Co. 86 Pa. 291; Falk v. Janes, 49 N. J. Eq. 484, 23 Atl. 813; Finney v. Guy, 189 U. S. 335, 345, 47 L. ed. 839, 845, 23 Sup. Ct. Rep. 558.

Whether or not a complaint in a state court states a cause of action, no Federal question being involved, is exclusively for the state court to determine.

Finney v. Guy, 189 U. S. 335, 339, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558; Allen v. Alleghany Co. 196 U. S. 458, 466, 49 L. ed. 551, 556, 25 Sup. Ct. Rep. 311.

In various cases the Federal courts have entertained jurisdiction of actions by receivers to enforce judgments for additional stockholders' liability. In those cases, the bringing of such an action would not have been against the public policy of the state in which the Federal court was sitting. In many of them the court expressly mentions this fact as bearing upon its ability to entertain the action.

Kirtley v. Holmes, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1; Lewis v. Clark, 64 C. C. A. 138, 129 Fed. 570; Rogers v. Riley, 80 Fed. 759; Burr v. Smith, 113 Fed. 858.

Where a case turns upon the construc-

tion, and not upon the validity, of the statute of another state, it does not necessarily involve a Federal question.

Finney v. Guy, 189 U. S. 335, 340, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 496, 47 L. ed. 273, 275, 23 Sup. Ct. Rep. 194; *Allen v. Alleghany Co.* 196 U. S. 463, 49 L. ed. 555, 25 Sup. Ct. Rep. 311; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banzholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

Upon demurrer to a complaint alleging the law of another state, the defendant is not concluded by such allegations; the court will examine the statutes and decisions of such state, and determine for itself whether the law is as pleaded.

Finney v. Guy, 189 U. S. 335, 343, 344, 47 L. ed. 839, 844, 845, 23 Sup. Ct. Rep. 558; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 58, 113 Am. St. Rep. 863, 77 N. E. 877.

There is nothing in any of the cases arising under the amended Minnesota statute and decided by this court since the amendment to the Minnesota law in conflict with the decision of the Wisconsin court in *Hunt v. Whewell*, 122 Wis. 33, 99 N. W. 599.

First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1166, 27 Sup. Ct. Rep. 755; *Converse v. First Nat. Bank*, 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691; *Converse v. Stewart*, 218 U. S. 666, 54 L. ed. 1202, 31 Sup. Ct. Rep. 226; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; *Post & Co. v. Toledo, C. & St. L. R. Co.* 144 Mass. 345, 59 Am. Rep. 86, 11 N. E. 540; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

Mr. Justice Van Devanter delivered the opinion of the court:

These were actions at law, brought in the circuit court of Dane County, Wisconsin, by a receiver of an insolvent Minnesota corporation, the Minnesota Thresher Manufacturing Company, to enforce an asserted double liability of two of its stockholders. The facts stated in the complaints, which were substantially alike, were these: A judgment creditor, upon whose judgment an execution had been issued and returned *nulla bona*, commenced a suit against the company in the district court of Washington county, Minnesota, for the sequestration of its property and effects and for the appointment of a receiver of the same. The company appeared in the suit, a receiver was appointed, and such further proceed-

ings were had therein, conformably to the statutes of the state, as resulted in the appearance of the creditors of the company, in the presentation and adjudication of their claims, aggregating many thousands of dollars, in an ascertainment of *the[252 complete insolvency of the company, and of the necessity of resorting to the double liability of its stockholders for the payment of its creditors, and in orders levying upon its stockholders two successive assessments of 36 and 64 per cent of the par value of their respective shares, requiring that these assessments be paid to the receiver within stated periods, and directing the receiver, in case any of the stockholders should fail to pay either assessment within the time prescribed, to institute and prosecute all such actions, whether within or without the state, as should be necessary to enforce the assessments. Some of the stockholders intervened in the suit and appealed from the order levying the first assessment, and the order was affirmed by the supreme court of the state. 90 Minn. 144, 95 N. W. 767.

The defendants here were stockholders in the company, and failed and refused to pay either assessment, although payment was duly demanded of them. But they were not made parties to the sequestration suit, and were not notified, otherwise than by publication or by mail, of the applications for the orders levying the assessments. Upon the expiration of the times prescribed in the orders, the receiver brought the present actions to enforce them. The complaints set forth the proceedings in the sequestration suit and the provisions of the Minnesota Constitution and statutes relating to the double liability of stockholders and its enforcement, with the interpretation placed upon those provisions by the supreme court of that state, and also made the claim that § 1, article 4, of the Constitution of the United States, and § 905, Rev. Stat. (U. S. Comp. Stat. 1901, p. 677), required the courts of Wisconsin to give such faith and credit to those proceedings and provisions as they have by law or usage in the courts of Minnesota.

Demurrers to the complaints were sustained upon the ground that to permit the actions to be maintained in the Wisconsin courts would be contrary to the settled policy *of that state in respect of the[253 enforcement of the like liability of stockholders in its own corporations, and judgments of dismissal were entered, accordingly. The judgments were affirmed by the supreme court of the state (136 Wis. 589 and 594, 118 N. W. 190, 192), and the receiver sued out these writs of error, alleging that he had been denied a right

asserted, as before indicated, under the Constitution and laws of the United States.

Of course, we must look to the Minnesota Constitution, statutes, and decisions to determine the nature and extent of the liability in question, and the effect given in that state to the laws and judicial proceedings therein looking to its enforcement, and when this is done we find that the situation, as applied to the cases now before us, is as follows:

1. Section 3, article 10, of the Minnesota Constitution, provides: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business), shall be liable to the amount of stock held or owned by him." The insolvent company, before mentioned, is within the general terms of this provision, not the excepting clause. *Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co.* 90 Minn. 144; 95 N. W. 767; *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. ed. 1163, 1172, 27 Sup. Ct. Rep. 755. The provision is self-executing, and under it each stockholder becomes liable for the debts of the corporation in an amount measured by the par value of his stock. This liability is not to the corporation, but to the creditors collectively; is not penal, but contractual; is not joint, but several; and the mode and means of its enforcement are subject to legislative regulation. *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*), 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 446, 38 L.R.A. 415, 69 N. W. 331; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 125, 83 N. W. 36; *London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co.* 84 Minn. 144, 86 N. W. 872; *Bernheimer v. Converse*, supra.

254] *2. The proceedings in the sequestration suit, looking to the enforcement of this liability, were had under chapter 272, Laws of 1899, and §§ 3184-3190, Revised Laws of 1905, the latter being a continuation of the former, with changes not here material. An earlier statute prescribed a mode of enforcement by a single suit in equity in a home court, which was to be prosecuted by all the creditors jointly, or by some for the benefit of all, against all the stockholders, or as many as could be served with process in the state, and all the rights of the different parties were to be finally adjusted therein. That mode was exclusive. A receiver could not sue on behalf of the creditors in a home court or elsewhere. A single creditor could not sue in his own behalf,

and, if all united, or one sued for the benefit of all, it was essential that the suit be in a home court. The statute was so interpreted by the supreme court of the state. See *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, and *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558, where the cases were carefully reviewed. In one of them, *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 446, 38 L.R.A. 415, 69 N. W. 331, that court, after holding that the liability could not then be enforced through a suit by a receiver, added: "If it be desirable, in order to secure a speedy, economical, and practical method of enforcing the liability, to invest the receiver with such power, it must be done by statute." Doubtless, responding, to this suggestion, the legislature enacted chapter 272, Laws of 1899. It expressly prescribed the mode of enforcement pursued in the present instance; that is to say, it made provision for bringing all the creditors into the sequestration suit, for the presentation and adjudication of their claims, for ascertaining the relation of the corporate debts and the expenses of the receivership to the available assets, and whether and to what extent it was necessary to resort to the stockholders' double liability, for levying such assessments upon the stockholders according to their respective holdings as should *be necessary[255 to pay the debts, and for investing the receiver with authority to collect the assessments on behalf of the creditors. And it also contained the following provisions respecting the effect to be given to the orders levying assessments, and respecting the authority and duties of the receiver:

"Sec. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

"Sec. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this

state or in any other state or country where such stockholder, or any property subject to attachment, garnishment, or other process in an action against such stockholder, may be found. . . ."

3. Under this statute, as interpreted by the supreme court of the state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi assignee and representative of the creditors; and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders, and with full authority to enforce the same in any [256] court of competent jurisdiction in the state or elsewhere. *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 125, 83 N. W. 36; *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. ed. 1163, 1172, 27 Sup. Ct. Rep. 755.

4. The constitutional validity of chapter 272 has been sustained by the supreme court of the state, as also by this court; and this because (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts. *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* supra; *London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co.* 84 Minn. 144, 86 N. W. 872; *Bernheimer v. Converse*, supra.

This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that state, discloses, as we think, that in the cases now before us the supreme court of Wisconsin failed to give

full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded. It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770. But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent*, a right of action, transitory in character, against one who was liable contractually and severally, if at all. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States, and this view of it was regarded as sustained by the decision of this court in *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558. But that case is obviously distinguishable from those now before us. It involved the right of a Minnesota receiver and of the creditors of a Minnesota corporation to sue a stockholder in Wisconsin prior to the enactment of chapter 272, and while the earlier statute, before mentioned, provided an exclusive remedy through a single suit in equity in a Minnesota court. That remedy having been exhausted, the receiver and the creditors sought, by an ancillary suit in Wisconsin, to enforce the liability of a stockholder who resided in that state and was not a party to the suit in Minnesota. The supreme court of Wisconsin, treating the right to maintain the suit in that state as [258] depending upon comity only, ruled that it ought not to be entertained. The case was then brought here, it being claimed that full faith and credit had not been accorded to the laws of Minnesota and the proceedings in the suit in that state. This claim was grounded upon a contention that the first decisions in Minnesota, holding that the

remedy provided by the earlier statute was exclusive, that a receiver could not sue thereunder, and that the rights of creditors against stockholders must be worked out in the single suit in the home court, had been overruled by later decisions giving, as was alleged, a different interpretation to that statute. The contention was fully considered by this court, the cases relied upon being carefully reviewed, and the conclusion was reached that "the law of Minnesota still remains upon this particular matter as stated in the former cases, which have not been overruled." The claim under the full faith and credit clause was accordingly held untenable, and it was then said: "Whether, aside from the Federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide."

We perceive nothing in the decision in that case which makes for the conclusion that when the representative character, title, and duties of a receiver have been established by proceedings in a Minnesota court conformably to the altogether different provisions of the later statute embodied in chapter 272, his right to enforce in the courts of another state the assessments judicially levied in Minnesota depends upon comity, unaffected by the full faith and credit clause. Indeed, the implication of the decision is to the contrary. We say this, first, because, had it been thought that the controlling question was one of comity only, there would have been no occasion to consider what effect was accorded in Minnesota to the earlier statute and to the proceedings thereunder; and, second, because especial care was taken to explain that the case in hand was not controlled by the decision in *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. That was an action in a Rhode Island court by a creditor of a Kansas corporation against one of its stockholders, to enforce the contractual double liability of the latter. The creditor had recovered against the corporation in a court in Kansas a judgment which, according to the laws of that state, invested the creditor with a cause of action against the stockholder which could be asserted in any court of competent jurisdiction. The supreme court of Rhode Island, treating the right to maintain the action in that state against the stockholder as dependent upon comity only, and finding that the right with which the creditor was invested under the law of Kansas was unlike that conferred by the law of Rhode Island in like situations, ruled that the action

could not be maintained in the courts of that state. 20 R. I. 466, 40 Atl. 341. But when the case came here, it was held that full faith and credit had not been given to the Kansas judgment upon which the creditor relied, and the judgment of the supreme court of Rhode Island was accordingly reversed, it being said in that connection: "The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured."

In *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, the present receiver sought, by reason of the proceedings in the Minnesota court under chapter 272, to maintain an action in New York against a stockholder residing in that state, "to enforce one of the assessments before mentioned, and this court sustained the action, saying (p. 534):

"It is objected that the receiver cannot bring this action, and *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; and *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a quasi assignee and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. *Relfe v. Rundle* (*Life Asso. of America v. Rundle*) 103 U. S. 222, 226, 26 L. ed. 337, 339; *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; *Howarth v. Angle*, 162 N. Y. 179, 182, 47 L.R.A. 725, 56 N. E. 489."

And in *Converse v. First Nat. Bank*, 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691, where, in a similar action, the supreme court of errors of Connecticut had given judgment against the receiver, this court reversed the judgment on the authority of *Bernheimer v. Converse*, supra.

True, the full faith and credit clause of the Constitution is not without well-recognized exceptions, as is pointed out in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed.

1123, 13 Sup. Ct. Rep. 224; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237, and *National Exch. Bank v. Wiley*, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; so much so that no other state properly can be said to have any public policy thereon. And what the law of Wisconsin 261] may be respecting the *relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.

Besides, it is not questioned that the Wisconsin court in which the receiver sought to enforce the causes of action with which he had become invested under the laws and proceedings relied upon was possessed of jurisdiction which was fully adequate to the occasion. His right to resort to that court was not denied by reason of any jurisdictional impediment, but because the supreme court of the state was of opinion that, as to such causes of action, the courts of that state "could, if they chose, close their doors and refuse to entertain the same."

In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States.

The judgments are accordingly reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed.

262]*O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly, & Company, Bankrupts, Appt.,

v.

CRUCIBLE STEEL COMPANY OF AMERICA.

(See S. C. Reporter's ed. 262-267.)

Bankruptcy—effect of unrecorded chattel mortgage.

1. The effect to be given in bankruptcy proceedings to an unrecorded chattel mort-

gage as against subsequent creditors of the bankrupt mortgagor, without notice, must be determined by the recording law of the state, in view of the declaration of the bankrupt act of July 1, 1898 (30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449), § 67a, that claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate.

[For other cases, see *Bankruptcy*, 193-201, in *Digest Sup. Ct. 1908.*]

Chattel mortgage — recording — creditors.

2. Subsequent creditors without notice of an unrecorded chattel mortgage, who have not secured any specific lien upon the mortgaged property by execution, attachment, or otherwise, are not comprehended by the term "creditors," as used in Ky. Stat. 1903, § 496, which provides that no unrecorded mortgage shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors.

[For other cases, see *Chattel Mortgage*, III., in *Digest Sup. Ct. 1908.*]

[No. 183.]

Argued March 4, 1912. Decided April 1, 1912.

APPEAL from the United States Circuit Court of appeals for the Sixth Circuit to review a decree which, reversing an order of the District Court for the Western District of Kentucky, sustained the right to priority asserted by the chattel mortgagee of a bankrupt, as against subsequent creditors who had not secured any specific lien upon the mortgaged property. Affirmed.

See same case below, 98 C. C. A. 101, 174 Fed. 127.

The facts are stated in the opinion.

Mr. H. H. Nettelroth argued the cause, and, with Mr. John C. Doolan, filed a brief for appellant:

Under the law of Kentucky an unrecorded mortgage is invalid as to subsequent creditors without notice, even though such creditors have fastened no lien upon the mortgaged property.

Wick Bros. v. McConnell, 102 Ky. 434, 43 S. W. 205; *Besten v. People's Messenger & Parcel Delivery Co.* 30 Ky. L. Rep. 787, 99 S. W. 631; *Swafford v. Asher*, 31 Ky. L. Rep. 1338, 105 S. W. 164; *Re Duck-er*, 67 C. C. A. 117, 134 Fed. 43.

Mr. Keith L. Bullitt argued the cause, and, with Mr. William Marshall Bullitt, filed a brief for appellee:

The term "creditors" includes only those who, by judgment, attachment, or otherwise, have obtained an interest in, or a

lien upon, the property covered by the mortgage.

Button v. Rathbone, 126 N. Y. 187, 27 N. E. 266; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248; 8 Am. & Eng. Enc. Law, 241; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; McFadden v. Worthington, 45 Ill. 365; Stewart v. Beale, 7 Hun, 405; Ransom v. Schmela, 13 Neb. 77, 12 N. W. 926; Grace v. Wade, 45 Tex. 527; Citizens' Sav. Bank v. Hibbs, 11 Ky. L. Rep. 441; Underwood v. Ogden, 6 B. Mon. 606; Bailey v. Welch, 4 B. Mon. 244; United States Bank v. Huth, 4 B. Mon. 451; Wicks Bros. v. McConnell, 102 Ky. 434, 43 S. W. 205; Re Ducker, 67 C. C. A. 117, 134 Fed. 48; Re Doran, 83 C. C. A. 265, 154 Fed. 471; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

The rule in Kentucky has not been changed by the decisions rendered in Swafford v. Asher, 31 Ky. L. Rep. 1338, 105 S. W. 164, and in Besten v. People's Messenger & Parcel Delivery Co. 30 Ky. L. Rep. 787, 99 S. W. 631.

Crucible Steel Co. v. Holt, 98 C. C. A. 101, 174 Fed. 127.

Mr. Justice Van Devanter delivered the opinion of the court:

This appeal brings up for review a decree reversing an order of the district court for the western district of Kentucky in a proceeding in bankruptcy. The matter in dispute is the validity, under the recording law of that state, of an unrecorded chattel mortgage as against creditors who became such after the mortgage was given, and without knowledge of it, where none of them had secured a lien upon the mortgaged property by execution, attachment, or otherwise. The mortgagee, in making proof of its claim, asserted a lien under the mortgage, and sought priority of payment out of the proceeds of the property covered by it. The claim was allowed, but the district court, being of opinion that the mortgage was invalid as against the subsequent creditors without notice, held that it gave no right to priority of payment as against them. The mortgagee appealed to the circuit court of appeals, and that court, taking the view that the mortgage was valid as against those creditors, since none had secured any specific lien upon the mortgaged property, sustained the right to priority asserted by the mortgagee. 98 C. C. A. 101, 174 Fed. 127. The trustee prosecutes the present appeal.

Section 67a of the bankruptcy act declares:

"Claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors
56 L. ed.

of the bankrupt, shall not be liens against his estate." [30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449.]

And the applicable provision of the recording law of Kentucky (Stat. 1903, § 496) is as follows:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

It is apparent from the language of § 67a and from the decisions of this court in York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519, and other like cases, that the effect to be given to the unrecorded chattel mortgage must be determined by the recording law of the state; and it is also apparent that the question arising under that law turns upon who are included in the term "creditors" in § 496.

Upon that question the decisions of the court of appeals of the state have not been uniform, but it is conceded, and is evident upon an examination of the more recent decisions, that the term does not include antecedent creditors, or subsequent creditors whose claims are acquired with notice of the unrecorded mortgage, but does include subsequent creditors without notice, who, by their diligence, secure a specific lien upon the property, as by execution or attachment, before the mortgage is recorded. Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146; Wicks Bros. v. McConnell, 102 Ky. 434, 43 S. W. 205; Clift v. Williams, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; Bowles v. Jones, 123 Ky. 395, 96 S. W. 1121; Swafford v. Asher, 31 Ky. L. Rep. 1338, 105 S. W. 164. And so, the question for decision is reduced to this: Does the term include subsequent creditors without notice, who have not secured such a lien?

No case in that court has been called to our attention, and none has been found by us, in which this question was presented for decision and decided; but in two of the later cases there are expressions bearing thereon which are respectively relied upon here. Thus, in Wicks Bros. v. McConnell, supra, where the prior cases were reviewed with the evident purpose of extracting a general and guiding rule, it was said: "On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit

are protected as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment." (Italics ours.) And in *Swafford v. Asher*, supra, it was said: "As the mortgage was not recorded, it would, of course, not be valid as to creditors whose debts were subsequently created; but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by § 496 of the Kentucky Statutes [of 1903], and, *as said before, there is nothing to show that any debt of the estate was created after the purchase of the terms, except that of appellant, who had actual notice." As *Wicks Bros. v. McConnell* was cited as sustaining this statement, it is not probable that the court regarded it as overruling or departing from what had been said in that case; and this view receives added support from the fact that the opinion in *Swafford v. Asher* was marked by the court, "Not to be officially reported." These considerations, coupled with the further fact that in cases such as *Bowles v. Jones*, supra, where subsequent creditors prevailed over such a mortgagee, the court was careful to state, not only that the claims of the creditors arose after the date of the unrecorded mortgage, but also that the creditors had obtained attachment or other liens upon the mortgaged property before the mortgage was recorded, are persuasive that what was said in *Wicks Bros. v. McConnell* should be accepted as reflecting the true construction of § 496, in the absence of some more positive and direct ruling upon the subject by the court of appeals of the state. Such was the view of the circuit court of appeals, and we are at least unable to say that it was wrong. It follows that, as here the subsequent creditors had not fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy by which the title passed to the trustee, the mortgage, although unrecorded, was valid and effective against them.

Decree affirmed.

268]*HENRY BRINKMEIER, Plff. in Err.,
v.
MISSOURI PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 268-270.)

Pleading — sufficiency of complaint — action under safety-appliance act.

1. The petition states no cause of action under the original safety-appliance act of

March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), making it unlawful for any railroad carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact," where there is no allegation that either of the cars was, at the time of the accident, or at any time, used in moving interstate traffic.

[For other cases, see Pleading, II, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — pleading and practice.

2. The refusal to allow an amendment to the petition in an action founded on the original safety-appliance act of March 2, 1893, after the cause had twice been tried without decisive result, and the period of limitation had expired, so as to allege that the cars were used in moving interstate traffic, involves only a question of pleading and practice under the local law, which is not reviewable in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2209-2226, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — evidence.

3. A ruling that the evidence is insufficient to sustain a recovery under a petition which, while founded on the safety-appliance act of March 2, 1893, fails to state a cause of action under that statute, but at most shows a right of recovery at common law, does not involve a Federal question open to examination in the Federal Supreme Court on a writ of error to a state court.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

[No. 206.]

Submitted March 11, 1912. Decided April 1, 1912.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Sedgwick County, in that state, in favor of defendant in an action for personal injuries. Affirmed.

See same case below, 81 Kan. 101, 105 Pac. 221.

The facts are stated in the opinion.

NOTE.—On the duty and liability under Federal and state railway safety-appliance acts—see note to *Chicago, M. & St. P. R. Co. v. United States*, 20 L.R.A. (N.S.) 473.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

As to questions of local practice and procedure on writ of error from Federal Supreme Court to a state court—see note to *Texas & N. O. R. Co. v. Miller*, 55 L. ed. U. S. 790.

Mr. C. V. Ferguson submitted the cause for plaintiff in error. Messrs. Kos Harris and V. Harris were on the brief:

By every intendment and a reasonable interpretation of the matter alleged in the petition, it sufficiently warns the defendant that it must meet a claim under the safety-appliance act.

Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867.

An objection must be specific; and a general objection that evidence is incompetent or irrelevant is no objection at all, and may and should be ignored by the court, and the evidence considered as admitted without objection.

Walker v. Armstrong, 2 Kan. 220; Kansas P. R. Co. v. Cutter, 19 Kan. 87.

The question of the sufficiency of the petition was not before the supreme court, because the district court made no decision on that question. The sufficiency of the petition was never challenged, at any stage of the proceedings, either by demurrer, motion, or objection.

Kansas P. R. Co. v. Cutter, supra; Evansville & C. R. Co. v. Lawrence, 29 Ind. 622; McBride v. Hartwell, 2 Kan. 410.

The only question properly before the supreme court was the ruling of the district court, sustaining the demurrer to the evidence; and in passing upon such a demurrer the appellate court, on an appeal by the plaintiff, is bound to consider all the evidence, whether rightfully or erroneously admitted by the trial court.

Atwell v. Grant, 11 Md. 101.

The failure to object to evidence at all, or at the proper time, or in a proper manner, is a waiver of the grounds of objection and of the right subsequently to question the admissibility of the evidence.

Hunt v. United States, 10 C. C. A. 74, 19 U. S. App. 683, 61 Fed. 795; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60.

Evidence which is in the case by virtue of a failure to make a proper objection to its admission must be considered and allowed its full force.

Lamb v. Taylor, 67 Md. 85, 8 Atl. 760; People v. Smith, 121 Cal. 355, 53 Pac. 802, 11 Am. Crim. Rep. 108; Levin v. Russell, 42 N. Y. 251; Jones v. Mobile & G. R. Co. 55 Ga. 122; Peters v. Gracia, 110 Cal. 89, 42 Pac. 455; Liverpool & L. & G. Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306.

Evidence which has been admitted without objection is evidence in the case, and must be treated as such in the appellate court, although it would have been rejected as inadmissible if properly objected to. 56 L. ed.

Atwell v. Grant, 11 Md. 101; Farmers' Bank v. Duvall, 7 Gill & J. 78.

Messrs. Balle P. Waggener, Charles E. Benton, and David Smyth submitted the cause for defendant in error:

No Federal question was involved.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Millingar v. Hartuppee, 6 Wall. 258, 18 L. ed. 829; Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

Amendments of pleadings or other proceedings are, as a rule, matters of discretion with the trial court.

Buena Vista County v. Iowa Falls & S. C. R. Co. 112 U. S. 165, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; Gormley v. Bunyan, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453; Stevens v. Nichols (Carr v. Nichols) 157 U. S. 370, 39 L. ed. 736, 15 Sup. Ct. Rep. 640; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

The petition does not state a cause of action under the safety-appliance act.

Johnson v. Southern P. Co. 117 Fed. 470, 54 C. C. A. 508; Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90; Rosney v. Erie R. Co. 68 C. C. A. 155, 135 Fed. 311; Southern R. Co. v. United States, 222 U. S. 20, ante, 72, 32 Sup. Ct. Rep. 2.

The supreme court of Kansas has held many times that a party must recover, if at all, upon the case made by his pleadings.

Union P. R. Co. v. Young, 8 Kan. 658; Atchison, T. & S. F. R. Co. v. Irwin, 35 Kan. 286, 10 Pac. 820; Telle v. Leavenworth Rapid Transit Co. 50 Kan. 455, 31 Pac. 1076; Southern Kansas R. Co. v. Griffith, 54 Kan. 428, 38 Pac. 478; Brown v. Chicago, R. I. & P. R. Co. 59 Kan. 70, 52 Pac. 65; Hunter Mill. Co. v. Allen, 65 Kan. 158, 69 Pac. 159; Schwarzschild & S. Co. v. Weeks, 66 Kan. 800, 72 Pac. 274.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover for personal injuries *sustained by a brake-[269 man while coupling two freight cars on a side track of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the state courts (81 Kan. 101, 105 Pac. 221), and the plaintiff brings the case here. The injury occurred November 12, 1900, and the action was begun March 15, 1901.

The question first presented for decision is whether the petition stated a cause of action under the original safety-appliance act of March 2, 1893, 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174, which made it unlawful for any common

carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car *used in moving interstate traffic*, not equipped with couplers coupling automatically by impact," etc. The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The supreme court of the state held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. *Southern R. Co. v. United States*, 222 U. S. 20, 25, ante, 72, 74, 32 Sup. Ct. Rep. 2. The act was amended March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143, so as to include all cars "used on any railroad engaged in interstate commerce," but the amendment came too late to be of any avail to the plaintiff.

In 1908, after the case had been twice 270] tried without any *decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534.

It also was held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the safety-appliance act, but at most a right of recovery at common law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to re-examination in this court.

Finding no error in the record in respect of any Federal right, the judgment must be affirmed.

STANDARD OIL COMPANY OF INDIANA, Plff. in Err.,

v.

STATE OF MISSOURI ON THE INFORMATION OF HERBERT S. HADLEY, Attorney General, Succeeded by Elliott W. Mayor, et al. (No. 47.)

REPUBLIC OIL COMPANY, Plff. in Err.,

v.

STATE OF MISSOURI ON THE INFORMATION OF HERBERT S. HADLEY, Attorney General, Succeeded by Elliott W. Mayor, et al. (No. 48.)

(See S. C. Reporter's ed. 270-290.)

Error to state court — scope of review — construction of state Constitution.

1. The ruling of the highest court of a state that, under the state Constitution, it had jurisdiction of the subject-matter, and authority to enter judgment of ouster and fine in civil quo warranto proceedings against foreign corporations holding licenses to do business in the state, is conclusive on the Federal Supreme Court on a writ of error to the state court, regardless of whether the judgment is civil or criminal, or both combined.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Quo warranto — judgment — fine.

2. A corporation may, in a quo warranto proceeding in Missouri, be subjected to a substantial fine as well as to a judgment of ouster, quo warranto in that state being regarded as purely civil in its nature.

[Nature of quo warranto proceedings. see Quo Warranto, in Digest Sup. Ct. 1908.]

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

As to what service of process is sufficient to constitute due process of law—see note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 577.

As to when quo warranto will lie against a corporation—see note to *Ames v. Kansas*, 28 L. ed. U. S. 482.

On exclusion or recognition of foreign corporations—see notes to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 289; and *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621; and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

Constitutional law — due process of law — notice and hearing.

3. Entry of a judgment of ouster and the imposition of a substantial fine in quo warranto proceedings, conformably to the local practice, afford sufficient notice and opportunity to be heard to satisfy the due-process-of-law clause of U. S. Const., 14th Amend., although the information contains only general allegations of misuser, with only a prayer for ouster.

[For other cases, see Constitutional Law, 696-724, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — quo warranto — notice and hearing.

4. There is no want of due process of law in a judgment of the highest court of a state, imposing a substantial fine in quo warranto proceedings, conformably to the local practice, upon a foreign corporation found to have misused its license to do business in the state, although there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing on that subject.

[For other cases, see Constitutional Law, 629-678; 696-724, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal questions.

5. Collateral questions as to whether quo warranto proceedings abated as against a foreign corporation when it gave notice of its withdrawal from the state, and as to whether an amendment to the state anti-trust act operated to relieve the corporation from the penalties for all combinations in restraint of trade entered into prior to the adoption of the amendatory statute, are not reviewable on writ of error from the Federal Supreme Court to a state court, to review a judgment of ouster and fine, where such judgment was within the jurisdiction of the state court, and within the issues submitted.

[For other cases, see Appeal and Error, 2072-2226, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — quo warranto.

6. A foreign corporation ousted and fined \$50,000 in civil quo warranto proceedings in the highest court of a state, for misuser of its license to do business in the state, cannot claim to have been denied the equal protection of the laws because corporations prosecuted in the inferior state courts for identically the same acts, in violation of the state anti-trust act, are entitled to a trial by jury, and, if convicted, can be ousted of their franchises and subjected to a fine not to exceed \$100 per day during the time the combination continued in effect.

[For other cases, see Constitutional Law, 239-291, in Digest Sup. Ct. 1908.]

Appeal — modifying or amending judgment below.

7. A judgment of ouster and fine, entered against a foreign corporation in quo warranto proceedings in the highest court of a state, which cannot be reversed on the Federal question involved, cannot be modified so as to provide that the judgment shall not be construed to conflict with a decree

entered in an equity cause in another court, to which the corporation is a party, nor be amended by adding a provision that the judgment of ouster shall not operate to make those who buy the products of the corporation subject to prosecution under a statute making it a felony for any person to deal in articles manufactured by a corporation whose license has been forfeited, which the court has no right to assume will be applied so as to interfere with interstate commerce.

[Judgment on appeal, see Judgment, IX., in Digest Sup. Ct. 1908.]

[Nos. 47 and 48.]

Argued November 8 and 9, 1911. Decided April 1, 1912.

TWO WRITS OF ERROR to the Supreme Court of the State of Missouri to review judgments of ouster and fine in quo warranto proceedings instituted in that court against foreign corporations charged with misusing their license to do business in the state. Affirmed.

See same case below, 218 Mo. 1, 116 S. W. 902.

Statement by Mr. Justice Lamar:

Writ of error to a judgment of ouster and fine against plaintiffs in error in original quo warranto proceedings in the supreme court of Missouri.

The Missouri anti-trust act (Rev. Stat. of 1899, §§ 8968, 8971) provides that any person or corporation which shall form a combination in restraint of trade shall be deemed guilty of a conspiracy to defraud, and on conviction shall be subject to a penalty of not less than \$5 nor more than \$100 per day for each day the combination continues, and in addition the guilty corporation shall have its franchises forfeited.

In April, 1905, while this act was in force, the attorney general filed an information in the nature of a writ of quo warranto against the Standard Oil Company and the Republic Oil Company, foreign corporations, holding licenses to do business in Missouri, and the Waters-Pierce Oil Company, a domestic company, alleging that between the day of 1901, and March 29, 1905, they had formed and maintained a combination to prevent competition in the buying, selling, and refining oil, to the great damage of the people of Missouri.

The information contained no reference to the anti-trust act further than was involved in the allegation that, "by reason of the premises, said respondents, . . . grossly offended against the laws of the state, and wilfully and flagrantly abused and misused their . . . franchises . . . and their acts . . . constitute a *wilful

and malicious perversion of the franchise granted the said corporations. . . . Wherefore, your informant, prosecuting in this behalf for the state of Missouri, prays" that each of the defendants be ousted of their said corporate franchises and license to do business under the laws of the state.

The defendants answered, denying all the allegations of the petition, and moving to dismiss on many grounds not material to be considered here. The case was referred to a commissioner to take testimony and report findings of fact and conclusions of law.

While the case was under consideration, the anti-trust statute was amended in March, 1907, so as to provide that if any corporation should be found guilty of a violation of the provisions of the act, its charter or license should be forfeited, and the court might also forfeit any or all of its property to the state, or cancel its right to do business, or the court might assess a fine. It was provided that the act should not operate to release any penalty, forfeiture, or liability already incurred.

After the passage of this amendment, making new and increased penalties for a violation of the anti-trust statute, the commissioner made his report, finding (May 24, 1907) against the defendants on the law and the fact. On June 22, 1907, the Republic Oil Company filed with the secretary of state, in statutory form, a notice of its withdrawal from the state. On October 23, 1907, the fact of this withdrawal was brought to the attention of the court, and a motion was made that the case be abated so far as the Republic Oil Company was concerned. The motion was overruled, and later the court found that each of the defendants had entered into a combination in restraint of trade, and prevented and destroyed competition. And it was adjudged that the defendants had each forfeited their right to do business, and they were each ousted of any and all right and franchise, 274]and fined *\$50,000. In view of the capital of the company and the amount of profits that had been made during the period of the combination, some members of the court expressed the opinion that the fine should be \$1,000,000.

A motion for rehearing was denied. The Waters-Pierce Oil Company paid the fine and complied with conditions, by virtue of which it was permitted to continue to do business in the state. The other two defendants brought the case here.

It is alleged that—

(b) "The court held that this was a civil proceeding, and that it had no criminal jurisdiction. It then, in addition to an ouster, adjudged that this respondent should pay a fine of \$50,000. This fine was at least

the exercise of criminal jurisdiction in an original proceeding, which was beyond the court's power and jurisdiction. The court thereby takes from the respondent its property without due process of law, discriminates against respondent, and refuses to accord to it the equal protection of the law, all of which is contrary to the 14th Amendment to the Constitution of the United States."

There are various assignments of error challenging the constitutionality of the anti-trust statute, on the ground that it deprived defendants of their property without due process of law and interfered with interstate commerce. It was also claimed that the defendants were denied the equal protection of the law, in that, in forfeiting their franchise and imposing a fine of \$50,000 without a jury trial, a different procedure had been adopted and a different judgment entered from that which could have been rendered on conviction by a jury for violation of the anti-trust statute.

The defendants (now plaintiffs in error) sought first a reversal of the judgment of the supreme court of Missouri, and, in the alternative, a modification of the judgment. *To this end attention was called to [275 the fact that the plaintiffs in error were parties in the case of *Standard Oil Co. v. United States* [221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502]. They pray that the judgment herein be modified so as to provide that it should not be held to conflict with any decree entered in that equity cause so far as concerned property in Missouri belonging to plaintiffs in error.

It was also urged that the statute making it a felony for any person to sell or deal in articles manufactured by a corporation whose license had been forfeited would operate to destroy the value of the plaintiffs' property in Missouri, and would in effect prevent them from engaging in interstate commerce. They moved that the judgment be modified here so as to provide against any such result.

Mr. Frank Hagerman argued the cause, and, with Messrs. Alfred D. Eddy and Robert W. Stewart, filed a brief for plaintiffs in error:

The cases below were civil, as distinguished from criminal.

State ex rel. Crow v. Vallins, 140 Mo. 535, 41 S. W. 887; *State ex rel. Walker v. Equitable Loan & Invest. Co.* 142 Mo. 335, 41 S. W. 916; *Ames v. Kansas*, 111 U. S. 449, 461, 28 L. ed. 482, 487, 4 Sup. Ct. Rep. 437.

The power to fine in a substantial sum did not exist at common law. Neither

state statute nor Constitution authorized it.

State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 69, 92 S. W. 185, 98 S. W. 539; Ames v. Kansas, 111 U. S. 449, 461, 28 L. ed. 482, 487, 4 Sup. Ct. Rep. 437; 3 Bl. Com. 263; Rex v. Francis, 2 T. R. 484; Bacon, Abr. title Information D; 2 Kyd, Corp. 439.

To treat respondents in a civil suit, asking no such relief, as criminals, and fine each of them \$50,000, by an exercise of original criminal jurisdiction, upon the court's own suggestion, after the submission of the case, and when the judgment was entered, was not due process of law, because at the threshold to that protection is the question of jurisdiction. If that does not exist, there is not due process.

Twining v. New Jersey, 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Bell v. Bell, 181 U. S. 175, 178, 45 L. ed. 804, 807, 21 Sup. Ct. Rep. 551; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237.

The discrimination is as pointed as that existing in the cases heretofore here decided.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 93, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247.

This court is empowered to do justice and thereby meet every emergency, and upon error enter, or direct the lower court to enter, such judgment as it deems proper.

Stanley v. Schwalby, 162 U. S. 255, 279, 283, 40 L. ed. 960, 968, 970, 16 Sup. Ct. Rep. 754.

It is possible to permit the company to remain in the state upon the same conditions that it is to be by this court permitted there to operate under the Sherman act by a reversal of so much of the judgment as provides for a fine, and the modification of the ouster to the extent that it shall become effective and in force in case the respondent fails, within a fixed time, to reorganize its business in accordance with the decree finally entered in United States v. Standard Oil Co. 173 Fed. 177, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, with the proviso that in case of such reorganization within such time, the ouster shall not be enforced.

The judgment of ouster and a fine was 56 L. ed.

clearly wrong as to the Republic Oil Company, which voluntarily withdrew from the state. The action should, as to it, therefore, be simply abated at its costs.

Re Franklin Teleg. Co. 119 Mass. 449; State v. Centreville Bridge Co. 18 Ala. 681.

The effect of the judgment of ouster is confiscation under Mo. Rev. Stat. 1899, §§ 8969, 8972, 8975 Mo. Laws 1907, pp. 379, 380), whereby the obligation of a contract is impaired and the equal protection of the law denied.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 172, 173, 52 L. ed. 436, 441, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The statute is not one of exclusion; it applies alike to all corporations, domestic and foreign, and therefore cannot be upheld upon the ground of being a condition to a foreign corporation entering the state or remaining therein.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66.

The Constitution of the United States is a protection against the act of the state, regardless of the form which it takes or method it is to pursue. It may be by judgment of a court, or come into existence for the first time by the effect to be given to such judgment.

Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 239, 50 L. ed. 167, 170, 26 Sup. Ct. Rep. 27; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 520, 50 L. ed. 845, 850, 851, 26 Sup. Ct. Rep. 518.

The judgment of ouster as entered, and especially as it is to be enforced under Mo. Rev. Stat. 1899, §§ 8972, 8975 (Mo. Laws 1907, p. 380), unwarrantably interferes with the right to do interstate business.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103.

There should have been added, as was done in a Texas case (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 41, 44 L. ed. 657, 662, 20 Sup. Ct. Rep. 518), an express provision that nothing in the judgment should preclude the defendant, its successors or assigns, from dealing, in the state, in any article in interstate business.

The judgment of ouster as written should at least be modified. If any modification is made, it would not be unfair to add that, as already suggested, any ouster should be suspended if and whenever there becomes effective the contemplated reorganization to meet the requirements made by the decree in *United States v. Standard Oil Co.* 173 Fed. 177, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502.

The statute for the violation of which there was an ouster was, prior to the trial, repealed, and it was not due process of law to enforce it.

State v. Centreville Bridge Co. 18 Ala. 681; *Re Franklin Teleg. Co.* 119 Mass. 449.

Mr. **Elliot W. Major**, Attorney General of Missouri, and Mr. **Charles G. Revelle**, Assistant Attorney General, argued the cause and filed a brief for defendant in error:

It is elementary that only Federal questions can be considered by the Supreme Court of the United States in reviewing the judgment of a state court.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Cornell University v. Fiske*, 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. Rep. 775; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Whether a statute is repugnant to the state Constitution is not a Federal question, but one which belongs exclusively to the state court, and the decision of that court is conclusive here.

De La Lande v. Louisiana, 18 How. 192, 15 L. ed. 350; *Re Kemmler*, 136 U. S. 447, 34 L. ed. 524, 10 Sup. Ct. Rep. 930; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Levy v. Superior Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170; *Rasmussen v. Idaho*, 181 U. S. 200, 45 L. ed. 821, 21 Sup. Ct.

Rep. 594; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 462, 463, 42 L. ed. 237, 17 Sup. Ct. Rep. 829.

The supreme court of Missouri has, on numerous occasions, sustained the validity of the anti-trust laws under which plaintiffs in error are being prosecuted, the same being justified as a proper exercise of the police power of the state.

State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; *State ex rel. Crow v. Continental Tobacco Co.* 177 Mo. 1, 75 S. W. 737; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645; *State ex rel. Hadley v. Standard Oil Co.* 194 Mo. 148, 91 S. W. 1062; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902.

Likewise the proper construction to be given a statute, and as to what is to be regarded as within its terms, presents no Federal question.

Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; *Smiley v. Kansas*, 196 U. S. 454, 455, 49 L. ed. 550, 551, 25 Sup. Ct. Rep. 289; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 42, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Armour Packing Co. v. Lacy*, 200 U. S. 236, 50 L. ed. 457, 26 Sup. Ct. Rep. 232; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 466, 467, 45 L. ed. 625, 626, 21 Sup. Ct. Rep. 423.

The question as to what penalties are prescribed by the laws of Missouri for violations of the anti-trust act involves only the exercise of judicial interpretation and is not reviewable.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 111, 53 L. ed. 430, 29 Sup. Ct. Rep. 220; *Coffey v. Harlan County*, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 414, 41 L. ed. 494, 17 Sup. Ct. Rep. 130.

The decision of the state court that, according to the rules of practice and procedure in Missouri, proceedings in the nature of quo warranto are of a civil nature, is conclusive.

Wood v. Brady, 150 U. S. 23, 37 L. ed. 983, 14 Sup. Ct. Rep. 6; *Brown-Forman Co. v. Kentucky*, 217 U. S. 571, 54 L. ed. 886, 30 Sup. Ct. Rep. 578.

The highest courts of Missouri have uni-

formly construed such proceedings to be of a civil nature.

State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 70, 92 S. W. 185, 98 S. W. 539.

The judgment of a state court, respecting the extent of its original jurisdiction in quo warranto proceedings and in dealing with matters under state law, is not reviewable here.

Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Smith v. Adsit, 16 Wall. 189, 21 L. ed. 310; Tripp v. Santa Rosa Street R. Co. 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Cincinnati Street R. Co. v. Snell, 193 U. S. 35, 38, 48 L. ed. 607, 608, 24 Sup. Ct. Rep. 319; Twining v. New Jersey, 211 U. S. 110, 113, 53 L. ed. 110, 112, 29 Sup. Ct. Rep. 14; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; League v. Texas, 184 U. S. 158, 46 L. ed. 480, 22 Sup. Ct. Rep. 475; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 570, 42 L. ed. 859, 18 Sup. Ct. Rep. 445; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 31, 25 L. ed. 992; Ex parte Reggel, 114 U. S. 651, 29 L. ed. 253, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Hooker v. Los Angeles, 188 U. S. 318, 319, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Waters-Pierce Oil Co. v. Texas, 212 U. S. 107, 53 L. ed. 428, 29 Sup. Ct. Rep. 220.

The jurisdiction in quo warranto has been universally construed by the supreme court of Missouri to mean jurisdiction of an information in the nature of a quo warranto, and, in the exercise thereof, forfeitures have been decreed and fines imposed.

State ex rel. McIlhany v. Stewart, 32 Mo. 379; State ex rel. Atty. Gen. v. Vail, 53 Mo. 97; State ex rel. Walker v. Equitable Loan & Invest. Asso. 142 Mo. 325, 41 S. W. 916; State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 51, 92 S. W. 185, 98 S. W. 539; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 345, 116 S. W. 902.

The question as to whether the penalty section of the law under which these proceedings were instituted was repealed by a subsequent legislative act involves no Federal question, and is not reviewable.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 166, 167, 36 L. ed. 928, 13 Sup. Ct. Rep. 54.

Even if the section referred to had been
56 L. ed.

repealed, as asserted by plaintiffs, the court still had the power to render the judgment it did, and this court cannot interfere.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 47, 44 L. ed. 665, 20 Sup. Ct. Rep. 518.

The constitutionality of the statute will not be determined in any case unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question, and then only where the part of the statute alleged to be unconstitutional is involved in the controversy and the remaining portion is incomplete and inoperative in itself.

National Cotton Oil Co. v. Texas, 197 U. S. 133, 49 L. ed. 696, 25 Sup. Ct. Rep. 379; 8 Enc. Law & Proc. 798; McChord v. Louisville & N. R. Co. 183 U. S. 495, 496, 46 L. ed. 295, 22 Sup. Ct. Rep. 165; New York ex rel. Hatch v. Reardon, 204 U. S. 160, 51 L. ed. 422, 27 Sup. Ct. Rep. 188; Patterson v. The Eudora, 190 U. S. 176, 47 L. ed. 1006, 23 Sup. Ct. Rep. 821; Arbuckle v. Blackburn, 191 U. S. 413, 415, 48 L. ed. 241, 242, 24 Sup. Ct. Rep. 148; Castillo v. McConnico, 168 U. S. 680, 42 L. ed. 624, 18 Sup. Ct. Rep. 229; Albany County v. Stanley, 105 U. S. 311, 26 L. ed. 1049; Clark v. Kansas City, 176 U. S. 118, 44 L. ed. 396, 20 Sup. Ct. Rep. 284; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 318, 50 L. ed. 209, 26 Sup. Ct. Rep. 100.

A Federal question cannot be raised for the first time in a petition or motion for rehearing, unless the state court actually passes thereon. An order merely overruling or denying the motion, or basing the denial upon other grounds, does not pass upon nor preserve the question.

Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Waters-Pierce Oil Co. v. Texas, 212 U. S. 115, 117, 53 L. ed. 433, 434, 29 Sup. Ct. Rep. 227; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Loeber v. Schroeder, 149 U. S. 580, 585, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 834; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.

Neither does this court review, but, on the contrary, accepts as conclusive, the findings of fact made by the state court, and that such facts constitute a violation of the law as construed.

Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452,

17 Mor. Min. Rep. 704; *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 200; *Gardner v. Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; *Chrisman v. Miller*, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; *Chapman & D. Land Co. v. Bigelow*, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; *Smiley v. Kansas*, 196 U. S. 454, 455, 49 L. ed. 550, 551, 25 Sup. Ct. Rep. 289.

The authority of the state legislature to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade, or the carrying out in the state of such agreements or combinations, is absolute and complete.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 410, 50 L. ed. 250, 26 Sup. Ct. Rep. 66; *United States v. Joint Traffic Asso.*, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States v. Trans-Missouri Freight Asso.*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The state likewise has the absolute right to prescribe the punishment for violations of the anti-trust laws.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 220; *Coffey v. Harlan County*, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Rippey v. Texas*, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; *Marvin v. Trout*, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Devine v. Los Angeles*, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct.

Rep. 110; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U. S. 251, 51 L. ed. 172, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104.

The statute relating to the production of books, papers, and witnesses upon an order of the court, after due notice and opportunity to be heard, does not violate any provision of the Federal Constitution.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 550, 52 L. ed. 334, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

The construction placed by the supreme court of Missouri upon the extent of its jurisdiction and its statutory and constitutional authority both to decree a forfeiture of the franchises of plaintiffs in error and impose a fine does not contravene any provision of the 14th Amendment to the Constitution of the United States.

Hammond Packing Co. v. Arkansas, 212 U. S. 343, 53 L. ed. 541, 29 Sup. Ct. Rep. 370; *Standard Oil Co. v. Tennessee*, 217 U. S. 420, 54 L. ed. 820, 30 Sup. Ct. Rep. 543; *Twining v. New Jersey*, 211 U. S. 111, 53 L. ed. 111, 29 Sup. Ct. Rep. 14; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Maxwell v. Dow*, 176 U. S. 599, 44 L. ed. 604, 20 Sup. Ct. Rep. 448, 494.

The decisions of the supreme court of Missouri that the reasons for the classification and the particular mischiefs which the legislature sought to suppress were sufficient to warrant the classification will not be disturbed unless shown to be unmistakably and palpably wrong.

Welch v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; *Southwestern Oil Co. v. Texas*, 217 U. S. 126, 127, 54 L. ed. 694, 695, 30 Sup. Ct. Rep. 496; *McLean v. Arkansas*, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; *Williams v. Arkansas*, 217 U. S. 90, 54 L. ed. 678, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865.

The distinction between labor and property is broad enough to authorize classification and separate regulations.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 600; *Thomas v. Cincinnati, N. O. &*

T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; *Arthur v. Oakes*, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Wabash R. Co. v. Hannahan*, 121 Fed. 568; *Coeur d'Alene Consol. & Min. Co. v. Miners' Union*, 19 L.R.A. 382, 51 Fed. 260; *Re Higgins*, 27 Fed. 443; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Snow v. Wheeler*, 113 Mass. 179; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Mayer v. Journeymen Stonecutters' Asso.* 47 N. J. Eq. 519, 20 Atl. 492; *National Protective Asso. v. Cumming*, 170 N. Y. 317, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Moores v. Bricklayers' Union*, 10 Ohio Dec. Reprint, 665; *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; *Cote v. Murphy*, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Everett Wadley Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798; *Reg. v. Rowland*, 5 Cox, C. C. 436; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *Pacific Exp. Co. v. Seibert*, 142 U. S. 399, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *McLean v. Arkansas*, 211 U. S. 545, 53 L. ed. 318, 29 Sup. Ct. Rep. 206; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; *Armour Packing Co. v. Lacy*, 200 U. S. 227, 50 L. ed. 452, 26 Sup. Ct. Rep. 232; *Clark v. Titusville*, 184 U. S. 330, 46 L. ed. 572, 22 Sup. Ct. Rep. 382; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The Standard Oil Company and the Republic Oil Company by this writ of error seek to reverse a judgment of ouster and

fine of \$50,000, entered against each of them in original quo warranto proceedings by the supreme court of Missouri, contending that they are thereby deprived of property without due process of law and denied the equal protection of the law.

The briefs and arguments for the defendants were addressed mainly to the proposition that the fine of \$50,000 was a criminal sentence in a civil suit, and void because beyond the jurisdiction of the court, and, for the further reason, that the pleadings and prayer gave no notice which would support such a sentence.

1. It is, of course, essential to the validity of any judgment that the court rendering it should have had jurisdiction, not only of the parties, but of the subject-matter. [281] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 247, 41 L. ed. 983, 988, 17 Sup. Ct. Rep. 581. But it is equally well settled that it is for the supreme court of a state finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the state by which the court was organized. In this case the Constitution of Missouri declared that "the supreme court shall have power to issue writs of habeas corpus, quo warranto, certiorari, and other remedial writs, and to hear and determine the same." Its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject-matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is conclusive upon us regardless of whether the judgment is civil or criminal, or both combined. *Standard Oil Co. v. Tennessee*, 217 U. S. 420, 54 L. ed. 820, 30 Sup. Ct. Rep. 543.

2. The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If,

for instance, the action be upon a money demand, *the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court, in rendering them, would transcend the limits of its authority in those cases." *Windsor v. McVeigh*, 93 U. S. 274, 282, 23 L. ed. 914, 917. See also *Reynolds v. Stockton*, 140 U. S. 265-268, 35 L. ed. 467-469, 11 Sup. Ct. Rep. 773; *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1, 14, 30 L. ed. 1128, 1132, 7 Sup. Ct. Rep. 1043.

The defendants claim that the present case is within this principle,—that the judgment for a fine of \$50,000, which some of the Missouri court thought should have been a million dollars, was not only a criminal sentence in a civil suit, but beyond the issues and the prayer for relief in the information, and therefore void, as having been in substance entered without notice and opportunity to be heard. This raises the old question whether information in the nature of quo warranto is a civil or a criminal proceeding, and the further question whether, under general allegations of misuser in and information with only a prayer for ouster, a fine may be imposed in those jurisdictions where quo warranto has ceased to be a criminal proceeding. The uncertainty as to the relief that may be granted in such case arises from the fact that at one time the proceeding was wholly criminal, and those guilty of usurping a franchise were prosecuted by information instead of by indictment, and punished both by judgment of ouster and by fine. But in England, before the Revolution, and since that date in most of American states, including Missouri, quo warranto has been resorted to for the purpose of trying the civil right, and determining *whether the defendant had usurped or forfeited the franchise in question. After this method of procedure began to be used as a form of action to try title, it was inevitable that the civil feature would tend to dominate in fixing its character for all purposes. But the discussion as to the nature of such writs and the character of the judgment that could be entered, though not controlled by their use (*Coffey v. Harlan County*, 204 U. S. 659, 664. 51 L. ed. 666, 669, 27 Sup. Ct. Rep. 305; *Huntington*

v. Attrill, 146 U. S. 667, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224; *Boyd v. United States*, 116 U. S. 634, 29 L. ed. 752, 6 Sup. Ct. Rep. 524), has been prolonged by the retention of the words information, prosecute, guilty, punish, fine,—survivals of the period when the writ was a criminal proceeding in every respect.

In some jurisdictions the writ is still treated as criminal, both in the procedure adopted and in the relief afforded. *State v. Kearn*, 17 R. I. 401, 22 Atl. 322, 1018. But there are practically no decisions which deal with the nature and amount of the fine which can be entered in states where, as in Missouri, quo warranto is treated as a purely civil proceeding. The references to the subject, both in textbooks and opinions, are few and casual. They usually repeat Blackstone's statement (3 Com. 262) that the writ is now used for trying the civil right, "the fine being nominal only." *Ames v. Kansas*, 111 U. S. 470, 28 L. ed. 490, 4 Sup. Ct. Rep. 437; *Com. v. Woelper*, 3 Serg. & R. 53; *High, Extr. Legal Rem.* 702, 697, 593. These authorities and the general practice indicate that in most of the American states only a nominal fine can be imposed in civil quo warranto proceedings. We shall not enter upon any discussion of the question as to the character of the proceeding nor the amount and nature of the money judgment. For, in Missouri, and prior to the decision in this case, the rulings were to the effect that the supreme court of Missouri had jurisdiction not only to oust, but to impose a substantial fine in quo warranto.

In 1865, under a Constitution which, like the present, *conferred power "to is-[284 sue writs of quo warranto and hear and determine the same," the court tried the case of *State ex rel. Circuit Atty. v. Bernoudy*, 36 Mo. 279, brought against the clerk of a circuit court for usurpation of the office. There was a prayer for judgment of ouster and costs. The court said:

"No evidence is offered to charge the defendant with any evil intent, and it being probable that he acted from mistaken views only, [the court] will not avail itself of the power given by law, to impose a fine on him, and will condemn him to pay the cost only of this proceeding."

In 1902, in *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 393, 41 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645, information in the nature of quo warranto was filed in the supreme court against three corporations, praying that their franchises be forfeited because they had formed and maintained a conspiracy in restraint of trade. The court held that, "under the circumstances, the judgment of absolute ouster

is not necessary, but the needs of justice will be satisfied by the imposition of a fine." It thereupon adjudged that each of the defendants should pay the sum of \$5,000 as a fine, together with the costs of court.

In *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 37, 92 S. W. 185, 98 S. W. 539, quo warranto was brought to forfeit the charter of the company, because it had violated a criminal statute prohibiting the sale of pools on horse races. A judgment of ouster was entered and a fine of \$5,000 was imposed. On rehearing the judgment was amended and the provision for a fine omitted. Evidently this was not for want of jurisdiction to impose such sentence, but because it was considered that ouster was all that was demanded by the facts. This appears from the fact that in the present case the court adopted the language of the original *Delmar* decision, in which it was said that the fine is imposed for a violation of the corporation's [285] implied contract "not to violate the franchise granted by the state (218 Mo. 360, 116 S. W. 902). So that, whatever may be the rule elsewhere, in Missouri a corporation may, in quo warranto, be subjected to a money judgment, whether called a fine as punishment, or damages for its implied contract not to violate its franchise.

3. But the defendants insist that even if the court had jurisdiction of the subject-matter and was authorized to impose a fine, there was nothing in the pleading to indicate that such an issue was to be tried, nor any prayer warranting such relief; and hence that the judgment is wanting in due process of law, and void for want of notice of what was to be heard and determined. It is true that the information did not ask for damages or that a fine should be imposed. But if this be treated as a criminal case, a prayer was no more necessary than in an indictment or ordinary information; since such proceedings never contain any reference whatever to the judgment or sentence to be rendered on conviction. In civil suits the pleadings should, no doubt, contain a prayer for judgment, so as to show that the judicial power of the court is invoked. The rules of practice also may well require that the plaintiff should indicate what remedy he seeks. But the prayer does not constitute a part of the notice guaranteed by the Constitution. The facts stated fix the limit of the relief that can be granted. While the judgment must not go beyond that to which the plaintiff was entitled on proof of the allegations made, yet the court may grant other and different relief than that for which he prayed.

4. Nor, from a Federal standpoint, is there any invalidity in the judgment be-
56 L. ed.

cause there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing on a subject which it is claimed was not referred to in the information. At common law, and under many English statutes, the amount of the fine to be imposed "in criminal cases" [286] was not fixed. This was true of the statute of 9 Ann, chapter 20, which, in quo warranto cases, made it "lawful as well to give judgment of ouster as to fine for usurping or unlawfully exercising any office or franchise." The amount to be paid in all such cases was left to the discretion of the court, "regulated by the provisions of Magna Charta and the Bill of Rights that excessive fines ought not to be demanded." 4 Bl. Com. 378. Or, considering the fine as in the nature of a civil penalty, the case is within the principle which permits the recovery of punitive damages. They are not compensatory, nor is the amount measured by rule. But "where the defendant has acted wantonly or perversely, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations" (*Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 107, 37 L. ed. 101, 13 Sup. Ct. Rep. 261), damages may, in some jurisdictions, be assessed, even in civil cases, by way of punishment. It is true that, except in cases for the breach of a contract of marriage, punitive damages have been allowed only in actions for torts. But no Federal question arises on a ruling that, in Missouri, punitive damages may be recovered from a corporation for the violation of its implied contract when, as alleged in the information, the defendants "wilfully and wantonly misused their licenses." *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

The real objection is not so much to the existence of the power to fix the amount of the fine, as the fact that, when exercised by the supreme court of the state, it is not subject to review, and is said to be unlimited. But it is limited. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 111, 53 L. ed. 430, 29 Sup. Ct. Rep. 220. It is limited by the obligation to administer justice, and to no more assess excessive damages than to impose excessive fines. But the power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state, *for right of appeal is not essential to [287] due process of law. *Twining v. New Jersey*, 211 U. S. 111, 53 L. ed. 111, 29 Sup. Ct. Rep. 14.

The 14th Amendment guarantees that the defendant shall be given that character of

notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law. *Iowa C. R. Co. v. Iowa*, supra; *West v. Louisiana*, 194 U. S. 261, 48 L. ed. 968, 24 Sup. Ct. Rep. 650. The matter was summed up by Justice Moody in *Twining v. New Jersey*, 211 U. S. 110, 53 L. ed. 110, 29 Sup. Ct. Rep. 14, where, citing many authorities, he said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, . . . and that there shall be notice and opportunity for hearing given the parties. . . . Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

There is nothing in the present record which takes the case out of that principle. This was not like a suit on a note resulting in a sentence to the penitentiary; or does it resemble any of the extreme illustrations given in *Windsor v. McVeigh*, 93 U. S. 282, 23 L. ed. 917, in which, after a trial, the judgment of a court having jurisdiction might be invalidated because the relief so far exceeded the issue heard as, in effect, to deprive the defendant of the benefit of his constitutional right to notice. No such question is presented in the present case, for the plaintiffs in error were bound to know that, under the laws of Missouri, the court, on proof of the charge contained in the information, might impose a fine, and 288]afforded an opportunity *to offer evidence in mitigation or reduction. On the application for a rehearing there was no claim that the fine was excessive, but the judgment was attacked on the ground that, for want both of jurisdiction and of notice, no such penalty could be imposed. We are concluded by the decision of the supreme court of the state as to its power; the judgment was within the issues submitted, and is not void as having been entered without due process of law.

If the judgment was not void, we cannot consider the collateral questions as to whether the suit abated against the Republic Oil Company when it gave notice of its withdrawal from the state; nor whether the act of 1907, amending the anti-trust act, operated to relieve the defendant from the penalties for all combinations in re-

straint of trade entered into prior to the adoption of the amending statute. These are non-Federal questions.

5. It is further contended that the defendants were denied the equal protection of the law. This claim is based upon the fact that, without indictment or trial by jury, they were ousted of their franchise and subjected to a fine of \$50,000, at the discretion of the supreme court, while corporations prosecuted in the circuit court for the identically same acts in violation of the anti-trust statute were entitled to a trial by jury, and, if convicted, could be ousted of their franchises and subjected to a fine not to exceed \$100 per day, during the time the combination continued in effect.

But proceedings by information in the nature of quo warranto differ in form and consequence from a prosecution by indictment for violation of a criminal statute. In the one, the state proceeds for a violation of the company's private contract; in the other, it prosecutes for a violation of public law. The corporation may be deprived of its franchise for nonuser,—a mere failure to act. It may also be deprived of its charter for that which, though *in-[289]nocent in itself, is beyond the power conferred upon it as an artificial person. If, however, the act of misuser is not only ultra vires but criminal, there is no merger of the civil liability in the criminal offense. Separate proceedings may be instituted,—one to secure the civil judgment, and the other to enforce the criminal law. Both cases may involve a consideration of the same facts; and evidence warranting a judgment of ouster may be sufficient to sustain a conviction for crime. A judgment may in one case sometimes be a bar to the other; but neither remedy is exclusive. The double liability, in civil and criminal proceedings, finds its counterpart in many instances; as, for example, where an attorney is disbarred or ousted of his right to practise in the court because of conduct for which he may likewise be prosecuted and fined.

In addition to these considerations it is to be noted that though the anti-trust act provides for penalties somewhat similar to those which may be entered in quo warranto proceedings, the statute did not, and, as held by the supreme court, could not, lessen the power conferred upon it to hear and determine quo warranto proceedings, and to enter judgments which, on general principles, appertained to the exercise of such constitutional jurisdiction. *Standard Oil Co. v. Tennessee*, 217 U. S. 421, 54 L. ed. 821, 30 Sup. Ct. Rep. 543; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 52 L. ed. 1080, 28 Sup. Ct. Rep. 732.

It was pointed out in the opinion (218 Mo. 349, 116 S. W. 902), that where a corporation had entered into a combination in restraint of trade, it thereby offended against the law of its creation, and consequently forfeited its right longer to exercise its franchise. It was thereupon held that in Missouri quo warranto might have been instituted for such acts of misuser, even though there had been no criminal statute on the subject. For this reason neither the validity nor invalidity of the anti-trust statute has any bearing on the case. The plaintiffs in error cannot 290] *complain that they were deprived of the equal protection of law, because in the civil proceeding they were not tried in the manner, and subjected to the judgment, appropriate in criminal cases.

If the plaintiffs in error were afforded due process of law, and were not deprived of the equal protection of the law, the judgment cannot be reversed. And, if it cannot be reversed, it cannot be modified to provide that it shall not be construed to conflict with a decree entered in an equity cause in another court to which plaintiffs are parties. Neither can it be amended by adding a provision that the judgment of ouster shall not operate to make those who buy plaintiff's products subject to prosecution, under the act of 1907, making it a felony for any person to deal in articles manufactured by a corporation whose license had been forfeited. This statute, which, it is said, will deprive plaintiffs of the right to do interstate business, is not before us. We have no right to assume that it will be applied so as to interfere with any right which plaintiffs have, under the Constitution, to do interstate business.

Affirmed.

WILLIAM CROZIER, Petitioner,

v.

FRIED. KRUPP AKTIENGESELLSCHAFT.

(See S. C. Reporter's ed. 290²-309.)

Injunction — infringement of patent by United States — right to sue officer.

1. Any existing Federal equity jurisdiction of a suit against an Army officer, based upon his alleged infringement of certain patents for the benefit of the United States, from which suit, by stipulation, every claim based upon the prior use of infringing devices was withdrawn, as was also the prayer for preliminary injunction

NOTE.—On jurisdiction to restrain acts of public officers—see note to *Mississippi v. Johnson*, 18 L. ed. U. S. 437. 56 L. ed.

and accounting, leaving in issue only the right to a permanent injunction forbidding the making of, or causing to be made by the defendant, guns or gun carriages embodying the inventions owned by complainant, was ousted by the provisions of the act of June 25, 1910 (36 Stat. at L. 851, chap. 423, U. S. Comp. Stat. Supp. 1911, p. 1457), that whenever an invention described in, and covered by, a patent of the United States, "shall hereafter be used by the United States without license of the owner thereof, or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the court of claims," the effect of which is to provide for the appropriation of a license to use the invention, the appropriation thus made being sanctioned by means of the compensation for which the statute provides.

[For other cases, see *Injunction*, 192, 193; *United States*, 183-189, in *Digest Sup. Ct.* 1908.]

Eminent domain — compensation — use of patent by United States.

2. The suit in the court of claims for compensation provided for by the act of June 25, 1910, "whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same," answers all requirements as to compensation necessary to sustain the statute as an exercise of the power of eminent domain.

[For other cases, see *Eminent Domain*, 138-144, in *Digest Sup. Ct.* 1908.]

Appeal — remanding — dismissal without prejudice.

3. The Federal Supreme Court, upon reversing a decree of the court of appeals of the District of Columbia with directions to affirm a decree of the supreme court of the District, dismissing the bill in a suit to enjoin an Army officer from making or causing to be made, guns or gun carriages embodying the patented inventions owned by complainant, will direct that such affirmation be without prejudice to the right of complainant to proceed in the court of claims, under the act of June 25, 1910, for the compensation for which that statute provides.

[For other cases, see *Appeal and Error*, 5491-5493, in *Digest Sup. Ct.* 1908.]

[No. 8.]

Argued April 20, 1911. Decided April 8, 1912.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, sustaining a demurrer to and dismissing the bill in a suit against an Army officer for the infringement of a patent. Reversed and remanded, with directions 'to

affirm the decree of the Supreme Court of the District, without prejudice.

See same case below, 32 App. D. C. 1, — L.R.A. (N.S.) —, 15 A. & E. Ann. Cas. 1108.

The facts are stated in the opinion.

Mr. Stuart McNamara, Special Assistant to the Attorney General, argued the cause, and, with Attorney General Wickersham, filed a brief for petitioner:

The government is immune from suit except where immunity is waived.

Bracton, de Leg. 168 B; Staundforde, Prerogative, 72 B; Hale, Analysis of Law, § 9; Doe ex dem. Legh v. Roe, 8 Mees. & W. 579, 11 L. J. Exch. N. S. 57; Cohen v. Virginia, 6 Wheat. 264-411, 5 L. ed. 257-292; United States v. Clarke, 8 Pet. 444, 8 L. ed. 1004; The Siren, 7 Wall. 152-154, 19 L. ed. 129-131.

Under the statute the United States may be sued on a contract where it or its representatives have used the inventions under a contract made by the United States with the owner of the invention.

United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; United States v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

The United States may also be sued under an implied contract, where it has appropriated the patented property of an individual under circumstances implying an agreement on the part of the government to pay reasonable compensation therefor.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Alexander, 148 U. S. 186-191, 37 L. ed. 415-417, 13 Sup. Ct. Rep. 529.

But the government cannot be sued in cases of tort. The United States has not consented to be sued in actions sounding in tort for wrongs done by their officers, even though in the discharge of official duties.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Hill v. United States, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011.

Nor can the tort be waived and the litigant proceed upon an implied contract.

Russell v. United States, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899.

This immunity of the government itself extends equally to its property; and there is no distinction between suits against the United States and against its property.

Stanley v. Schwalby, 147 U. S. 508-512, 37 L. ed. 259-261, 13 Sup. Ct. Rep. 418.

The officers and agents of the government, civil and military, in times of peace,

are personally liable to an individual whose rights of property they have wrongfully invaded, even by authority of the United States.

Bates v. Clark, 95 U. S. 204, 24 L. ed. 471.

Such officers, although acting under the orders of the government, are personally liable to be sued for their own infringement of a patent.

Cammeyer v. Newton, 94 U. S. 225-235, 24 L. ed. 72-76.

But there can be no enjoining of government through its officers.

Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820.

A plain, adequate, and complete remedy may be had by respondent for the invasion of its patents, and no circumstance of the case warrants the court's interference by injunction, even if jurisdiction to do so otherwise existed.

James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; Gerken v. Hall, 35 Misc. 225, 71 N. Y. Supp. 753; Grey ex rel. Simmons v. Paterson, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995; Lloyd v. Catlin Coal Co. 210 Ill. 460, 71 N. E. 335; Smith v. Sands, 24 Fed. 470; Bowers Dredging Co. v. New York Dredging Co. 77 Fed. 980; Huntington Dry-Pulverizer Co. v. Alpha Portland Cement Co. 91 Fed. 534; American Ordnance Co. v. Driggs-Seabury Co. 87 Fed. 947.

Mr. William A. Jenner argued the cause and filed a brief for respondent:

The right of a patentee and his assigns under letters patent of the United States to make, use, and vend the patented invention is exclusive of the government of the United States as well as of all others; and any use of such invention unauthorized by the owner of the letters patent, whether done directly by the United States, or indirectly through one of its officers, is a violation of that right.

Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Cammeyer v. Newton, 94 U. S. 225, 235, 24 L. ed. 72, 75; United States v. Burns, 12 Wall. 246, 20 L. ed. 388.

The fact that the invasion of a plaintiff's property is done by a defendant while acting in his official capacity as an officer of the United States government or of a state government does not of itself justify the

wrong nor deprive plaintiff of the relief which otherwise the court would grant.

Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. ed. 623, 628; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Howell v. Miller*, 33 C. C. A. 407, 62 U. S. App. 17, 91 Fed. 129; *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Teal v. Felton*, 12 How. 284, 13 L. ed. 990; *Little v. Barreme*, 2 Cranch, 170, 2 L. ed. 243; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. ed. 373.

The courts have frequently entertained jurisdiction of actions brought to enjoin officers of the United States from infringement of letters patent.

Dashiell v. Grosvenor, 162 U. S. 425, 40 L. ed. 1025, 16 Sup. Ct. Rep. 805; *Cammer v. Newton*, 94 U. S. 225, 24 L. ed. 72; *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717.

The argument that an injunction against the manufacture by defendant of guns and gun carriages infringing the complainant's patent would in effect be an injunction against the free use by the United States of the material at its arsenals used in the manufacture of guns and gun carriages, and that therefore the case is brought within the decision of *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443, and *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820, is untenable.

Howell v. Miller, 33 C. C. A. 407, 62 U. S. App. 17, 91 Fed. 129.

Where jurisdiction in equity has become established, a subsequent statute creating a remedy at law or removing the obstacles at law upon the existence of which the equity jurisdiction was originally founded does not oust equity of that jurisdiction, unless the statute affirmatively discloses the legislative intent to make the legal remedy exclusive.

16 Cyc. 34; *White v. Meday*, 2 Edw. Ch. 486; *New York Ins. Co. v. Roulet*, 24 Wend. 514; *Mayne v. Griswold*, 3 Sandf. 463; *Sailly v. Elmore*, 2 Paige, 497; *Labadie v. Hewitt*, 85 Ill. 341; *McNab v. Heald*, 41 56 L. ed.

Ill. 326; *Crass v. Memphis & C. R. Co.* 96 Ala. 447, 11 So. 480; *Hardeman v. Battersby*, 53 Ga. 36.

Mr. Chief Justice **White** delivered the opinion of the court:

The defendant, a corporation organized under the laws of the German Empire, commenced this suit on June 8, 1907, in the supreme court of the District of Columbia. Relief was sought because of alleged infringements of three described letters patent of the United States, originally issued in the name of Fried. Krupp and assigned to the corporation. Two of the patents, numbered 722,724 and 722,725, were granted in 1903, and the third, issued in 1905, was numbered 791,347. The patents related to improvements in guns and gun carriages. The petitioner here, William Crozier, was named as sole defendant in the bill.

After full averments as to the issue of the patents and the assignments by which the plaintiff had become the owner thereof, it was charged that the defendant Crozier, well knowing of the existence of the patents, "in violation and infringement of said letters patent and of the exclusive rights granted and secured under said letters patent . . . since the 17th day of March, 1903, *and within the period[298 of six (6) years prior to the filing of this bill of complaint, in the city of Bridgeport, state of Connecticut, and in the Watervliet Arsenal in the state of New York, and in the Rock Island Arsenal in the state of Illinois, . . . and elsewhere in the United States," has "made and used, or caused to be made and used, is now making and causing to be made and used, and threatens and intends to continue to make or cause to be made, and to use and cause to be used," guns and recoil-brake apparatus and guns and gun carriages embodying the inventions owned by the complainant, in violation of the rights secured by the patents.

The prayer was for a preliminary and a permanent writ enjoining the defendant, "his agents and employees, from making or using or causing to be made or used any guns or gun carriages or other devices which shall contain or employ the inventions or any of the inventions covered and secured by said letters patent or any of said letters patent." There was also a prayer that the defendant "may be compelled to account for and pay over to your orator all the profits which the defendant has or had derived from any making or using of any gun or any specimen or device covered and secured by said letters patent or any of said letters patent, and that al-

so the defendant be decreed to pay all damages which your orator has incurred or shall incur upon account of defendant's infringement of any of said letters patent, with such increase thereof as shall be meet. . . . "

A stipulation was filed in the cause, in which, while expressly reserving the right of the defendant "to demur or otherwise plead to the bill of complaint, because of lack of jurisdiction on any ground," it was agreed as follows:

"The complainant stipulates that no pecuniary benefit has accrued to the defendant, William Crozier, by reason of the acts set forth in the bill, and complainant waives any claim against said defendant for 299]an accounting of the *profits or for damages, if any, arising out of or suffered by the complainant by reason of the acts and things set forth in the bill. Defendant stipulates and agrees that the government of the United States of America and the Ordnance Department of said government have manufactured, are now manufacturing, and intend to continue the manufacture and use, or to cause to be manufactured for their use, field guns and carriages made after the so-called 'Model of 1902' referred to in the bill of complaint, the claim or claims of complainant being in nowise admitted; that the defendant, William Crozier, sued in this suit, is an officer in the United States Army and Chief of the Ordnance of the United States Army, and is the officer in the service of the United States who directs and is in charge of such manufacture of said field guns and carriages for the United States. The complainant concedes that the defendant, William Crozier, is such officer. The defendant further stipulates and agrees that the complainant is a corporation organized and existing under the laws of the Empire of Germany and a citizen of said Empire and a subject of the Emperor of Germany.

"Further, complainant desires to amend its bill in certain particulars, and the defendant desires to consent thereto. It is therefore stipulated that the bill of complaint herein be amended to read as follows: In paragraph 32 of said bill shall be eliminated and expunged the words 'a preliminary and also,' and also the words 'or using' and the words 'or used,' so that the said 32d paragraph of said bill of complaint shall, when so amended, read as follows:

"And your orator therefore prays your honors to grant unto your orator a permanent writ of injunction issuing out of and under the seal of this honorable court, directed to the said defendant, William Crozier, and strictly enjoining him, his agents

and employees, from making or causing to be made any guns or gun carriages or other *devices which shall contain or em-[300 ploy the inventions or any of the inventions covered and secured by said letters patent or any of said letters patent."

"Paragraph 33 of said bill of complaint shall be amended so as to eliminate and expunge from said paragraph the following words:

"by a decree of this court may be compelled to account for and pay over to your orator all the profits which the defendant has or had derived from any making or using of any gun or any specimen or device covered and secured by said letters patent or any of said letters patent, and that also the defendant be decreed to pay all damages which your orator has incurred or shall incur upon account of defendant's infringement of any of such letters patent, with such increase thereof as shall seem meet, and that also the defendant."

"So that the paragraph marked 33, when so amended, shall read as follows:

"And your orator further prays that the defendant be decreed to pay the costs of this suit, and that your orator may have such other and further relief as the equity of the cause or the statutes of the United States may require and to this court may seem just."

The defendant demurred to the amended bill on various grounds, all of which, in substance, challenged the jurisdiction of the court over the cause on the ground that the suit was really against the United States.

The demurrer was sustained and the bill dismissed. The court of appeals reversed, and remanded the cause for further proceedings not inconsistent with its opinion. 32 App. D. C. 1, — L.R.A.(N.S.) —, 15 A. & E. Ann. Cas. 1108.

The court held that there was a broad distinction between interfering by injunction with the use by the United States of its property and the granting of a writ of injunction for the purpose of preventing the wrongful taking of private property, even although the individual *who was[301 enjoined from such taking was an officer of the government, and although the purpose of the proposed taking was to appropriate the private property when taken to a governmental purpose. The cases of *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443, and *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820, were analyzed and held to be apposite solely to the first proposition; that is, the want of authority to interfere with the

property of the United States used for a governmental purpose. The court said:

"It will thus be seen that in the Belknap and Bruce Cases the subject-matter involved was property of the United States, and that therefore the United States was necessarily a party. In the present case it is not sought to disturb the United States in the possession and use of the guns already manufactured. The court is not asked to deal with property of the United States. The plaintiff simply asks that an officer of the United States be restrained from invading rights granted by the government itself. The acts complained of are not only not sanctioned by any law, but are inconsistent with the patent laws of the United States."

A writ of certiorari was thereupon allowed.

The arguments at bar ultimately considered but affirm on the one hand and deny on the other the ground of distinction upon which the court below placed its ruling and by which the decisions in *Belknap v. Schild* and *International Postal Supply Co. v. Bruce* were held to be distinguishable from the case in hand, and therefore not to be controlling. Thus the government insists that although, under the stipulation and the bill as amended, it resulted that no damages were sought in respect to use by the government of the patented inventions, and no interference of any kind was asked with property belonging to the government, nevertheless the suit was against the United States, because the defendant was conceded to be an officer of the Army of the United States, engaged in the duty of making or causing to be made guns or gun carriages for the Army of the United States. This, it is contended, is demonstrated to be the case by considering that the right to enjoin the officer of the United States, which the court below upheld, virtually asserts the existence of a judicial power to close every arsenal of the United States. On the other hand, the plaintiff insists that the act of the officer in wrongfully attempting to take its property cannot be assumed to be a governmental act, but must be treated as an individual wrong which the courts have the authority to prevent. The exertion of the power to enjoin a wrong of that nature in order to prevent the illegal conversion of private property is, it is urged, a manifestly different thing from using the process of injunction to interfere with property in the possession of the government, and which is being used for a public purpose. But we do not think, under the conditions which presently exist, we are called upon to consider the correctness of the theory upon which the court of

appeals placed its decision, or the soundness of the contentions at bar by which that theory is supported on the one hand or assailed on the other. We reach this conclusion because, since October 7, 1908, when the decision of the court of appeals was rendered, the subject to which the controversy relates was dealt with by Congress by a law enacted on June 25, 1910, 36 Stat. at L. chap. 423, p. 851, U. S. Comp. Stat. Supp. 1911, p. 1457, as follows:

An Act to Provide Additional Protection for Owners of Patents of the United States, and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the court of claims: [303] Provided, however, That said court of claims shall not entertain a suit or reward compensation under the provisions of this act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of, the United States: Provided further, That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in title sixty of the Revised Statutes or otherwise: And provided further, That the benefits of this act, shall not inure to any patentee who, when he makes such claim, is in the employment or service of the government of the United States; or the assignee of any such patentee; nor shall this act apply to any device discovered or invented by such employee during the time of his employment or service.

The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers; that is, that such officer, under the conditions stated, had infringed a patent.

The enactment of the statute, we think, grew out of the operation of the prior statute law concerning the right to sue the United States for the act of an officer in infringing a patent, as interpreted by repeated decisions of this court. *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *Schillinger*

v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; United States v. Berdan Fire-arms Mfg. Co. 156 U. S. 552, 39 L. ed. 531, 15 Sup. Ct. Rep. 420; Russell v. United States, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899; Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634. The effect of the statute was thus pointed out in the last-cited case (198 U. S. 234):

"We held in Russell v. United States, 182 U. S. 516, 530, 45 L. ed. 1210, 1215, 21 Sup. Ct. Rep. 899, that in order to give the court of claims jurisdiction, under the act of March 3, 1887, 24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752, [304] *defining claims of which the court of claims had jurisdiction, the demand sued on must be founded on 'a convention between the parties,—a coming together of minds.' And we excluded, as not meeting this condition, those contracts or obligations that the law is said to ~~take~~ ^{derive} from a tort. Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; United States v. Berdan Fire-arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420."

In other words, the situation prior to the passage of the act of 1910 was this: Where it was asserted that an officer of the government had infringed a patent right belonging to another,—in other words, had taken his property for the benefit of the government,—the power to sue the United States for redress did not obtain unless, from the proof, it was established that a contract to pay could be implied,—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers. Evidently inspired by the injustice of this rule as applied to rights of the character of those embraced by patents, because of the frequent possibility of their infringement by the acts of officers under circumstances which would not justify the implication of a contract, the intention of the statute to create a remedy for this condition is illustrated by the declaration in the title that the statute was enacted "to provide additional protection for owners of patents." To secure this end, in comprehensive terms the statute provides that whenever an invention described in and covered by a patent of the United States "shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the court of claims." That is to say, it adds to the right to sue the United States in the court of claims already conferred when contract relations exist, the right to sue even al-

though no element of contract is present. And to render the power thus conferred efficacious, the statute endows any owner of *a patent with the right to establish [305] contradictorily with the United States the truth of his belief that his rights have been, in whole or in part, appropriated by an officer of the United States, and if he does so establish such appropriation, that the United States shall be considered as having ratified the act of the officer, and be treated as responsible pecuniarily for the consequences. These results of the statute are the obvious consequences of the power which it confers upon the patentee to seek redress in the court of claims for any injury which he asserts may have been inflicted upon him by the unwarranted use of his patented invention, and the nature and character of the defenses which the statute prescribes may be made by the United States to such an action when brought. The adoption by the United States of the wrongful act of an officer is, of course, an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the government, for which compensation is provided. In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides.

This being the substantial result of the statute, it remains only to determine whether its provisions are adequate to sustain and justify giving effect to its plain and beneficent purpose to furnish additional protection to owners of patents when their rights are infringed by the officers of the government in the discharge of their public duties. This inquiry may be solved, under the conditions here involved, by taking the most exacting *aspect of the [306] well-established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use.† Indisputably the duty to make

†United States v. Russell, 13 Wall. 623, 20 L. ed. 474; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43. See Lewis, Em. Dom. 3d ed. vol. 2, §§ 675, 679, and Cooley, Const. Lim. 7th ed. p. 813.

compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is, that the amount should be ascertained and paid in advance of the appropriation,—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end.

Coming to apply these principles, and confining ourselves in their application, as we have done in their statement, strictly to the conditions here before us, that is, the intangible nature—patent rights—of the property taken, the great possibilities in the essential operations of government that such rights may be invaded by incorporating them into property of a public character, of the vital public interest involved in the subject-matter of the patents in question, and the grave detriment to the very existence of government which might result from interference with the right of 307]the government to make and use *instrumentalities of the character of those with which the patents in question are concerned, of the purpose which the statute manifests to add additional protection and sanction to private rights, and the pledge of the good faith of the government which the statute plainly implies, to appropriate for and pay the compensation when ascertained as provided in the statute,—we think there is no room for doubt that the statute makes full and adequate provision for the exercise of the power of eminent domain for which, considered in its final analysis, it was the purpose of the statute to provide. Indeed, the desire to confine ourselves to the particular case before us has led us to state and limit the doctrine which we here apply, when it was possibly unnecessary to do so. We say this because no contention was made in argument by counsel for the corporation that the statute of 1910 does not provide methods of compensation adequate to the exercise of the power of taking for which the statute provides. Thus, in the argument, it is said: "If the officers of the United States have since the act . . . used or shall

hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under the act in the court of claims,"—this statement being followed by an insistence that even although this be the case, the statute is not controlling, because it was enacted after the bill was filed, and did not, therefore, retroactively deprive the court below of the power to afford relief under the conditions existing when the suit was commenced. The conclusion of the argument on this subject was thus stated:

"The general rule is that, where jurisdiction in equity has been established, a subsequent statute creating a remedy at law or removing the obstacle at law upon which the existence of the equity jurisdiction was originally founded does not oust equity of that jurisdiction unless the statute affirmatively discloses the legislative *intent to make the legal remedy ex-308 clusive . . . We cannot discover in the act of June 25, 1910, any evidence of an intent to oust equity when its jurisdiction had attached, because there is no expression and the act is not retroactive."

But this contention is either an afterthought or is occasioned by overlooking the amendment to the pleadings operated by the stipulation to which we have hitherto referred. By that stipulation every conceivable claim based on the prior use of infringing devices was withdrawn. The prayer for a preliminary restraint was waived, and all right to an accounting was likewise withdrawn. As a result the case was confined solely to obtaining at the end of the suit a permanent injunction forbidding the making of, or causing to be made by the defendant, guns or gun carriages embodying the inventions owned by complainant.

Upon the hypothesis that the decree of the court below, remanding the case for further proceedings not inconsistent with its opinion, was correct under the conditions existing when it was rendered, clearly, under the circumstances now existing, that is, the acquiring by the government, under the right of eminent domain, as the result of the statute of 1910, of a license to use the patented inventions in question, there could be no possible right to award at the end of a trial the permanent injunction to which the issue in the case was confined. Moreover, taking a broader view, and supposing that a final decree granting a permanent injunction had been entered below, in view of the subject-matter of the controversy and the right of the United States to exert the power of eminent domain as to that subject, at most and in any event the injunction could right-

fully only have been made to operate until the United States had appropriated the right to use the patented inventions; and as that event has happened, the injunction, if granted, would no longer have operative 309]*force. It follows that the decree of the Court of Appeals must be reversed, with directions to that court to affirm the decree of the Supreme Court of the District of Columbia, dismissing the bill, without prejudice, however, to the right of the defendant here, who was the complainant below, to proceed in the Court of Claims in accordance with the provisions of the act of 1910.

Reversed and remanded.

UNITED STATES, Appt.,

v.

SOCIETE ANONYME DES ANCIENS
ETABLISSEMENTS CAIL. (No. 209.)

SOCIETE ANONYME DES ANCIENS
ETABLISSEMENTS CAIL, Appt.,

v.

UNITED STATES. (No. 210.)

(See S. C. Reporter's ed. 309-330.)

Claims — jurisdiction — implied contract — use of patent.

1. An implied contract to pay for the use of a patent, justiciable in the court of claims, arises out of its use by the United States with the patentee's consent, and with no claim of ownership on the part of the United States, and nothing to show any intention to dispute the patentee's title.

[For other cases, see Claims, 122-127, in Digest Sup. Ct. 1908.]

Patents — combination — construction — equivalents — infringement.

2. The claim of the De Bange patent, No. 301,220, for a device to prevent the escape of gas from breech-loading cannon, the essence of which is a "system of packing" which, by the force of the explosion of the powder, is expanded to make a tight joint to prevent leakage of gas, should not be confined to the specific form of the elements described therein as the best means of carrying out the invention, so that a change in the covering of the packing, or the substitution of steel rings for brass, will avoid infringement.

[For other cases, see Patents, 708-760, 908-931, 935-1000, in Digest Sup. Ct. 1908.]

Appeal — from court of claims — remanding for additional finding.

3. A case will not be remanded to the court of claims on a motion which in effect calls for the certification of the evidence, and not the court's conclusions from the

evidence, since this would contravene a rule of the Federal Supreme Court which requires the record on an appeal from the court of claims to contain a finding "of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing it."

[For other cases, see Appeal and Error, V. o, in Digest Sup. Ct. 1908.]

Appeal — from court of claims — review of finding.

4. A finding of the court of claims upon the question of the compensation to be paid by the United States for its use of a patent, to which finding there was no objection taken nor exception reserved, is conclusive on the Federal Supreme Court, being in the nature of a special verdict of the jury.

[For other cases, see Appeal and Error, 4892-4902, in Digest Sup. Ct. 1908.]

[Nos. 209 and 210.]

Argued March 12 and '13, 1912. Decided April 8, 1912.

CROSS APPEALS from the Court of Claims to review an award for the use of a patent by the United States. Affirmed.

See same case below, 43 Ct. Cl. 25.

The facts are stated in the opinion.

Messrs. Philip Mauro and Timothy D. Merwin argued the cause and filed a brief for Société Anonyme Des Anciens Etablissements Cail:

If there be among pre-existing devices anything presenting a superficial resemblance to the De Bange breech mechanism, the resemblance is of the kind characterized by this court in the Richardson Valve Case (Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.) 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513, in which the court, speaking of certain prior devices, said: "Likenesses in them, in physical structure, to the apparatus of Richardson, in important particulars, may be pointed out; but it is only as the anatomy of a corpse resembles that of a living being. The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success."

Ibid.

The court of claims had jurisdiction.

United States v. Palmer, 128 U. S. 262, 269, 32 L. ed. 442, 444, 9 Sup. Ct. Rep. 104; United States v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

A patent is not to be limited to one particular form of machine, excluding all other forms, if the claim can fairly be construed otherwise.

Winans v. Denmead, 15 How. 330, 14 L.

NOTE.—As to what claims constitute valid demands against a state—see note to Northwestern & P. Hypotheek Bank v. State, 42 L.R.A. 33.

ed. 717; *Western Electric Co. v. LaRue*, 139 U. S. 601, 608, 35 L. ed. 294, 297, 11 Sup. Ct. Rep. 670; *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.* 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; *Turrill v. Michigan S. & N. I. R. Co.* 1 Wall. 491, 17 L. ed. 668; *Klein v. Russell*, 19 Wall. 433, 466, 22 L. ed. 116, 124; *Consolidated Fastner Co. v. Columbian Fastener Co.* 79 Fed. 795; *Bonnette Arc Lawn Sprinkler Co. v. Koehler*, 27 C. C. A. 200, 54 U. S. App. 267, 82 Fed. 428.

The claim, even if it had been limited in terms to a copper envelope and brass shells, would be entitled to such a construction as to cover equivalent substances such as a canvas cover and steel shells.

Union Paper-Bag Mach. Co. v. Murphy, 97 U. S. 120, 125, 24 L. ed. 935, 936.

Assistant Attorney General **Thompson** and Mr. **Malcolm A. Coles** argued the cause and filed a brief for the United States:

There is nothing in the record to show a meeting of minds, or agreement as to compensation, which this court has held to be an essential requisite as a basis for an implied contract in fact.

Russell v. United States, 36 Ct. Cl. 581, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899; *Harley v. United States*, 39 Ct. Cl. 114, 198 U. S. 229-234, 49 L. ed. 1029-1031, 25 Sup. Ct. Rep. 634.

No implied contract in fact with the United States can arise from the action of any officer of the United States who is not authorized under the statutes to make an express contract.

Sprague v. United States, 37 Ct. Cl. 455; *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 48 L. ed. 130, 24 Sup. Ct. Rep. 47; *McLaughlin v. United States*, 37 Ct. Cl. 185.

What is the thing patented is a question of law, to be determined by the court, construing the letters patent, and the description of the invention and specification of claim annexed to them.

Winans v. Denmead, 15 How. 330, 338, 14 L. ed. 717, 720; *Davis v. Palmer*, 2 Brock. 298, Fed. Cas. No. 3,645; *Davoll v. Brown*, 1 Woodb. & M. 53, Fed. Cas. No. 3,662; *Parker v. Hulme*, 1 Fisher, Pat. Cas. 44, Fed. Cas. No. 10,740; *Teese v. Phelps*, McAll. 48, Fed. Cas. No. 13,819; *Cahoon v. Ring*, 1 Cliff. 592, Fed. Cas. No. 2,292; *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.* 19 Fed. 514; *Emerson v. Hogg*, 2 Blatchf. 6, Fed. Cas. No. 4,440; *Ransom v. New York*, 1 Fisher, Pat. Cas. 252, Fed. Cas. No. 11,573.

Inasmuch as the *Davis* and *Gerdomb* de-
56 L. ed.

VICES used by the government, while containing asbestos and tallow, do not employ the copper shells and the brass shells, they do not fall within the claim.

Singer Mfg. Co. v. Cramer, 192 U. S. 265, 48 L. ed. 437, 24 Sup. Ct. Rep. 291.

The courts, in treating broad claims, often regard the use of reference letters to designate the elements of a combination claim, not as limiting the claim to the precise details of the elements to which the letters apply, but as covering, as well, all substitutes for such elements having differing details.

Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co. 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; *Reed v. Chase*, 25 Fed. 99; *Delemater v. Heath*, 7 C. C. A. 279, 20 U. S. App. 14, 58 Fed. 414; *Bonnette Arc Lawn Sprinkler Co. v. Koehler*, 27 C. C. A. 200, 54 U. S. App. 267, 82 Fed. 428.

Had the patentee, appellee herein, actually considered that claim 1 was not as broad as it was intended to draw it, or as it might have been drawn when the application was pending, the remedy to correct any such defect or oversight in the handling of the application was to have applied within reasonable time for a re-issue of the patent. No such application for reissue was filed; hence a dedication to the public of all which was not defined in the claims of the patent has unquestionably occurred.

Ex parte Roberts, Comrs. Decisions, 1887, p. 61; *Ex parte Mullen*, 50 Off. Gaz. 837; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. ed. 168, 10 Sup. Ct. Rep. 884.

It matters not what the real invention of the patentee may have been. It is he who is called upon to define it, and if he characterizes it as narrow and circumscribed when in fact it is broad and generic, he, and not the public, must suffer for it. On the other hand, if he defines it as broad, when in fact it is narrow, he is equally bound. The claim must have a fixed meaning. It cannot mean one thing to-day and another to-morrow.

McClain v. Ortmyer, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76; *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112, 26 L. ed. 639; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. ed. 235; *Burns v. Meyer*, 100 U. S. 671, 25 L. ed. 738; *Sutter v. Robinson*, 119 U. S. 530, 30 L. ed. 492, 7 Sup. Ct. Rep. 376.

The appellee's effort in this case to have the court read into his claim just enough to hold the government is entirely without warrant.

Santa Clara Valley Mill. & Lumber Co.

v. Prescott, 42 C. C. A. 477, 102 Fed. 501; McCarty v. Lehigh Valley R. Co. 160 U. S. 110, 40 L. ed. 358, 16 Sup. Ct. Rep. 240; Day v. Fair Haven & W. R. Co. 132 U. S. 98, 33 L. ed. 265, 10 Sup. Ct. Rep. 11; Howe Mach. Co. v. National Needle Co. 134 U. S. 388, 33 L. ed. 963, 10 Sup. Ct. Rep. 570; White v. Dunbar, 119 U. S. 47, 30 L. ed. 303, 7 Sup. Ct. Rep. 72; United States Repair & Guarantee Co. v. Assyrian Asphalt Co. 183 U. S. 591, 46 L. ed. 342, 22 Sup. Ct. Rep. 87; Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 121, 54 U. S. App. 591, 85 Fed. 218; Paul Boynton Co. v. Morris Chute Co. 30 C. C. A. 617, 58 U. S. App. 53, 87 Fed. 225; Penfield v. Potts, 61 C. C. A. 371, 126 Fed. 475; Westinghouse Air Brake Co. v. New York Air Brake Co. 56 C. C. A. 404, 119 Fed. 874; American Bell Teleph. Co. v. National Tel. Mfg. Co. 109 Fed. 976; Gerard v. Diebold Safe & Lock Co. 9 C. C. A. 451, 23 U. S. App. 341, 61 Fed. 209.

Should this judgment not be reversed, the amount thereof, being in the nature of a special verdict found by the court of claims, cannot be altered or enlarged under the well-established practice of this court.

District of Columbia v. Barnes, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. Rep. 401.

Assistant Attorney General Thompson, Mr. Malcolm A. Coles, and the late Solicitor General Bowers, filed a brief in opposition to the motion for remand:

It is a well-settled policy of this court, particularly as to the amount determined and fixed as its judgment by the court of claims, that such a finding is in the nature of a special verdict and will not be disturbed by this court upon appeal.

United States v. Smith, 94 U. S. 214, 24 L. ed. 115; McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321; Union P. R. Co. v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 325; Stone v. United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464; District of Columbia v. Barnes, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. Rep. 401; Moore v. United States, 25 Ct. Cl. 86.

Mr. Malcolm A. Coles also filed a separate brief for the United States:

A combination is an entirety, and if one of its elements is omitted the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination. A patentee makes all parts of a combination material when he claims them in combination, and not separately. He cannot, therefore, show

his invention to be broader or narrower by construction, to prevent anticipation or to assert infringement.

Walker, Patents, §§ 176, 181, 182, 186, 339, 349; Case v. Brown, 2 Wall. 320, 17 L. ed. 817; Derby v. Thompson, 146 U. S. 476, 482, 36 L. ed. 1051, 1053, 13 Sup. Ct. Rep. 181; Wright v. Yuengling, 155 U. S. 47, 39 L. ed. 64, 15 Sup. Ct. Rep. 1; McClain v. Ortmyer, 141 U. S. 419, 425, 35 L. ed. 800, 802, 12 Sup. Ct. Rep. 76; Hubbell v. United States, 179 U. S. 77, 82, 45 L. ed. 95, 98, 21 Sup. Ct. Rep. 24; Union Water Meter Co. v. Desper, 101 U. S. 332, 25 L. ed. 1024; Fay v. Cordesman, 109 U. S. 408, 27 L. ed. 979, 3 Sup. Ct. Rep. 236; American Can. Co. v. Hickmott Asparagus Canning Co. 137 Fed. 86.

And when the alleged infringing device omits from its construction and operation one or more of the elements, as claimed in the patent in suit, or embodies one or more elements in addition to those as claimed in the patent in suit, the allegation of infringement must fail of establishment unless the claim can be saved by invoking the doctrine of mechanical equivalents.

Knapp v. Morss, 150 U. S. 221, 37 L. ed. 1059, 14 Sup. Ct. Rep. 81; Boyden Power Brake Co. v. Westinghouse, 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707; Adams Electric R. Co. v. Lindell R. Co. 23 C. C. A. 223, 40 U. S. App. 482, 77 Fed. 432; National Harrow Brake-Beam Co. v. Interchangeable Brake-Beam Co. 45 C. A. 544, 106 Fed. 693.

Mr. Justice McKenna delivered the opinion of the court:

This suit is for royalties alleged to be due for the use by the government of a certain patented invention known as a "gas check" or "obturator,"—a device applied to breech-loading cannon to prevent the escape of gas.

The court of claims rendered judgment against the United States for the sum of \$136,000. Both parties appeal, the United States contending against any judgment, the claimant contending for the recovery of a larger sum. No further distinction is necessary to be observed between the appeals. The discussion of the case will dispose of both.

The first contention of the government is that the facts *set out in the findings[311] did not constitute an implied contract in fact as distinguished from a tort, and that therefore the court of claims had no jurisdiction of the case.

Such a contract is necessary to sustain the exercise of jurisdiction. Russell v. United States, 182 U. S. 516, 45 L. ed.

1210, 21 Sup. Ct. Rep. 899, and cases cited. The court of claims decided that such a contract existed and that the jurisdiction of the court was established; citing *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 531, 15 Sup. Ct. Rep. 420. The court said: "The findings disclose an invitation to present the details of the patent to the defendant [the government], its examination by a board of officers appointed to investigate such inventions, and its final use without the slightest claim of ownership. Nothing appears to show an intention to dispute claimant's title to the patent, hence an implied contract arose to pay for such use." [43 Ct. Cl. 55]

In discussing the correctness of these conclusions we necessarily assume the validity of the patent, its utility and use by the government, the question being only for the present whether such use was a trespass upon the rights of the claimant, or in concession of such rights and of an obligation to pay for them.

The findings lack, and, it may be, necessarily lack, definiteness. They trace the history and progress of the invention of gas checks from an early period to the culmination in the patent to Colonel De Bange, an officer of the French army, in 1884, granted upon an application made in 1883. It immediately attracted the notice of American army and naval officers and received favorable commendation in ordnance notes.

In 1883, under an act of Congress of that year (22 Stat. at L. 474, chap. 97), a board was constituted, known as the "gun foundry board," composed of eminent officers of the Army and Navy, headed by Rear Admiral Simpson of the Navy, whose duty it was, among others, as it is recited in the findings, to report on the establishment *of a government foundry, "or what other method, if any, should be adopted for the manufacture of heavy ordnance adapted to modern warfare, for the use of the Army and Navy of the United States."

The board visited the claimant's works at Paris on June 29, 1883. "In the official report of this board reference is made to a visit to the claimant's works at Paris, France, on August 29, 1883, and to the inspection by said board of the De Bange system of ordnance. In the said report of said board is the following:

"Breech fermeture.—All the French guns are breech-loading, and are fitted with the interrupted screw system, as modified by Colonel De Bange to suit his gas check.

"Gas check.—The De Bange gas check is universally employed."

Prior to the visit of the gun foundry 56 L. ed.

board the De Bange obturator was brought directly to the attention of the United States ordnance authorities through Lieutenant Commander Chadwick, naval *attaché* at London, to whom De Bange explained his invention, and who gave to Lieutenant Commander Folger of the Bureau of Ordnance, Navy Department, a detailed description of the method of making it, furnished by De Bange, subsequently (July 5, 1883) forwarding to the Department the device, accompanied by the following letter:

Sir:—

I have the honor to forward herewith a De Bange "obturator," which was kindly presented on request by the French minister of war.

I am, very respectfully, your obedient servant,
F. E. Chadwick,
Lt. Comdr., U. S. Navy, Naval *Attaché*.
Commodore J. E. Walker,

U. S. Navy, Chief of Bureau of Navigation,

Navy Department, Washington.

*In 1884 the ordnance officers of [313 the United States, after experimenting with the De Bange device, adopted it for heavy ordnance (5-inch caliber and upward), and have used no other device since.

"The United States government [we quote from the findings] has never disputed the title of claimant's assignor, Colonel De Bange, as inventor of the said invention; but, on the contrary, the said invention has, ever since its adoption, been known in the service of the United States as the 'De Bange gas check,' and is described by that name in the official reports of the Secretaries of War and of the Navy."

The findings contain certain correspondence which is relied on by the government to sustain its contention, and, as it is not possible to condense it, it is given in full.

Paris, June 29, 1891.

Colonel De Bange to H. E., the Minister Plenipotentiary of the United States.

Mr. Minister:—

In order to respond to the desire expressed by your excellency in the letter which you have done me the honor to address to me, I add some details to my previous observations.

One of my patents bears the number 331,618; it relates to gun carriages; it is not very important, because one can do without it; but the second, No. 301,220, which is connected with the obturation of guns and breech mechanism, is of the highest importance. Without my obturator the loading of a gun by the breech is difficult

and the service is rendered ineffectual. The metallic ring used in Germany is far from having its value and imparts to the gun a considerable inferiority. Thus all the makers of cannon are led to employ my invention, either openly or in a disguised form, styled by them improvement. The War and Navy Departments at New York, which are well acquainted with the question, will certainly not contest *the truth of my assertions; they have under their eyes, on trial, guns which speak for themselves.

This is not the first time that I have had to complain of my idea being borrowed without my knowledge, in France or abroad. The English government particularly had taken up my system, and without my having demanded anything, had offered me £20,000 sterling to indemnify me. I refused this offer, it is true, but because, as a French officer, I ought not to aid in the arming of a power which I do not consider as friendly. In part, deprived of my assistance, England has copied me badly, and possesses but a moderate artillery.

In any case, I appeal to the sentiments of equity of the government of the United States, convinced that it will recognize easily the justice of my claim.

Pray accept, etc., etc.,

(Sgd.) Colonel De Bange.

United States Legation,

Naval *Attaché*,

Paris, July 2d, 1891.

The naval *attaché* at London suggested in a communication to Mr. Reid, our Minister there, that Colonel De Bange's letter be forwarded to the Navy Department. The Minister, however, referred it to the Secretary of State.

De Bange sent the following letter to the Secretary of the Navy:

Versailles, near Paris, 16/8/91.
Colonel De Bange to Monsieur Benjamin F. Tracy, Secretary of the Navy at Washington.

Mr. Secretary:—

Some months ago I addressed the United States Minister at Paris, verbally and by writing, several remarks on the subject of loans which I had made of my invention to the Departments of War and of the Navy; finally, as I have undertaken to write to you directly, I now have the honor to lay before you the following:

315] *I had taken out letters patent, which treated of artillery in the United States, one number, 301,220, relative to the obturation of guns, and of principal importance; the other number, 331,618, relative to the carriage.

Furthermore, I have seen at Paris many of your officers, to whom I furnished without reserve all the information which they have asked of me.

Under these circumstances I hope that if the government has desired to utilize my inventions, it will inform me; there has been no defect, and I have learned from a reliable source that my systems was copied, unknown to me, by the Departments of War and of the Navy, be it under the disguise of an improvement or be it openly.

I regret that this has occurred, but in any case I consider that an indemnity is due me. If you will have the kindness to notify the government of my claim, I am confident that it will see that justice is accorded me in the indemnity to which I believe myself to be entitled.

Please accept, Mr. Secretary, the expression of sentiments of highest consideration, with which I am

Your obedient servant,

De Bange.

Please reply.

This letter seems also to have been sent to the Department of State, and referred by it to the Secretary of the Navy, as appears from the following letter of the Chief of the Bureau of Ordnance:

Bureau of Ordnance, August 27, 1891.

Respectfully returned to the honorable Secretary of the Navy.

The bureau has not manufactured and is not using any gun carriages which contain principles which could be held as infringing any claims secured in United States patent No. 331,618. The gas check which has been adopted for the naval guns of 6-in. Caliber and upwards *resem- [316] bles in certain features that described in United States patent No. 301,220, issued to Col. De Bange. It also differs from it materially in particulars which are original in this bureau.

I am not in position to give an opinion as to the question of infringement, and have to suggest that the applicant refer the matter to the court of claims.

The bureau will note for the information of the applicant that there are no funds appropriated or available for the payment of any claim that might be allowed by the court of claims, and that it will be necessary for the applicant to go to Congress for relief in the event of a decision being obtained which will warrant such action.

(Sgd.) Wm. M. Folger,

Chief Bureau of Ordnance.

The Navy Department then addressed the Secretary of State as follows:

Navy Department,
Washington, September 3, 1891.

Sir:—

I have the honor to acknowledge the receipt of your communication of the 20th ultimo, inclosing copies of correspondence relating to a claim of Colonel De Bange, a retired officer of the French army, residing in Paris, France, who alleges the use by this government of certain inventions patented by him in guns and gun carriages.

In reply I have to state that the Chief of the Bureau of Ordnance, in this Department, to whom the communication and accompanying papers were referred, reports as follows:

The bureau has not manufactured, and is not using, any gun carriages which contain principles which could be held as infringing any claims described in U. S. patent No. 331,618.

The gas check which has been adopted for the naval guns of 6-inch. caliber and 317]upwards resembles in certain *features that described in U. S. patent 301,220, issued to Colonel De Bange. It also differs from it materially in particulars which were original in this bureau.

In view of the statement made by the Chief of the Bureau of Ordnance, there appears to be no proper ground for the claim of Colonel De Bange.

Very respectfully,

F. M. Ramsay,

Acting Secretary of the Navy.

The Honorable the Secretary of State.

On January 31, 1894, the claimant, by its attorneys, addressed substantially similar letters to the Secretary of War and the Secretary of the Navy, stating its claim for the use of its patented invention, and requesting payment for the use of it. The letters described and extolled the device, and stated that they "deemed it expedient to take a low average price and apply it to all guns." They fixed such price at \$200 per gun.

The Secretary of the Navy, on February 10, 1894, in replying, referred to and quoted from the Department's letter of August 20, 1891, and added: "As the status of the case has not been changed since the date of the Department's letter above mentioned, and as the matter has been previously disposed of by the Department, no further consideration of the case appears to be required."

The letter of the claimant's attorneys, however, was the subject of a report and 56 L. ed.

recommendation by the Chief of Bureau of Ordnance, which resulted in the following letters:

Bureau of Ordnance,
December 4, 1894.

Respectfully returned to the Department.

The gas check applied to guns constructed for the Navy is that illustrated in United States letters patent No. 318,093, of May 10, 1885, and so far as this patent *is valid no royalties should be paid.[318 See Court of Claims Reports, p. 334, vol. 23, 1887-88. If, however, as the bureau believes to be the case, the above-mentioned patent is only valid so far as it covers improvements on the De Bange patent (No. 301,220, of July 1, 1884), then, so far as the latter patent is valid, the within claim for royalties, in the bureau's opinion, is a proper one, and would be maintained by the courts.

It must be noted, however, that until recently there has been no authority of law for the payment of royalties out of the naval appropriations, and the manufacture of most of the gas checks in question had been completed prior to the legislation giving such authority. Moreover, the bureau is of opinion that the Davis patent (No. 318,093, of May 19, 1885) covers real and important improvements, without which it is doubtful if the De Bange system would have been adopted for United States naval guns, and consequently it will be necessary to decide as to the relative values of the device in its original and improved forms. The fact that practically the same gas check is in use in all United States Army guns of recent construction, and is being applied to guns now being made by the Bethlehem Iron Company, under contract with the War Department, should also be considered, since independent action on the part of the Navy Department might easily be against the interests of the government.

It is therefore recommended that an investigation be made in regard to the De Bange patent, and if this patent is concluded to be valid, that the War Department be consulted as to whether a definite sum, to be fixed upon either by a board or in some other way, should not be offered the claimants for the right on the part of the government to use the device in question on all its guns.

W. T. Sampson,
Chief of Bureau of Ordnance.

*The final action of the Navy Department upon petitioner's claim was communicated to the petitioner in a letter of

the Secretary of the Navy, dated December 31, 1894, as follows:

Navy Department,
Washington, December 31, 1894.

Gentlemen:—

The Department has carefully considered the questions presented in the brief filed by you, as well as in former correspondence, relative to the matter of the claim of the Société Anonyme des Anciens Etablissements Cail for compensation for the use by the United States of a gas check invented by Col. Charles T. W. V. De Bange, of the French army.

It appears that the matter is now in such a condition that it will in all probability involve not only questions arising under the patent issued to Colonel De Bange, but also those growing out of the claims and affecting the rights of other patentees. Under these circumstances the Department is of opinion that the full consideration and determination of these questions can be more certainly and equitably reached, and the rights of all the parties concerned, as well as the government, more definitely ascertained and assured, through the medium of a court of justice. It is therefore suggested that the necessary proceedings for the consideration and adjustment of the matter by the court of claims be instituted.

Very respectfully,

H. A. Herbert, Secretary.

Messrs. Pollock & Mauro,
Attorneys at Law, Washington, D. C.

The final action of the War Department was communicated to claimant's attorneys in a letter dated January 14, 1895, in which the language and suggestion of the Secretary of the Navy were adopted substantially verbatim.

320] *It is not possible to review the arguments by which the claimant asserts and the government denies the sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the government. The ultimate contention of the government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but "there must be (1) a use of it with the patentee's assent; and there must also be (2) an *agreement or meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use*, even though the amount of the compensation be not fixed." These elements, it is insisted, were present in the Berdan Case, which we have seen was relied on by the court of claims; they are,

it is further insisted, absent in the case at bar.

But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it, because there was doubt as to how far the devices used were attributable to or belonged to De Bange, or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.

We agree with the court of claims that there is resemblance between this case and the Berdan Case. In that case the court had no difficulty in adducing the assent of Berdan to the use of his invention. The court *found more difficulty in infer-[321 ring the assent of the government. The court said, by Mr. Justice Brewer: "While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use in spite of protest or remonstrance. Negatively, at least, the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

Like comment may be made of the facts in the case at bar. It is true that the letter of William F. Folger, Chief of the Bureau of Ordnance, stated that while the gas check used by the government resembled in certain features De Bange's gas check, it differed from it materially in particulars which were original in the bureau. But this was not a denial of the use or the utility of De Bange's invention. Whether there was infringement the officer did not decide, but suggested that the "applicant refer the matter to the court of claims." Subsequently the Acting Secretary of the Navy did deny infringement.

But that position was abandoned and the Secretaries of War and the Navy "suggested that the necessary proceedings for the consideration of the adjustment of the matter by the court of claims be instituted." There were parallel circumstances in the Berdan Case

The invention of Berdan was an "extractor-ejector" for use in breech-loading rifles, and that which was used by the government was devised by one of its employees. There was a difference between it and Berdan's device, but the officers of the government doubted if the difference was material, and concluded that it was a matter 322] *for the courts to decide. It is true there was no assertion of right against the Berdan device in consequence of the difference between it and the device used by the government as, it may be said, there was in the case at bar by the letter of Admiral Ramsay of September 3, 1891. But the position taken in that letter was, as we have seen, abandoned, and it was declared that so far as the De Bange patent was valid, its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one, and would be sustained by the courts. This was in 1894. Prior to that time and afterwards the government continued to use the device. We think the court of claims had jurisdiction.

The government contends that it has not infringed the De Bange patent. Infringement is a question of fact, and as an aid to its solution courts are furnished usually with an expert comparison of the contending devices, their identity or difference of construction and modes of operation. This record is destitute of such testimony. The government contends for the very narrow construction of the patent based on its claims and the prior art. The only proof of the prior art, however, is a reference to thirteen or fourteen patents by number and patentee, some of which are English, some French, and some American. The only explanation of them is in the argument of counsel and an exhibition of the patents. It is very doubtful if we may take notice of even the American patents; more doubtful if we may of the foreign ones. We, however, have considered counsel's explanation of them. They reveal nothing material to be considered that the findings of the court of claims do not show of the prior art and the progress, from its failure to the success of the De Bange invention,—a success, it may be conceded, that availed itself of all that the prior art demonstrated, but went beyond it to the fulfilment that it had not achieved.

The necessity of a gas check to the success 323] of breach *loading guns all could see, 56 L. ed.

and what a device, to be successful, must do; but the world struggled a long time with the problem, and that problem was to find something which would stand the intense heat generated and the great force caused by the explosion of the powder in a high power gun, and the backward escape of the resultant gas under the enormous pressure exerted, and this not in one service of the gun, but in many services. The experiments are detailed in the findings. Metallic cups were tried and paper cups. As early as 1858 India rubber was suggested. Its elasticity, it was thought, would afford all that was necessary for a complete automatic obturation, the gas by its expansion "to seal its own escape."

Rubber had some success when constructed in rings of varying degrees of suppleness and hardness, and seemed to have settled the problem. But defects subsequently developed and experiments continued for something better and which would fulfil all the conditions. Then soap obturators were tried, and finally Colonel De Bange's invention of tallow and asbestos. If our purpose was speculative, not practical, we might pause to wonder how such substances could produce such results under the conditions to which they are subjected, and by wondering we express in a way the quality of the invention. We are told by the findings of the court of claims that a gas check "is subject to a pressure of from 30,000 to 40,000 pounds per square inch, to very high temperatures, to the effects of corrosive gases, and the effects of rapid and violent shocks."

We need not, however, dwell longer on the excellence of the invention. The government has testified to its excellence by using it in the guns intended for the national defense.

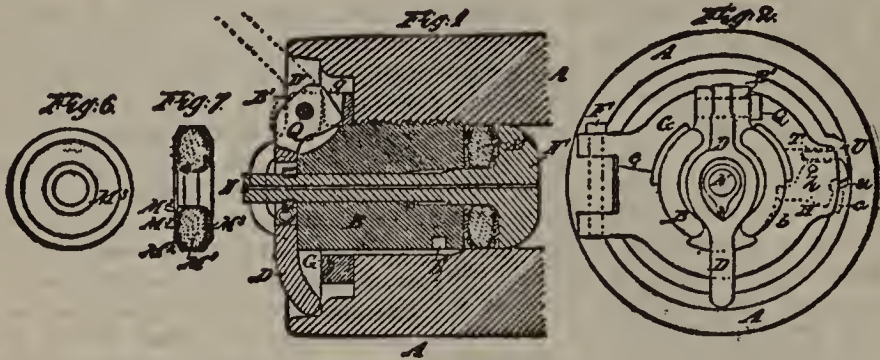
But it is contended that the claim of the patent is for a specific combination of elements, and that that combination of elements is not used by the government.

*This contention is based upon what[324 is considered to be the proper construction of claim 1 of the patent, a strict construction being urged of it,—indeed, as we understand the argument, the claim must be confined to the specific forms of its elements, giving the widest latitude to imitation.

The patentee answers the contention. Describing his invention, De Bange calls it "certain new and useful improvements in breech-loading guns." Specifying the improvements, he says that they "apply to breach-loading guns which employ a screw plug having its threads interrupted." Further specifying, he adds: "I have devised a system of packing placed in ad-

vance of the plug, and which is expanded by the force of the explosion of the powder to make a tight joint to prevent the leakage of gas." He declares the drawings form a part of the specification, and represent what he considers the best means of carrying out the invention. It is only necessary to give Figures 1, 2, 6, and 7.

sufficient to pack the joint tightly against the escape of gas. This expansion is due to two causes,—the tapering form of the front end of the pin N, which acts on the interior of the packing, and the powerful compression received from the head N'. The expansion from one or both causes is sufficient to press the exterior of the cop-



They are described in the patent as follows: "Figure 1 is a central longitudinal section. The strong lines show the parts ready for firing. The dotted lines show the transverse lever in a position for conveniently operating to turn the screw plug. Fig. 2 is a rear view showing the parts locked. Fig. 3 is a corresponding view showing the parts unlocked. . . . Figs. 6 and 7 represent the packing ring detached. Fig. 6 is a face view, and Fig. 7 a section in the plane of the axis." The specification then proceeds as follows:

"A liberal hole in the line of the axis of the screw plug B carries a stout sliding pin, N, at the extreme front of which is a stout head, N'. The portion of the body adjacent to the head N' is slightly enlarged. The head N' is adapted to receive the force of the powder at the discharge. At the moment of the discharge this head moves backward, compressing a relatively soft and expansible packing ring, M, behind it. Certain portions of this ring will be distinguished, when necessary, by additional marks, as M' M². The body M' of this packing is of asbestos saturated with tallow, and affords a sufficiently yielding mass with the required capacity for enduring heat and for withstanding the very strong compressive force to which it is subjected by the discharge. It is inclosed between two thin shells, M² M², of copper, one fitting the body M' on the inner and the other on the outer side, and nearly incasing the entire packing. Both the body M' and the copper M² are then inclosed between two strong shells of brass, M³ M³. The entire packing thus made is adapted to maintain its form, but to allow a small amount of radial expansion suf-

per M² tightly against the interior of the gun, thus effectually preventing any leakage of gas."

Claim 1 is the important one and is as follows:

"1. The partially-threaded plug B, headed pin N N', extending through said plug, and the yielding packing M, arranged between the head N' and the inner end of the plug, in combination with each other and with the gun A, arranged as shown, to allow the pin to be driven rearward and compress the packing, as herein specified."

It will be observed, therefore, that De Bange declared that what he devised was a "system of packing" which, by the force of the explosion of the powder, is expanded to make a tight joint to prevent the leakage of gas. The mechanical parts are but aids to this result, securing in place the packing and enabling its qualities to operate, enabling it to maintain its form, but to allow radial expansion sufficient "to pack the joint tightly against the escape of gas." This expansion has also the effect of pressing "the copper (M²)" against the interior of the gun, and co-operates to prevent the leakage of gas.

That this packing constitutes the very essence of the invention is declared in all of the literature on the subject and recognized in all of the government publications. The government now contends for a limitation of it, and insists that it consists of "a yielding packing M," exactly as described, although the description is declared by De Bange to represent "the best means of carrying out his invention," and he declares also that "modifications could be used in the forms and proportions."

We cannot therefore assent to the contention of the government, and in rejecting it we do not render "the claim elastic and indefinite where it should be certain." We preserve that which was declared to be and which has always been recognized to be the invention, and by those competent to declare, whose duty it was to comprehend and estimate, not only the result achieved, but by what achieved.

In the description furnished by De Bange to Commander Chadwick a covering of cloth is described. The description in the Ordinance Notes of April 20, 1883, mentions "plates of tin, strengthened at the edges 327] by thin brass *rings." Another description speaks of "a metallic split ring." These are but details. As said by the court of claims, through Booth, J., "The invention described by the language of the claim was the yielding pad of asbestos and tallow." And this, the learned judge also said, predominates as the one "central idea" in every description of the patent in either the specifications or claim.

We learn from the court that it heard much expert testimony, and in its opinion it considers two subsequent patents expressed to be improvements on the De Bange patent. One of these was issued to James B. Davis and the other to Gregory Gerdorn. The difference between them and the De Bange patent was commented on, and it was said that the record disclosed that in all inventions subsequent to De Bange's "the pad of asbestos and tallow is the functioning element of the device, without which its utility is as nothing;" and that a pad of that composition supplied "the necessary expansion, indispensable to forward the operation of both the Davis and Gerdorn patents. The United States used the Gerdorn patent and paid him substantial royalties for its use."

It would seem, therefore, that the contention of the government turns upon a question of fact found against it by the court below; that is, it was found that the particular envelop of the tallow and asbestos pad were not essential features of De Bange's invention, and that the substitution of steel rings for brass rings could be an infringement of the invention. As said by counsel for claimant, claim 1 "does not recite among its elements the materials whereof the envelop [of the pad] and rings are made. . . . It is, on the contrary, obvious that any suitable material may be used for these subsidiary parts." It is conceded that the pliable copper envelop (M²) may be properly regarded as a part of the "yielding packing." The patentee so states, but he does not say that the "strong shells of brass M² M³ are parts" 56 L. ed.

of it. *It would indeed be arbitrary, [328 as said by claimant, to read into the claim the specific metal of which those shells are composed "for no other purpose than to render it [the claim] worthless."

We have seen De Bange describe what he conceived to be the best form of his invention, and contemplated that it could be represented in other forms and proportions. This, however, was unnecessary, for the law would secure him against imitation by other forms and proportions. *Winans v. Denmead*, 15 How. 330, 14 L. ed. 717; *Hotchkiss v. Greenwood*, 11 How. 248, 265, 13 L. ed. 683, 690; *Western Electric Co. v. La Rue*, 139 U. S. 601, 608, 35 L. ed. 294, 297, 11 Sup. Ct. Rep. 670.

We think, therefore, that the court of claims rightfully decided the question of infringement against the government.

The cross appeal of claimant is directed to the question of damages.

In the original petition filed by it on January 31, 1895, damages were laid at \$140,000. There was no traverse filed until October, 1907. An amended petition was filed April 12, 1909, and judgment was prayed for \$1,447,667.98. In this petition it was alleged that the invention was used upon 1,518 guns of various calibers within the six years next preceding the filing of the original petition, the number which was used by the Army and that used by the Navy being given. The total cost of the guns was stated to be \$18,226,-263. There is no finding responding to these allegations. The opinion of the court was filed December 2, 1907, that is, before the filing of the amended position. The opinion contains the following statement: "There is no testimony in the record upon which the quantum of damages can be predicated. The measure of damages would be the value of the device to the defendants. Following the precedents heretofore established, the case will stand upon the docket, with leave to furnish testimony upon this point."

*On the 20th of May, 1909, judgment [329 was rendered for claimant in the sum of \$136,000. Each party moved for an amendment to the findings, which were overruled in part and allowed in part. The former findings were withdrawn and amended findings of fact filed. No exception appears to have been taken to this action. Indeed, the record does not furnish us with a comparison between the findings which were withdrawn and those filed. There is nothing to show upon what the court's ruling was invoked.

A motion was presented to this court April 25, 1910, to remand the case to the court of claims, and that that court be in-

structed to find and certify as matters of fact, in addition to the facts found, in regard to the cost of the guns in which the De Bange obturators were used, the amount the government paid or contracted to pay for patented improvements in breech-loading mechanism for ordnance, and whether there appears in the record the testimony of experts as to the value of the De Bange device, or what would be a reasonable compensation for its use, and, if so, to state the amounts of such estimates.

It was further moved that the court of claims be instructed to strike out certain matters in the findings which were described to be evidentiary. The motion was postponed to the hearing, and is now to be considered. The motion is, in effect, for a direction to the court of claims to certify the evidence to this court, and not its conclusions from the evidence. This is clearly in contravention of the rule of this court which requires the record on appeal from the court of claims to contain a finding by the court "of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing it."

Besides, as we have seen, the record does not disclose what ruling was invoked. We 330] can only act upon the *record, and that shows a finding of the court upon the question of compensation, to which finding there was no objection taken nor exception reserved. The finding determines the matter, being in the nature of a special verdict of a jury. *United States v. New York Indians*, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464.

Ceballos v. United States, 214 U. S. 47, 53 L. ed. 904, 29 Sup. Ct. Rep. 583, is not applicable. There was a contract of which there could be no dispute, and therefore a motion to embrace it in the record from the court of claims was granted and the case reviewed in the light thereof.

The motion to remand the case is therefore denied.

Judgment affirmed.

CITY OF POMONA et al., Appts.,

v.

SUNSET TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 330-346.)

Appeal — jurisdiction of circuit court of appeals.

1. A circuit court of appeals has jurisdiction to review a decree of a Federal

circuit court, dismissing a bill to restrain a municipality from removing the poles and wires of a telephone and telegraph company from the city streets, and from preventing the placing of further poles and wires therein, on the ground that the company had rights under the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 et seq., U. S. Comp. Stat. 1901, p. 3579), that were infringed, and that the conduct of the city has given rise to a contract protected against impairment.

[For other cases, see Appeal and Error, III. c. in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — corporate franchise.

2. No grant to a telephone company of the right to occupy the streets of a city without its consent, which will be protected by the contract clause of the Federal Constitution, can be deduced from the amendment of October 10, 1911, to Cal. Const. art. 11, § 19, under which persons or corporations may establish and operate works for supplying the inhabitants of a municipality with telephone service "upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges."

[For other cases, see Constitutional Law, 1201-1213, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — corporate franchise — repeal.

3. A telephone company can claim no contract right under the amendment of March 20, 1905, to Cal. Civ. Code, § 536, to occupy the streets of a city for local business without the city's consent, in view of the passage, before the date when such amendment by its terms was to go into effect, of the franchise act of March 22, 1905, taking effect immediately, and providing that every franchise to erect or lay telephone wires, except "telephone lines doing an interstate business," shall be granted upon the conditions named in such act, which leaves franchise grants generally to the local subdivisions concerned, and con-

NOTE.—On the privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to *Clarksburg Electric Light Co. v. Clarksburg*, 50 L.R.A. 142.

As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

On the jurisdiction of the circuit courts of appeals—see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6, and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

tains a general repealing clause naming certain exceptions, of which § 536 is not one. [For other cases, see Constitutional Law, 1201-1213, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — corporate franchise.

4. A contract right to maintain only through interstate telephone wires in the city streets, and not to maintain the poles and wires connecting local subscribers, is all that can be gathered from the exceptions in favor of "telephone lines doing interstate business," made by Cal. act of March 22, 1905, which repealed, before it took effect, the act of March 20, 1905, amending Cal. Civ. Code, § 536, so as to include telephone companies among the corporations which could occupy the city streets without municipal consent.

[For other cases, see Constitutional Law, 1201-1213, in Digest Sup. Ct. 1908.]

[No. 215.]

Argued March 14 and 15, 1912. Decided April 8, 1912.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, reversing a decree of the Circuit Court for the Southern District of California, enjoined a municipality from removing telephone poles and wires from the city streets, and from preventing the placing of further poles and wires therein. Reversed, with directions to dismiss the bill without prejudice.

See same case below, 97 C. C. A. 251, 172 Fed. 829.

The facts are stated in the opinion.

Messrs. John W. Shenk and William J. Carr argued the cause, and, with Messrs. C. W. Guerin, Robert G. Loucks, W. B. Mathews, Leslie R. Hewitt, J. P. Wood, and J. W. Joos, filed a brief for appellants:

If the claim of rights by the company under the act of July 24, 1866, presents a question for Federal jurisdiction, an appeal would lie to the circuit court of appeals under § 6, and that court would decide the whole case or certify the constitutional questions also involved to the Supreme Court, and proceed as thereupon advised, or an appeal would lie directly to the Supreme Court under § 5 of the judiciary act.

Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

If the claim of the company under the act of July 24, 1866, does not present a question for Federal jurisdiction, the Supreme Court has exclusive jurisdiction of this appeal.

56 L. ed.

Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

The act of July 24, 1866, has been so thoroughly construed by the Supreme Court of the United States that appellee's claim under it has been determined and is no longer a Federal question.

Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 777, 778, 43 L. ed. 1162, 1168, 1169, 19 Sup. Ct. Rep. 778; St. Louis v. Western U. Teleg. Co. 148 U. S. 93, 37 L. ed. 381, 13 Sup. Ct. Rep. 485; St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 594, 49 L. ed. 332, 25 Sup. Ct. Rep. 150, 1 Ann. Cas. 533; Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 24 L.R.A. 161, 29 Atl. 819, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; Toledo v. Western U. Teleg. Co. 52 L.R.A. 730, 46 C. C. A. 111, 107 Fed. 10; Cumberland Teleph. & Teleg. Co. v. Evansville, 127 Fed. 187.

The Federal courts will not recognize a claim for Federal jurisdiction when the same legal points involved have been determined by the Supreme Court.

Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 54 L. ed. 482, 30 Sup. Ct. Rep. 326; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 422, 49 L. ed. 1108, 1111, 25 Sup. Ct. Rep. 750; Myrtle v. Nevada, C. & O. R. Co. 137 Fed. 193; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.

The obstruction of a public street or highway is a common nuisance.

Lewiston Turnp. Co. v. Shasta & Wagon Road Co. 41 Cal. 562; Siskiyou Lumber & Mercantile Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118; Marini v. Graham, 67 Cal. 130, 7 Pac. 442; Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688; Vanderhurst v. Tholcke, 113 Cal. 147, 35 L.R.A. 267, 45 Pac. 266; Southern P. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929; Coverdale v. Edwards, 155 Ind. 383, 58 N. E. 495; Valparaiso v. Bozarth, 153 Ind. 536, 47 L.R.A. 487, 55 N. E. 439; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Indianapolis v. Miller, 27 Ind. 394; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44:

Daublin v. New Orleans, 1 Mart. (La.) 185.

No user or lapse of time can legalize such a nuisance.

People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Webb v. Demopolis*, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289.

It devolves upon the company to justify the use of the streets by its poles and lines.

Sunset Teleph. & Teleg. Co. v. Pasadena, 42 Cal. Dec. 593, 118 Pac. 796; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44.

The interstate commerce clause of the Constitution does not in itself confer upon the company the right to appropriate for the maintenance of its system portions of the streets of the city of Pomona. Competent authority from the state, therefore, is necessary.

Sunset Teleph. & Teleg. Co. v. Pasadena, *supra*; **Northwestern Teleph. Exch. Co. v. St. Charles**, 154 Fed. 386.

The expenditure of money by the company and the extension of its system, even though with the consent or at the request of the city, furnishes no authority to the company to maintain its lines. The mode whereby the city may contract or grant a privilege being prescribed, that mode constitutes the measure of the city's power in such respect, and any right granted or claimed otherwise is a mere nullity. Estoppel will not lie against the city in such case to deny the existence of the contract or privilege.

People ex rel. Dean v. Contra Costa County, 122 Cal. 422, 55 Pac. 131; **Pacific Electric R. Co. v. Los Angeles**, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; **Pelham v. Pelham Teleph. Co.** 131 Ga. 325, 62 S. E. 186; **Tri-State Teleph. & Teleg. Co. v. Thief River Falls**, 183 Fed. 854; **Zottman v. San Francisco**, 20 Cal. 96, 81 Am. Dec. 96; **Times Pub. Co. v. Weatherby**, 139 Cal. 618, 73 Pac. 465; **Frick v. Los Angeles**, 115 Cal. 512, 47 Pac. 250; **Wichmann v. Placerville**, 147 Cal. 164, 81 Pac. 537; **Santa Cruz Rock Pavement Co. v. Broderick**, 113 Cal. 628, 45 Pac. 863; **McCoy v. Briant**, 53 Cal. 247; **French v. Teschemaker**, 24 Cal. 550; **Brady v. New York**, 16 How. Pr. 444; **Arnott v. Spokane**, 6 Wash. 442, 33 Pac. 1063; **Chippewa Bridge Co. v. Durand**, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; **Murphy v. Louisville**, 9 Bush, 189; **Jersey City Supply Co. v. Jersey City**, 71 N. J. L. 631, 60 Atl. 381, 2 Ann. Cas. 507; **Providence**

v. Providence Electric Light Co. 122 Ky. 237, 91 S. W. 664.

No rights were acquired by the company under § 536 of the Civil Code prior to its repeal and re-enactment in 1905. The word "telegraph," as therein used, does not include "telephone."

Sunset Teleph. & Teleg. Co. v. Pasadena, 42 Cal. Dec. 593, 118 Pac. 796; **Richmond v. Southern Bell Teleph. & Teleg. Co.** 174 U. S. 761, 773, 775, 43 L. ed. 1163, 1167, 1168, 15 Sup. Ct. Rep. 778; **Cumberland Teleph. & Teleg. Co. v. Evansville**, 127 Fed. 187; **Toledo v. Western U. Teleg. Co.** 52 L.R.A. 730, 46 C. C. A. 111, 107 Fed. 10, **Sunset Teleph. & Teleg. Co. v. Pomona**, 164 Fed. 573, 97 C. C. A. 251, 172 Fed. 838; **Home Teleg. Co. v. Nashville**, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824; **Suburban Light & P. Co. v. Boston**, 153 Mass. 200, 10 L.R.A. 497, 26 N. E. 447.

Where two acts are inconsistent, and both are otherwise valid, one previously passed which takes effect sixty days after its passage is impliedly repealed by an inconsistent act passed one day later, which takes effect immediately.

Ex parte Sohnecke, 148 Cal. 262, 2 L.R.A. (N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475.

When a negative statute is subsequent in time to an affirmative statute, such as § 536 of the Civil Code, the courts will not feel the same reluctance, or experience the same difficulty, in holding that the latter repeals the former, as in the case of two affirmative statutes.

Lewis's Sutherland, Stat. Constr. 2d ed. § 248.

The various decisions of the state supreme court upon Cal. Laws 1905, p. 777, and the franchise acts preceding it, give to this line of legislation a scope and effect entirely inconsistent with the idea that such act is not repugnant to § 536 of the Civil Code.

Horton v. Los Angeles, 119 Cal. 602, 51 Pac. 956; **People ex rel. Dean v. Contra Costa County**, 122 Cal. 421, 55 Pac. 131; **Pereria v. Wallace**, 129 Cal. 397, 62 Pac. 61; **Los Angeles v. Davidson**, 150 Cal. 59, 88 Pac. 42; **McGinnis v. San Jose**, 153 Cal. 711, 96 Pac. 367.

The lines of the company in Pomona which were destroyed or threatened by the city were not lines doing an interstate business, within the meaning of the exception in Cal. Laws 1905, p. 777.

Lewis's Sutherland, Stat. Constr. 2d ed. § 352; **People ex rel. Pierce v. Morrill**, 26 Cal. 336; **Southern Bell Teleph. & Teleg. Co. v. D'Alemberte**, 39 Fla. 25, 21 So. 571; **New York ex rel. Pennsylvania R. Co. v. Knight**, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; **Sunset Teleph. & Teleg.**

Co. v. Pasadena, 42 Cal. Dec. 593, 118 Pac. 796.

The burden was on the company to show that its lines were doing an interstate business.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

The exception of telegraph or telephone lines doing an interstate business, contained in Cal. Stat. 1905, p. 777, is not in itself a grant of a franchise to construct and maintain such lines. It is not the function of an exception or proviso to confer power or grant a privilege.

Chicago v. Phoenix Ins. Co. 126 Ill. 276, 18 N. E. 668; Com. ex rel. Harper v. Hough, 22 Pa. Co. Ct. 440; Sunset Teleph. & Teleg. Co. v. Pasadena, 42 Cal. Dec. 593, 118 Pac. 796.

Section 19 of art. 11 of the California Constitution, as amended on October 10, 1911, is not to be construed as a blanket grant of a franchise from the state to use the streets of municipalities for the operation of telephone lines and the works of the other utilities mentioned. On the contrary, the section as amended repealed *in toto* § 536 of the Civil Code as re-enacted in 1905.

Sunset Teleph. & Teleg. Co. v. Pasadena, 42 Cal. Dec. 593, 118 Pac. 796; State ex rel. Spokane & B. C. Teleph. & Teleg. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Chicago General R. Co. v. Chicago, 176 Ill. 253, 66 L.R.A. 959, 68 Am. St. Rep. 188, 52 N. E. 880, Providence v. Union R. Co. 12 R. I. 473; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628.

A decree granting an injunction, based upon a law repealed after the entry of such decree, but prior to the determination of the appeal therefrom, will not be affirmed.

Cooley, Const. Lim. 6th ed. 469; 3 Cyc. 407, 408; United States v. The Peggy, 1 Cranch, 103-110, 2 L. ed. 49-51; Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101; Mills v. Green, 159 U. S. 651, 656, 657, 40 L. ed. 293-295, 16 Sup. Ct. Rep. 132; Dinsmore v. Southern Exp. Co. 183 U. S. 115-120, 46 L. ed. 111-113, 22 Sup. Ct. Rep. 45; Linn County v. Hewitt, 55 Iowa, 505, 8 N. W. 340; Vance v. Rankin, 194 Ill. 627, 88 Am. St. Rep. 173, 62 N. E. 807; Wade v. St. Mary's Industrial School, 43 Md. 178; Muskogee Nat. Teleph. Co. v. Hall, 4 Ind. Terr. 18, 64 S. W. 604. New Orleans Flour Inspectors v. Glover, 56 L. ed.

160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321.

The repeal of § 536 of the Civil Code as re-enacted in 1905 by the amendment of § 19 of art. 11, of the Constitution adopted on October 10, 1911, neither impairs the obligation of any contract of the company, arising under § 536, nor assails any of its vested rights.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; San Antonio Traction Co. v. Altegelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820.

Mr. Alfred Sutro argued the cause, and, with Mr. E. S. Pillsbury, filed a brief for appellee:

The circuit court of appeals had jurisdiction to hear and determine the appeal from the circuit court.

Chicago Junction R. Co. v. King, 222 U. S. 222, ante, 173, 32 Sup. Ct. Rep. 79; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376; Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863, 20 Sup. Ct. Rep. 713; Robinson v. Caldwell, 165 U. S. 359, 361, 41 L. ed. 745, 746, 17 Sup. Ct. Rep. 343; Re Can Pon, 93 C. C. A. 635, 168 Fed. 479; Hooper v. Remmel, 91 C. C. A. 322, 165 Fed. 336; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 612; Mills v. Provident Life & Trust Co. 40 C. C. A. 394, 100 Fed. 348.

Section 536 of the Civil Code is a grant of right by the state to telephone and telegraph corporations to use the highways of the state for their lines.

Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 560; Western U. Teleg. Co. v. Los Angeles County, 160 Cal. 124, 116 Pac. 564; Postal Teleg. Cable Co. v. Los Angeles County, 160 Cal. 129, 116 Pac. 566; Sunset Teleph. & Teleg. Co. v. Pasadena, — Cal. —, 118 Pac. 796; New Union Teleph. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. Supp. 81; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 660, 114 Wis. 505, 90 N. W. 441; Abbott v. Duluth, 104 Fed. 833, 55 C. C. A. 153, 117 Fed. 137; Duluth v. Duluth Teleph. Co. 84 Minn. 486, 87 N. W. 1127; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Wichita v. Old Colony Trust Co. 66 C. C. A. 19, 132 Fed. 641; Wichita v. Missouri & K. Teleph. Co. 70 Kan. 441, 78 Pac. 886; State ex rel. Rocky Mountain Bell Teleph. Co. v. Red Lodge, 30 Mont. 338, 76 Pac. 758; Chamberlain v

Iowa Teleph. Co. 119 Iowa, 619, 93 N. W. 596; State v. Nebraska Teleph. Co. 127 Iowa, 194, 103 N. W. 120; Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 512, 47 L.R.A. 104, 80 N. W. 386; Farmer v. Columbiana County Teleph. Co. 72 Ohio St. 526, 74 N. E. 1078; Carthage v. Central New York Teleph. & Teleg. Co. 185 N. Y. 448, 78 N. E. 165; Gannett v. Independent Teleph. Co. 55 Misc. 555, 106 N. Y. Supp. 3; Texarkana v. Southwestern Teleg. & Teleph. Co. 48 Tex. Civ. App. 16, 106 S. W. 915; Missouri River Teleph. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67; Hodges v. Western U. Teleg. Co. 72 Miss. 910, 29 L.R.A. 770, 18 So. 84.

The word "highways" in § 536 includes the streets of cities and towns in California.

Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 562; Western U. Teleg. Co. v. Visalia, 149 Cal. 746, 87 Pac. 1023; Niles v. Los Angeles, 125 Cal. 576, 58 Pac. 190; Smith v. San Luis Obispo, 95 Cal. 469, 30 Pac. 591.

The provisions of the franchise act of 1905 are not inconsistent with those of § 536 of the Civil Code as re-enacted in 1905, because § 536 is a grant of franchise, and the franchise act of 1905 only provides the method by which franchises must be granted; it contains no delegation of power to grant franchises.

Sunset Teleph. & Teleg. Co. v. Pasadena, — Cal. —, 118 Pac. 799.

The power to grant franchises for the use of the highways in a city inheres, of course, in the state.

Re Johnston, 137 Cal. 122, 69 Pac. 973; Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20; South Pasadena v. Los Angeles Terminal R. Co. 109 Cal. 315, 41 Pac. 1093.

The delegation to a municipal corporation of the power to grant franchises must clearly appear before the right to exercise the power may be asserted. Any reasonable doubt concerning the existence of the power is to be resolved against the municipal corporation.

Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 693; Glass v. Ashbury, 49 Cal. 571; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 661; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720.

It is true that a rule of construction is to be found to the effect that a qualifying clause is ordinarily to be confined in its operation to its immediate antecedent. But this rule does not apply where a consideration of the subject-matter requires a different construction.

Greenough v. Phoenix Ins. Co. 206 Mass.

247, 138 Am. St. Rep. 383, 92 N. E. 449.

And the rule is that a qualifying clause following several clauses may be applied to all of them, if applicable, or to the last one, as best accords with the purpose and spirit of the act.

State v. Louisville & N. R. Co. 97 Miss. 35, 51 So. 918, 53 So. 455.

The phrase "hereafter proposed to be granted" qualifies every franchise or privilege mentioned in the first section of the act.

Los Angeles v. Davidson, 150 Cal. 59, 88 Pac. 42.

The legislature of California, by providing in the franchise act that all acts or parts of acts "in conflict herewith" are hereby repealed, has thereby implied very strongly that there may be acts on the same subject which are not thereby repealed.

Hess v. Reynolds, 113 U. S. 73, 79, 28 L. ed. 927, 929, 5 Sup. Ct. Rep. 377.

By so providing the legislature, in passing the later act, had the question of repeal under consideration, and gave expression to the extent of its intention in that regard in § 11 of the act, which shows the repeal of the former acts to be only in so far as they are inconsistent with the provisions of the later act.

Bank of British N. A. v. Cahn, 79 Cal. 465, 21 Pac. 863.

The implication of repeal cannot arise when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act.

Patterson v. Tatum, 3 Sawy. 164, Fed. Cas. No. 10,830.

Any repeal of § 536 of the Civil Code by the franchise act of 1905 could have been only by implication. Such repeals are not favored, and occur only in cases of clear and irreconcilable conflict.

United States v. Morgan, 222 U. S. 274, ante, 198, 32 Sup. Ct. Rep. 82; Wood County v. Lackawana Iron & Coal Co. 93 U. S. 619, 624, 23 L. ed. 989, 991; Wood v. United States, 16 Pet. 342, 362, 10 L. ed. 987, 995; Distilled Spirits, 11 Wall. 356, 365, 20 L. ed. 167, 170; Henderson's Tobacco (United States v. Henderson) 11 Wall. 652, 20 L. ed. 235; Arthur v. Homer, 96 U. S. 137, 140, 24 L. ed. 811, 812; Chew Heong v. United States, 112 U. S. 536, 549, 28 L. ed. 770, 773, 5 Sup. Ct. Rep. 255; Frost v. Wienie, 157 U. S. 46, 58, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; Cope v. Cope, 137 U. S. 682, 686, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; Wetzell v. Paducah, 117 Fed. 647; Mer-

rill v. Gorham, 6 Cal. 41; Soher v. Calaveras County, 39 Cal. 134; Malone v. Bosch, 104 Cal. 683, 38 Pac. 516; Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900; Hilton v. Curry, 124 Cal. 84, 56 Pac. 784; Thompson v. Alameda County, 111 Cal. 556, 44 Pac. 230; Rowe v. Hibernia Sav. & L. Soc. 134 Cal. 406, 66 Pac. 569.

Section 536 of the Civil Code was re-enacted at the same session of the legislature and at about the same time that the franchise act of 1905 was passed. This circumstance is a strong argument against the repeal by implication of the former by the latter.

State ex rel. Hendricks County v. Marion County, — Ind. —, 85 N. E. 513; State ex rel. Hay v. Hindson, 40 Mont. 353, 106 Pac. 364; State ex rel. Scholl v. Duncan, 162 Ala. 196, 50 So. 265; Stubblefield v. Menzies, 8 Sawy. 41, 11 Fed. 276.

Pomona is a part of the interstate telephone system of the appellee, extending throughout the state of California and into many parts of the states of Nevada, Oregon, and Washington.

United States v. Southern R. Co. 164 Fed. 349; United States v. Pittsburgh, C. C. & St. L. R. Co. 143 Fed. 360; United States v. Northern P. Terminal Co. 144 Fed. 861; United States v. Great Northern R. Co. 145 Fed. 438.

Without excluding interstate telephone lines from its operation, the act of March 22, 1905, would be unconstitutional.

Muscogee Nat. Teleph. Co. v. Hall, 55 C. C. A. 208, 118 Fed. 382; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Re Pennsylvania Teleph. Co. — N. J. Eq. —, 20 Atl. 846; South Pasadena v. Los Angeles Terminal R. Co. 109 Cal. 315, 41 Pac. 1093; People ex rel. San Francisco & S. J. R. Co. v. Craycroft, 111 Cal. 544, 44 Pac. 463.

The appellee has the right, under § 19 of the Constitution of the state of California, as amended October 10, 1911, to use the streets of the city of Pomona for its telephone system without a special franchise therefor from the city.

People v. Stephens, 62 Cal. 235; Re Johnston, 137 Cal. 119, 69 Pac. 973; Denninger v. Recorder's Ct. 145 Cal. 638, 79 Pac. 364; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 318, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; San Francisco v. Oakland Water Co. 148 Cal. 333, 83 Pac. 61; People ex rel. Los Angeles v. Los Angeles Independent Gas Co. 150 Cal. 557, 89 Pac. 108.

Any repeal of § 536, as re-enacted in 1905, by subdivision 19 of art. 11 of the Constitution, as amended October 10, 1911, 56 L. ed.

would necessarily be without prejudice to the rights of the appellee under § 536. Those rights constitute a contract between the appellee and the state which is not subject to impairment by the state, either through its legislature, or by the people in their Constitution.

Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 563.

Subdivisions 4 and 13 of § 764 of the municipal corporation act did not, nor does subdivision 58 of § 54 of its charter, confer upon the city of Pomona the power to grant or refuse a franchise to telegraph or telephone companies.

Wichita v. Missouri & K. Teleph. Co. 70 Kan. 441, 78 Pac. 888; State ex rel. Rocky Mountain Bell Teleph. Co. v. Red Lodge, 30 Mont. 338, 76 Pac. 760; Re Johnston, 137 Cal. 115, 69 Pac. 973; Abbott v. Duluth, 104 Fed. 833; Wichita v. Old Colony Trust Co. 66 C. C. A. 19, 132 Fed. 641; Chamberlain v. Iowa Teleph. Co. 119 Iowa, 619, 93 N. W. 599; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 512, 47 L.R.A. 104, 80 N. W. 386; Carthage v. Central New York Teleph. & Teleg. Co. 185 N. Y. 448, 113 Am. St. Rep. 932, 78 N. E. 165; Texarkana v. Southwestern Teleg. & Teleph. Co. 48 Tex. Civ. App. 16, 106 N. W. 915; Bishop v. Riddle, 51 Tex. Civ. App. 317, 113 S. W. 153.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the appellee, a California corporation, to restrain the city of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellee's placing further poles and wires in the streets. The circuit court dismissed the bill (164 Fed. 561), but the decree was reversed and an injunction granted by the circuit court of appeals. 97 C. C. A. 251, 172 Fed. 829. Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, chap. 230, 14 Stat. at L. 221 (Rev. Stat. §§ 5263 et seq. U. S. Comp. Stat. 1901, p. 3579), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the circuit court of appeals. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376. The remaining ground is that the Constitution of California, as amended in 1911, or the statutes of the state, contained a grant with which the

Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources, it has no right to occupy the streets.

The claim based upon the amendment to article 11, § 19, of the Constitution of the state, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light, etc. individuals or corporations of the state, duly authorized, should have the privilege of using the streets, etc., for the purpose, upon the condition that **343]** *the municipal government should have the right to regulate the charges. By the amendment "any municipal corporation may establish and operate public works for . . . telephone service," either by construction or by purchase. It then goes on: "Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges therefore." We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words, "upon such conditions," etc., are not to be confined to police powers, which are conferred by § 11 of the same article, but are of general import. If the municipal corporation does not see fit to establish the public works itself, it may let others do it; but its power to impose conditions excludes the notion that the Constitution alone is a grant to others of a right to occupy the streets without its consent.

The claim founded upon the statutes seems to us stronger. By § 536 of the Civil Code, "Telegraph . . . corporations may construct lines of telegraph . . . along and upon any public road or highway . . . and may erect poles . . . in such manner and at such points as not to interfere with the public use of the road." This is treated by the supreme court of California as a grant when acted upon. *Western U. Teleph. Co. v. Hopkins*, — Cal. —, 116 Pac. 557. But as the words "telegraph corporations" have been construed not to include telephone corporations (*Sunset Teleph. & Teleg. Co. v. Pasadena*, — Cal. —, 118 Pac. 796),—a construction that we know no sufficient reason for not following (*Yazoo & M. Valley R. Co. v. Adams*, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729; *Richmond v. Southern Bell Teleph. & Teleg. Co.* **344]**174 *U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778),—the section until amended

did the appellee no good. On March 20, 1905, however, the section was amended so as to include telephone corporations, so that, if that were all, the case of the appellee would be clear, the city of Pomona not having been organized under provisions of the Constitution that withdrew certain cities from the operation of general laws. See *Ex parte Helm*, 143 Cal. 553, 77 Pac. 453; *Sunset Teleph. & Teleg. Co. v. Pasadena*, — Cal. —, 118 Pac. 796, 803.

But the amendment did not go into effect for sixty days; and two days later, on March 22, a franchise act was passed, to take effect immediately, providing that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads, . . . or to exercise any other privilege whatever hereafter proposed to be granted" by the legislative body of any county, city and county, city or town, except telegraph or telephone lines doing an interstate business, should be granted upon the conditions specified in the act, and not otherwise. "Any applicant for any franchise or privilege above mentioned" was required to file an application, there was to be an advertisement for bids, etc., with other particulars that need not be specified, as the appellee does not claim under this statute. It contends that this act establishes conditions only for counties, cities, and towns, and does not qualify the grant from the state in the amended § 536. The appellant, on the other hand, argues that the franchise act repealed § 536, so far as it affects this case, except as to telephones doing an interstate business. In view of the frame of the act as a whole, of a general repealing clause at the end, naming certain exceptions of which § 536 is not one, and of the fact that the grant of such franchises seems generally to have been left to the local subdivisions concerned (*Sunset Teleph. & Teleg. Co. v. Pasadena*, supra), we construe the words quoted as *of general application, and are of [345] opinion that they cannot be supposed to have had the narrow operation that would be left to them if there were in force a grant from the state of almost universal scope. Until the state court shall decide otherwise we must take § 536 to have been repealed, subject to the exception contained in the later act, before any grant or right under it had accrued to the appellee.

We come, then, to consider the extent of the exception. This is not a question whether all telephones having the usual connections might not be instruments of commerce among the states; it is not a question whether the state could interfere with the local business of lines engaged in

such commerce. It is a question of how far the offer of a grant that had not yet taken effect should be understood to have been left on foot by the repealing act,—a question as to the meaning of words. In construing them it may be assumed that the exception was made unwillingly. No policy can be discovered that would be likely to induce the making of it, and it is most easily explained by the uncertainty then prevailing as to the power of the state over telegraphs; etc., running into other States in view of the commerce clause of the Constitution and the act of July 24, 1866,—an uncertainty then lately and since largely dispelled. *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517; *Western U. Teleg. Co. v. Richmond*, April 1, 1912 [224 U. S. 160, ante, 710, 32 Sup. Ct. Rep. 449]. The words to be interpreted are “except telegraph or telephone lines doing an interstate business.” The qualification “doing an interstate business” shows that not all telephones were expected to benefit by the grant in § 536, and the limitation is presumably substantial. The legislature probably supposed by mistake that it was bound to grant a right to direct through lines, but evidently meant to grant no more than it must. It was understood so by the city. The order and threat of the city were confined to poles 346] and wires *doing a state and local business. This appears by the bill and the finding of the circuit court, not disturbed above, as to what actually was done. We are of opinion that the city’s interpretation was correct.

The result is that the appellee must be taken to have a grant of the right to keep its main through lines in the streets of Pomona, but not to maintain the posts and wires by which it connects with subscribers. So far as appears the city attacks only the latter, and therefore no present ground is shown for the bill. But as the line of distinction may be delicate and questions may arise, the bill will be dismissed without prejudice.

Decree reversed.

Bill to be dismissed without prejudice.

TITLE GUARANTY & SURETY COMPANY, Plff. in Err., v.

WILLIAM FRANCIS NICHOLS.

(See S. C. Reporter’s ed. 346-353.)

Evidence — burden of proof — action on cashier’s bond — condition.

1. The burden is upon the surety, in an
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action on a cashier’s bond, to plead and prove a breach of the bank’s agreement that monthly examinations of the cashier’s books should be made, since such requirement, if a condition at all, was a condition subsequent rather than precedent.

[For other cases, see Bonds, 119-126d; Evidence, 668-672, in Digest Sup. Ct. 1908.]

Trial — question for jury — diligence.

2. The question whether reasonably proper monthly examinations of the cashier’s books were made is for the jury in an action on his bond, where there is evidence that such cashier made monthly reports which were regularly inspected once a month by the bank’s officers; that the embezzlements which were not detected by such inspection were concealed by false entries relating to remittances to the bank’s correspondents, whereby the balances in such correspondent banks were made to appear much larger than they actually were, and that the officers were misled by the bookkeeper’s innocent use, as the basis for ledger entries, of the cashier’s falsified slips, purporting to show the cash used to buy exchange for remittances.

[For other cases, see Trial, 178-184, in Digest Sup. Ct. 1908.]

Bonds — of employee — renewal — warranty.

3. An official certificate, made in contemplation of the renewal of a bank cashier’s bond, that, just prior thereto, his books and accounts “were examined and found correct in every respect, and all moneys accounted for,” is not a warranty of the correctness of such accounts, and the existence of discrepancies covered up by false entries or other bookkeeping devices will not avoid the new bond if due diligence was used in making the examination.

[For other cases, see Bonds, III, in Digest Sup. Ct. 1908.]

Trial — question for jury — good faith.

4. The good faith of the bank in certifying, in contemplation of a renewal of the cashier’s bond, that just prior thereto his books and accounts “were examined and found correct in every respect, and all moneys accounted for,” is a question for the jury in an action on the new bond, where there is evidence that due diligence was used in making the examination, although

NOTE.—What constitutes a verification of accounts as required by fidelity bond or contract.

Whether regarded as a promissory representation or a warranty, the employer’s obligation assumed in a fidelity contract to examine or verify the accounts of the bonded employee is ordinarily satisfied by such an examination as is due and customary with the insured in his business, if made in good faith. This was said to be the case in *Guarantee Co. of N. A. v. Mechanics’ Sav. Bank & T. Co.* 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766, affirming 68 Fed. 459, where the “guaranty proposal” signed by the bank’s president stipulated that the acts of the principal—a

it failed to disclose discrepancies covered up by false entries or other bookkeeping devices.

[For other cases, see Trial, 248-253, in Digest Sup. Ct. 1908.]

[No. 102.]

Argued December 13, 1911. Decided April 8, 1912.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Maricopa County, in that territory, in favor of plaintiff in an action on the bond of a bank cashier. Affirmed.

See same case below, 12 Ariz. 405, 100 Pac. 825.

The facts are stated in the opinion.

Mr. Philip Walker argued the cause, and, with Mr. C. F. Ainsworth, filed a brief for plaintiff in error:

The agreement for the monthly examination of the employer's books was in the nature of a warranty and a condition precedent.

teller—should be verified by the finance committee, and the bond itself was conditioned upon the regular inspection of his accounts.

So, in *Southern Surety Co. v. Tyler & S. Co.* — Okla. —, 120 Pac. 936, statements in the application for a bond to indemnify the insured against the fraud or dishonesty of a bookkeeper, that the insured would verify his accounts by taking monthly balances and watching him, though held to be warranties, were said not to mean such a thorough and consistent examination or audit as would necessarily discover the slightest irregularity, however cunningly concealed, and were therefore satisfied by a monthly examination by the officers of the insured, which, from the statements, books, and reports, showed his accounts to be correct, and by such supervision as was exercised over the other employees, and such as was usual and customary.

So, in *United States Fidelity & G. Co. v. Foster Deposit Bank*, — Ky. —, 147 S. W. 406, the court held that the sufficiency of the compliance of a bank with its promissory representations in an application for a cashier's bond, that a careful examination of his books should be made monthly by three or more directors, was to be tested by the degree of care which ordinarily prudent directors of a bank similarly situated would exercise under like or similar circumstances; and that, where the bank is a country one, the directors should not be held to the same degree of care as directors in city banks, who are more experienced in such matters.

A warranty in the application of a bank for a bond for its cashier, that his books would be examined monthly by the auditing committee, is satisfied by an examination

Rice v. Fidelity & D. Co. 43 C. C. A. 270, 103 Fed. 427; *Willoughby v. Fidelity & D. Co.* 16 Okla. 546, 7 L.R.A.(N.S.) 548, 85 Pac. 713, 8 Ann. Cas. 603, affirmed in 205 U. S. 537, 51 L. ed. 920, 27 Sup. Ct. Rep. 790.

Whether or not the monthly accounts and audits were made was peculiarly within the knowledge of the bank.

Selma, R. & D. R. Co. v. United States, 139 U. S. 560, 35 L. ed. 266, 11 Sup. Ct. Rep. 638; Best, Ev. § 274.

While not expressly so stating, the court practically held that the renewal statement was a representation, whereas, in law, it was a warranty, and if it were false, whether with or without knowledge, the bond was void as to subsequent defalcations.

American Bonding & T. Co. v. Burke, 36 Colo. 58, 85 Pac. 692; *Livingston v. Fidelity & D. Co.* 76 Ohio St. 253, 81 N. E. 330; *Max J. Winkler Brokerage Co. v. Fidelity & D. Co.* 119 La. 735, 44 So. 449; *Guarantee Co. of N. A. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Glidden v. United States*

by such committee, composed of certain directors of the bank, if made in good faith, with the purpose of fulfilling their duty to the bank, though they were not expert accountants. *American Bonding Co. v. Morrow*, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613.

But a warranty in a bank's application for a bond for its time-check buyer to have him account monthly, and to check up his remittances about three times a month, is not satisfied by charging to his account money delivered to him for the purpose of buying time checks, and crediting his account with the amount of time checks or expense accounts sent in by him, and striking a balance, without making any effort to ascertain if the money was actually on hand, or to ascertain in whose possession it was. *United States Fidelity & G. Co. v. Bank of Batesville*, 87 Ark. 348, 112 S. W. 957.

And the verification of the accounts of the treasurer of an association, required by his fidelity bond, is insufficient where the examining officials accept as true the amount which the treasurer has in the bank as shown by his pass book, without taking any steps to ascertain from the bank whether or not it represents the true state of the account. *United States Fidelity & G. Co. v. Downey*, 38 Colo. 414, 10 L.R.A.(N.S.) 323, 120 Am. St. Rep. 128, 88 Pac. 451.

A provision that the obligee in such contract is to make monthly comparison and verification of the cash in the hands of its agent, an insurance agent, with his accounts and vouchers, is not satisfied by making the comparison with the accounts and vouchers filed by him two months before. *Hunt v. Fidelity & C. Co.* 39 C. C. A. 496, 99 Fed. 242.

Fidelity & G. Co. 198 Mass. 109, 84 N. E. 143; Willoughby v. Fidelity & D. Co. 16 Okla. 546, 7 L.R.A.(N.S.) 548, 85 Pac. 713, 8 Ann. Cas. 603, affirmed in 205 U. S. 537, 51 L. ed. 920, 27 Sup. Ct. Rep. 790; Frost, Guaranty Ins. 241; Walker, Fidelity Bonds, 49.

Mr. Frank B. Kellogg argued the cause, and, with Messrs. C. A. Severance, Robert E. Olds, Thomas Armstrong, Jr., and Ernest W. Lewis, filed a brief for defendant in error:

The contract must be construed, if possible, in favor of the insured, rather than in favor of the insurer.

First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; Thompson v. Phenix Ins. Co. 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019; Imperial F. Ins. Co. v. Coös County, 151 U. S. 452, 462, 38 L. ed. 231, 235, 14 Sup. Ct. Rep. 379; Moulton v. American L. Ins. Co. 111 U. S. 342, 343, 28 L. ed. 449, 450, 4 Sup. Ct. Rep. 466; American Surety Co. v. Pauly, 170 U. S. 133, 144, 160, 42 L. ed. 977, 981, 987, 18 Sup. Ct. Rep. 552; Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co. 83 C. C. A. 431, 154 Fed. 555.

The burden of proving the allegations of the answer with respect to the falsity of specific declarations rested with the surety company.

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610.

The expression "promissory warranty" is nothing more nor less than another expression for "condition subsequent."

Redman v. Aetna Ins. Co. 49 Wis. 431, 4 N. W. 591.

The performance of conditions subsequent need not be alleged and proved by the parties suing upon a contract.

Chambers v. Northwestern Mut. L. Ins. Co. 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367; Badenfeld v. Massachusetts Mut. Acci. Asso. 13 L.R.A. 263, note; Jones, Ev. § 179.

On the subject of the burden of proof, a distinction has been taken between express warranties contained in a policy of insurance and declarations made in an application, even where such declarations are stipulated to be warranties.

American Credit Indemnity Co. v. Wood, 19 C. C. A. 264, 38 U. S. App. 583, 73 Fed. 81.

An employer would need no insurance against that close and relentless vigilance which makes stealing impossible.

Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 774.

The declarations in the employer's statement

need not be literally true, provided good faith was observed in making them, and this would be so, even if language of warranty had been used.

Moulton v. American L. Ins. Co. 111 U. S. 342, 343, 28 L. ed. 449, 450, 4 Sup. Ct. Rep. 466.

The bank's duty under the contract was confined to the observance of good faith and fair dealing; and the evidence shows that this obligation was fully met.

Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

The statements of accounts with correspondent banks were admissible.

Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299; Ritter v. State, 70 Ark. 477, 68 S. W. 262; Wright v. Chicago, B. & Q. R. Co. 118 Mo. App. 392, 94 S. W. 555; Strand v. Great Northern R. Co. 101 Minn. 85, 111 N. W. 961; Hauenstein v. Gillespie, 73 Miss. 742, 55 Am. St. Rep. 569, 19 So. 673; Jones, Ev. § 699.

Where facts are of a voluminous character and the examination of many books and papers is involved, a summary statement may be given by the person who made the examination.

Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299; Schumacher v. Pima County, 7 Ariz. 269, 64 Pac. 490; Brown v. United States, 73 C. C. A. 187, 142 Fed. 1.

Mr. Justice Lurton delivered the opinion of the court:

Action upon a bond executed by the plaintiff in error to protect the Union Bank & Trust Company, of Phoenix, Arizona, against the dishonesty of its cashier. There were two or more renewals. Embezzlements by the cashier occurred during the currency of the bond. After a right of action had accrued, the bond was assigned to the defendant in error, who brought this action thereon.

The principal defense was that the loss was due to the neglect of the employer to supervise the conduct of the employee by making such monthly examinations of his accounts as it agreed to make or have made. There was a jury and verdict for the plaintiff, and a judgment against the surety company, which was affirmed by the supreme court.

A number of errors have been assigned which relate to this defense, but the argument has turned upon those which, in different ways, raise the question as to whether, after the defendant in error had made out a prima facie case by proving the bond and its breach by a refusal to

indemnify him for losses sustained during its currency through the dishonesty of the 350]employee guaranteed, the *onus devolved upon the surety company to plead and prove that the loss had occurred through the fault of the employer in not making the monthly examinations which it had agreed to make. The trial judge ruled that the onus was upon the defendant, and this ruling has been affirmed by the supreme court.

Whether this ruling was right or wrong must depend upon whether the requirement of the bond, that monthly examinations of the books of the employee should be made, constituted a condition precedent or a condition subsequent. The bond on its face requires the employer "to take and use all reasonable steps and precautions to detect and prevent any act upon the part of the employee which would tend to render the company liable for any loss." It also provides that if the statements by the employer in the application "shall be untrue, the bond shall be void." The obligation in respect to examinations of the employee's accounts is found in the application. The questions propounded by the surety company and the employer's answers, so far as relevant, were these:

"To whom and how frequently will he account for his handlings of funds and securities? Monthly; to board of directors.

"What means will you use to ascertain whether his accounts are correct? Examination of books and count of money and securities. How frequently will they be examined? Monthly or oftener. By whom will they be examined? Our auditor.

"When were his accounts last examined? February 8th, 1905.

"Were they reported correct? Yes.

"Is there now or has there been any shortage due you by applicant? No."

There was never any question but that liability under the bond would be defeated if it appeared that the loss attributable to the 351]dishonesty of the employee was due *to the neglect of the bank to make the monthly examinations required. And so the jury were instructed. The question was whether this requirement was a condition precedent to liability, which the bank was required to aver and prove, or whether it was a defense to be made out by the defendant. But a construction which makes the bond inoperative until the employer shows that it had made such examinations is not a fair and reasonable interpretation. The distinction between conditions precedent and subsequent is plain enough. The condition here involved, if properly a condition at all, is of the latter class.

The coming into effect of a contract may be made to depend upon the happening or performance of a condition. But a condition subsequent presupposes a contract in effect which may be defeated by the happening or performance of a condition. Where, therefore, an action is upon a contract subject to a condition precedent, the performance of that condition must be averred and proved; but if the contract sued upon is subject to a condition subsequent, there is no occasion for any averment in respect to the condition. It is a matter of defense, which must come from the other side. 1 Chitty, Pl. pp. 246, 255.

The plaintiff was plainly entitled to recover upon proving the bond, an embezzlement, and a breach by a refusal to indemnify. It was not obliged to aver that it had made the examinations which it agreed should be made. If it had failed in that duty, it was for the surety company to so plead and prove. Such, indeed, was the course of the pleading in this case, and a breach of the agreement to make such examinations was set up as a defense. There was no error in the ruling of the court that the onus was upon the surety company to prove a breach of the obligation to make examinations. *Piedmont & A. L. Ins. Co. v. Ewing*, 98 U. S. 377, 23 L. ed. 610; *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 264, 38 U. S. App. 583, 73 Fed. 81; *Redman v. Aetna Ins. Co.* 49 Wis. 431, 4 N. W. 591; **Murray v. New York L. Ins.* [352 Co. 85 N. Y. 236; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372.

It has been argued that there was no evidence upon which the case could go to the jury upon the question of whether reasonably proper monthly examinations were in fact made. This insistence has no foundation. The plaintiff in error brought out upon its own cross-examination of McDowell, the defaulting cashier, that he made monthly reports and that these reports were gone over by the officers of the bank regularly, once a month. He testified that his cash and securities were counted and examined and his report verified from the book entries made by the bank's bookkeeper. Indeed, he testified, "that there never was a set of directors in any bank that tried to watch things closer than that set of directors." The cashier's embezzlements of money were covered by false entries relating to remittances to the bank's correspondents, whereby the balances in such banks were made to appear much larger than they actually were. The defendant's expert evidence tended to show that if the returned vouchers or the reconciliation re-

ports of such banks had been compared with the ledger accounts, the discrepancy would have appeared. But the cashier was cunning, and he testified to the difficulties which he threw in the way of any effort to verify the books in these particulars. He supported his report by his cash and his bills receivable and a showing of the books kept by another officer, who made the entries from "slips" made by himself (the cashier), purporting to show cash used to buy exchange for remittances. These "slips," being falsified memoranda, were innocently used by the bookkeeper as the basis for the ledger entries which misled the officers in their examinations. On this evidence the question as to whether reasonable diligence had been used in making such examinations was one for the jury. It was so submitted under a fair charge, and they 353] found for the *plaintiff below. Finally, it is said that the greater part of the loss occurred during the currency of renewal bonds, and that each such renewal was made upon a certificate by the employer which stated that just prior thereto the books and accounts of the employee "were examined and found correct in every respect and all moneys accounted for." It is said that this statement was untrue, inasmuch as, at the date of such renewals, the books and accounts were not correct and the cashier was short in his cash. But the certificate is not to be taken as a warranty of the correctness of the accounts. The statement is that his books and accounts had been examined and found correct. The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries, or other bookkeeping devices, would not defeat the renewal. The case upon this point went to the jury upon the fact of reasonable examinations and the good faith of the bank in making the representation. The question of the weight or credibility of the evidence is not one for our consideration. There was some evidence which the trial judge thought sufficient to carry the case to the jury. The supreme court of Arizona agreed with the trial court, and with both courts we concur.

The assignments of error relating to admission of evidence have been examined so far as the state of the record admits. The court below thought most of them insufficiently saved, and none of them so material as to require a reversal for new trial. In this we concur.

Judgment affirmed.

Mr. Justice McKenna dissents.

56 L. ed.

*ST. LOUIS, IRON MOUNTAIN, & [354
SOUTHERN RAILWAY COMPANY,
Plff. in Err.,

v.
T. J. WYNNE.

(See S. C. Reporter's ed. 354-361.)

Constitutional law — due process of law — penalizing refusal to pay claim.

Exacting double liability and an attorneys' fee under the authority of Ark. Laws 1907, No. 61, from a railway company refusing to pay within thirty days an excessive demand for the killing of live stock by one of its trains, takes the company's property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 103.]

Submitted December 14, 1911. Decided April 15, 1912.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Desha, in that state, exacting double liability and an attorneys' fee from a railroad company refusing to pay within thirty days a demand for the killing of live stock by one of its trains. Reversed and remanded for further proceedings.

See same case below, 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631.

The facts are stated in the opinion.

Messrs. W. E. Hemingway and E. B. Kinsworthy submitted the cause for plaintiff in error:

The statute and judgment deprive the railway company of its property without due process of law and are unconstitutional and void, since they require the payment of double damages and an attorneys' fee merely because the company failed to pay an unliquidated demand, with respect to which there were bona fide and substantial doubts as to the extent of the damage and as to its liability.

Pacific Mut. L. Ins. Co. v. Carter, 92 Ark. 387, 123 S. W. 384, 124 S. W. 764; Industrial Mut. Indemnity Co. v. Armstrong, 93 Ark. 84, 124 S. W. 236; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The statute is invalid for the further reason that it was designed and is calculated, by its heavy penalties, to deter railroads from contesting any claim fairly involved in doubt, either with respect to liability or the amount of damage, and to coerce the payment of all such claims; in this respect, it denies to railroads the equal protection of the law, contrary to the equal-protection guaranties of the 14th Amendment.

Ex parte Young, 209 U. S. 123, 145, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Mr. Robert E. Wiley submitted the cause for defendant in error. Mr. Powell Clayton was on the brief:

The statute, when properly construed, is not in conflict with the 14th Amendment to the Constitution of the United States.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

The penalty provided in the statute in question is not so heavy as to deter the railroad company from contesting a claim, thus denying to it the equal protection of the law.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Seaboard Air Line Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

The railroads are proper subjects of classification with respect to the matters contained in the statute attacked in this case.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Mr. Justice Van Devanter delivered the opinion of the court:

A statute of the state of Arkansas (Laws of 1907, act 61), relating to the liability of carriers by railroad for live stock killed,

wounded, or injured by their trains, contains this provision:

"And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorneys' fee. And provided further, That if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury, and not be entitled to recover any attorneys' fees."

*The owner of two horses which were[359 killed within the state by a train of a railway company served upon the company a written notice demanding damages in the sum of \$500. The company refused to pay the demand, and after the expiration of thirty days the owner brought suit in a court of the state to recover his damages, alleged in the complaint to be \$400. A trial to a jury resulted in a verdict for the owner, assessing his damages at the amount sued for, and the court, deeming the statute applicable, gave judgment for double that amount and for an attorneys' fee of \$50. The company objected that the statute, as thus applied, was repugnant to the due process of law clause of the 14th Amendment to the Constitution of the United States, but the objection was overruled, and on appeal to the supreme court of the state the judgment was affirmed. 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631. The case is here on a writ of error to that court.

It will be perceived that, while before the suit the owner demanded \$500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint he confessed, and by the verdict of the jury it was found, that his damages were but \$400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet, the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorneys' fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit.

We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the pow-

ers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not 360]merely provide a reasonable *incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature, as was the case with the statute considered in *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, but attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law. And, in principle, the supreme court of the state has so held since its decision in this case. In *Pacific Mut. L. Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, that court had occasion to consider a statute of the state providing that if a loss under a policy of insurance was not paid within the time specified, "after demand made therefor," the company should be liable, in addition to the amount of the loss, to 12 per cent damages and a reasonable attorneys' fee. An insured demanded in payment of a loss under such a policy the sum of \$1,666.66, which the insurance company refused to pay, and in a suit on the policy, wherein it was found that the loss was but \$1,444.44, the insured was awarded the statutory damages and an attorneys' fee. That part of the judgment was reversed, and it was said:

"But the act makes the company liable for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty and attorneys' fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the legislature to make the insurance companies pay a penalty and attorneys' fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right 361]to resist the payment of a *demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorneys' fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it."

In the brief for the railway company the contention is advanced that the statute 56 L. ed.

would still be wanting in due process of law were it construed as imposing double liability, with an attorneys' fee, only where the prior demand is fully established in the suit following the refusal to pay; but that question does not necessarily arise upon the facts of this case, and we purposely refrain from considering it.

Confining ourselves to what is necessary for the decision of the case in hand, we hold that the statute, as construed and applied by the state courts, is wanting in due process of law, and repugnant to the 14th Amendment of the Constitution of the United States.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

*SAMUEL D. GROMER, Treasurer of [362
Porto Rico, Appt.,
v.

STANDARD DREDGING COMPANY.

(See S. C. Reporter's ed. 362-383.)

Taxes — jurisdiction of Porto Rico — harbor areas and navigable waters.

1. Jurisdiction for taxing purposes of the harbor areas and navigable waters within the defined limits of Porto Rico was not denied the insular government by the reservations of such areas and waters in favor of the United States, made by the act of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 13, and the act of July 1, 1902 (32 Stat. at L. 731, chap. 1383), which must be construed as proprietary reservations only, and not as limitations upon the exercise of government.

Taxes — Federal agencies.

2. The use of machinery and boats in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States, does not exempt them from local taxation.

[For other cases, see Taxes, 139-164, in Digest Sup. Ct. 1908.]

[No. 174.]

Submitted February 28, 1911. Decided April 22, 1912.

APPEAL from the District Court of the United States for Porto Rico to review a decree enjoining the enforcement of a local tax upon machinery and boats in use in the harbor of San Juan in the per-

NOTE.—On the limitations of taxing power from mutual independence of Federal and state governments—see note to *Grether v. Wright*, 23 C. C. A. 515.

formance of a dredging contract with the United States. Reversed, with directions to sustain the demurrer and dismiss the bill.

See same case below on demurrer, 5 Porto Rico Fed. Rep. 142.

The facts are stated in the opinion.

Mr. Foster V. Brown, Attorney General of Porto Rico, and Mr. Paul Charlton, submitted the cause for appellant:

The fact that the appellee is engaged in the prosecution of a work under a contract with the United States government has no bearing whatever on the right of the insular government to levy a tax on its property. Being engaged in such work does not make appellee a Federal agency in the sense that a taxation of its property would be an interference with the instrumentalities and operations of the Federal government.

Union P. R. Co. v. Peniston, 18 Wall. 36, 21 L. ed. 793; Western U. Teleg. Co. v. Richmond, 26 Gratt. 1; Judson, Taxn. §§ 1-38.

Until the Congress of the United States has acted in the premises the legislative assembly of Porto Rico is empowered and has full authority to legislate in reference to all matters pertaining to the harbors of Porto Rico.

1 Ops. Atty. Gen. of Porto Rico, 44; Valdesy Cobian v. Grahame, 3 Porto Rico Fed. Rep. 417; 23 Ops. Atty. Gen. 566; 26 Ops. Atty. Gen. 91; Shively v. Bowlby, 152 U. S. 30, 38 L. ed. 342, 14 Sup. Ct. Rep. 548; National Dredging Co. v. State, 99 Ala. 462, 12 So. 720; Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95, 54 L.R.A. 212, 87 Am. St. Rep. 747, 64 Pac. 909; 1 Farnham, Waters, pp. 82, 83; United States v. Bevans, 3 Wheat. 336, 4 L. ed. 404; United States v. Bateman, 34 Fed. 86; United States v. Davis, 2 N. Y. Leg. Obs. 35, Fed. Cas. No. 14,931; The Panama, 1 Or. 418, Fed. Cas. No. 10,702.

A territorial statute is operative upon a military reservation within the territory so long as it does not conflict with the laws of the United States or with the military administration and legitimate operations of the government.

Reynolds v. People, 1 Colo. 181; Territory v. Burgess, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558; Scott v. United States, 1 Wyo. 40.

The right of a state or territory to tax private property on reservations has been affirmed in numerous cases.

Thomas v. Gray, 169 U. S. 275, 42 L. ed. 744, 18 Sup. Ct. Rep. 340; Wagoner v. Evans, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730.

Messrs. Charles Hartzell and Manuel Rodriguez-Serra submitted the cause for appellee:

The basic and underlying principle which must control the determination of this cause is as to the extent of the control of jurisdiction of the insular government over the harbor of San Juan; and in this connection as to whether or not property situated entirely within the harbor area, engaged in operations connected with the lands underlying such harbor area, could receive any benefit from the expenditure of moneys raised by the Insular government by taxation.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Kaysville v. Ellison, 18 Utah, 163, 43 L.R.A. 81, 72 Am. St. Rep. 772, 55 Pac. 386; People v. Daniels, 6 Utah, 288, 5 L.R.A. 444, 22 Pac. 159; People ex rel. Griffin v. Brooklyn, 4 N. Y. 420, 55 Am. Dec. 266; Cooley, Taxn. pp. 159, 160.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the power of Porto Rico to tax certain machinery and boats which, at the time of the levy of the taxes, were in the harbor of San Juan, engaged in dredging work, in pursuance of a contract of the Standard Dredging Company with the United States government.

The dredging company filed a bill to enjoin the appellant, treasurer of Porto Rico, from enforcing the tax. Appellant demurred to the bill for insufficiency and want of equity, which was overruled. He declined to answer, and the injunction which had been granted was made perpetual. This appeal was then taken.

The material allegations of the bill are as follows:

The dredging company is a Delaware corporation, with its principal office and place of business at the city of Wilmington, state of Delaware. Gromer is treasurer of Porto Rico.

That theretofore and prior to April 1, 1908, the dredging company entered into a contract with the United States government to dredge certain portions of the harbor of San Juan and the channel leading from the ocean to the harbor area. Prior to that date, for use in connection with its operations under the contract, it brought to the harbor one dredge, one tugboat, two scows for dumping material to be removed, one coal scow, and one launch. The boats and machinery are its property and have been constantly used by it in the performance of its contract, and were not used in

connection with any other business or operations, and were at all times within the harbor where the operations under the contract were carried on. The dredging company has neither conducted nor carried on any other business in Porto Rico or the waters adjacent thereto except its operations under the contract.

Gromer, as treasurer of Porto Rico, pretending to act under the revenue laws of Porto Rico, assumed to assess and levy on the said property as of the value of \$75,000 a tax of \$1,200, for the fiscal year 1908-09, and he and his agents "have levied an embargo on part of said property . . . and are threatening to foreclose the same and to sell the property for the purpose of enforcing the collection of the said alleged tax."

The tax is illegal and its enforcement will be illegal by virtue of the laws of the United States and of Porto Rico, and especially by virtue of the acts and proclamations of Congress and of the President of the United States, creating reservations in and about the island of Porto Rico. The insular government of Porto Rico is not authorized to levy or collect any tax in connection with property the situs of which is within the reservation or within any navigable waters of harbor areas of the island of Porto Rico. The property of the company has not been brought within the jurisdiction of the insular government, nor is it subject to taxation while being employed in the performance *of the contract with the United States and within the harbor area.

It is alleged that the company is without any remedy at law, and an injunction is therefore prayed.

In support of his demurrer appellant contends that the dredging company had an adequate remedy at law, and that § 12 of the act of the legislative assembly of Porto Rico, approved March 8, 1906, which provides that an "injunction may be issued to prevent the illegal levying of any tax, duty, or toll, or for the illegal collection thereof, or against any proceeding to enforce such collection . . . " does not apply to the district court of the United States for Porto Rico. We, however, pass the contention, as we prefer to rest our decision on the merits.

The bill of the dredging company, and its contentions here, are based on two propositions: (1) the property was not within the jurisdiction of Porto Rico, but was within the harbor area reserved by the United States; (2) the property was being used "within the harbor area" in the performance of a contract with the United

States, and therefore not subject to taxation for insular purposes.

To sustain the first proposition, § 13 of the Foraker act [31 Stat. at L. 80, chap. 191] is relied on and the act of Congress of July 1, 1902 [32 Stat. at L. 731, chap. 1383].

Section 13 reads as follows:

"That all property which may have been acquired in Porto Rico by the United States under the cession of Spain, in said treaty of peace in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, and all property which, at the time of the cession, belonged under the laws of Spain then in force to the various harbor works boards of Porto Rico, and of the harbor shores, docks, slips, and reclaimed lands, *but not including harbor areas or *navigable waters*, is hereby placed under the control of the government established by this act, to be administered for the benefit of the people of Porto Rico, and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters, as it may deem advisable." [Italics ours.]

Under the act of Congress of July 1, 1902, a division of the public properties of Porto Rico was made under which the President of the United States was authorized to reserve certain public properties for the use of the Federal government. The properties not reserved were granted to the government of Porto Rico, to be held or disposed of for the use and benefit of the people of the island. The reservations included lands and buildings for army and navy and other Federal governmental purposes. The exception of harbors and navigable streams was as follows:

"And all the public lands and buildings, not including harbor areas and navigable streams and bodies of water, and the submerged lands underlying the same, owned by the United States in said island, and not so reserved," etc.

Considering these provisions alone it is, we think, manifest that they only provide for proprietary reservations and dispositions, and not for limitations upon the exercise of government. This conclusion is confirmed by § 1 of the Foraker act, which provides that the provisions of the act "shall apply to the island of Porto Rico and to the adjacent islands and waters of the islands lying east of the seventy-fourth meridian of longitude west of Greenwich, which were ceded to the United States by the government of Spain

by treaty entered into on the tenth day of December, eighteen hundred and ninety-eight [30 Stat at L. 1754]; and the name Porto Rico, as used in this act, shall be held to include not only the island of that name, but all the adjacent islands, as aforesaid."

As early as 1901 the control by the gov- 367]ernment of the *United States over Porto Rican waters came up for consideration and was referred by the Secretary of War to the Attorney General for determination. The elements in the question were the river and harbor act of 1899 [30 Stat. at L. 1121, chap. 425] and the act of April 12, 1900, "temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." 31 Stat. at L. 77, 80, chap. 191. Section 14 of the latter act provided, with certain exceptions, that the statutory laws of the United States not locally inapplicable should have the same force and effect in Porto Rico as in the United States. Section 13 provided that certain harbor property which, at the time of the cession, belonged, under the laws of Spain, to the various harbor works boards of Porto Rico, "but not including harbor areas or navigable waters," should be "placed under the control of the government established by this act, and to be administered for the benefit of the people of Porto Rico." The legislative assembly created by the act was given authority "to legislate with respect to all such matters" as it might deem advisable, and this authority was extended to all matters of a legislative character not locally inapplicable. It was further provided that all laws should be referred to Congress, which reserved the power to annul the same.

The river and harbor act of 1899 (30 Stat. at L. 1151, chap. 425, U. S. Comp. Stat. 1901, p. 3540), prohibited unauthorized obstructions to navigation in any of the waters of the United States, and provided for control by the Secretary of War of wharves and similar structures in ports and other waters of the United States.

The Attorney General expressed the opinion that under these statutes the coastal waters, harbors, and other navigable waters of the island, were water of the United States, and that a license granted by the Secretary of War to build a wharf in the harbor, given before the ratification of the treaty with Spain, was valid, and 368]that the *power under the license to rebuild the wharf, which had been destroyed by fire, continued as against the control of the executive council of Porto Rico. Commenting on the provisions of the river and harbor act and the acts in regard to

Porto Rico, it was said that Congress, since the ratification of the treaty with Spain, has nowhere indicated that Porto Rican waters are not to be regarded as waters of the United States, nor directed that the authority of the Secretary of War, under the river and harbor act of 1899, shall not extend to the Porto Rican waters. "On the contrary, Congress has used language in the Porto Rican act, as, for instance, in § 13, which clearly contemplates national jurisdiction over those waters as waters of the United States." 23 Ops. Atty. Gen. 551. In other words, the jurisdiction of the United States over those waters was the jurisdiction that the United States had over all other navigable waters, an exercise of which the river and harbor act was an example.

This is made clear by a subsequent opinion, in which it was declared "that Congress committed to local control, subject to the expressed limitation upon the local legislative power, the administration of certain public property and utilities, including 'harbor shores, docks, slips, and reclaimed lands,' but excluding 'harbor areas or navigable waters.'" And, speaking of §§ 12 and 13 of the Porto Rican act of April 12, 1900, it was said that the "obvious implication" from them is "that the general government retains title to, possession of, and control over certain other public property, of which fortifications and their appurtenances are specified, and also reserves for its own administration the usual national powers over lights, buoys, and other matters affecting navigation or 'works undertaken by the United States.'" And it was said, further: "From all this it is certain that the ordinary national control of the marine belt affects the coastal *waters of Porto Rico as[369 well as those of any state or any other territory of the United States." But as to the "harbor margins" it was said that "the government of the United States, by reason of these grants . . . to . . . Porto Rico, is now in the same position with reference to the island government, as well as to private owners, as it would be in a similar case affecting a state of the United States." 23 Ops. Atty. Gen. 564.

From this principle it was concluded that the United States could not appropriate the islands of Culebra for a naval base, they being within the limits described in § 1 of the act of April 12, 1900. And § 1 of that act is identical with § 1 of the Foraker act, and its provisions for "harbor areas and navigable waters" are the same as in the Foraker act. The views of the Attorney General, therefore, are

expressly applicable, for the language of the act of April 12, 1900, which determined them, was repeated in the Foraker act, which we are now called upon to consider.

The distinction made between local control of property and the exercise of government is a substantial one and is illustrated in cases. *Shively v. Bowlby*, 152 U. S. 30, 38 L. ed. 342, 14 Sup. Ct. Rep. 548; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 542, 29 L. ed. 264, 270, 5 Sup. Ct. Rep. 995; *Western U. Teleg. Co. v. Chiles*, 214 U. S. 278, 53 L. ed. 997, 29 Sup. Ct. Rep. 613; *Reynolds v. People*, 1 Colo. 181; *Scott v. United States*, 1 Wyo. 40; *Territory v. Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558.

We have seen that by § 1 of the Foraker act all of its provisions are made applicable to a certain defined area, and that the name Porto Rico "shall be held to include not only the island of that name, but all adjacent islands and waters of the islands." The governmental powers conferred upon Porto Rico must be coextensive with that area, subject to the reservation that all laws passed shall not be in conflict with the laws of the United States, and the power of enacting such laws is conferred upon the legislative assembly. There is precaution against abuse. 370]*They must be reported to Congress, which has the power to annul them.

The purpose of the act is to give local self-government, conferring an autonomy similar to that of the states and territories, reserving to the United States rights to the harbor areas and navigable waters for the purpose of exercising the usual national control and jurisdiction over commerce and navigation.

The United States could have reserved government control and exercised it as it does in instances, by the consent of the states, over certain places in the states devoted to the governmental service of the United States. We do not think, as we have said, that the United States has done so, and that it has not is the view of the executive department of the government, as expressed through the Attorney General. The War Department entertained the same view as to military reservations in Porto Rico, and also as to such reservations in the Philippine Islands.

Section 12 of the Philippine act placed all property rights acquired from Spain under the control of the island government for the benefit of its inhabitants, except "such land or other property as shall be designated by the President of the United

States for military and other reservations of the government of the United States." [32 Stat. at L. 695, chap. 1369.] The extent of the power thus reserved was referred for consideration by the Secretary of War to the Attorney General, and in an opinion written by Solicitor General Hoyt, and approved by Attorney General Moody, it was held that the provisions granted and reserved property, but did not confer governmental jurisdiction. It was said in the course of the opinion, after referring to the provisions of the Philippine act which directed that all laws passed by the Philippine government should be reported to Congress, and the reservation by Congress of the power to annul the same (a similar provision is in the Porto Rico act), that "the relation of Congress to all territorial legislation is similar [certain organic acts of the States being cited], and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress." 26 Ops. Atty. Gen. 91, 97.

There is an allegation in the bill that the property was not "subject to any lien or burden of taxation while being employed in the performance of its said contract with the United States of America and within the said harbor area." It is not clear what is meant by the allegation. So far as it means that the property is an instrument of the national government, and not subject, therefore, to local taxation, the contention cannot prevail. *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 382, 49 L. ed. 242, 244, 25 Sup. Ct. Rep. 50. Indeed, the contention is a very broad one, and would seem to be independent of the situation of the property, and, if true at all, would apply to property employed in the service of the United States, wherever situated, and no matter to what extent employed. Appellant discusses it somewhat. We shall consider it in the aspect presented by appellee. Counsel say that "the basic and underlying principle which must control in the determination of the case is as to the extent of the control or jurisdiction of the insular government over the harbor of San Juan; and in this connection, as to whether or not property situated entirely within the harbor area, engaged in operations connected with the lands underlying such harbor area, could receive any benefit from the expenditure from moneys raised by the insular government from taxation."

There is a confusing mixture of elements. If Porto Rico had jurisdiction over

the harbor area, it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and, being so situated, the validity of the tax upon it cannot be determined by an inquiry of **372]***the extent it may be benefited. *Thomas v. Gay*, 162 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Wagoner v. Evans*, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730.

It, however, may be said that the property was only temporarily in the waters of Porto Rico, and that its situs was at the domicil of the dredging company.

The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 305, 49 L. ed. 1059, 1062, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100.

The allegation is that prior to the 1st of April, 1908, the property was brought to and within the harbor of San Juan. The date is that of the assessment and levy of the tax, but whence the property had been brought, or how long it had been in the harbor before the levy of the tax, is not averred, nor was it necessary for the purpose of the cause of action alleged. There is not an intimation that the property had its situs for taxation elsewhere. The claims of exemption from the tax, and the only claims of exemption, were: (1) That Porto Rico, by virtue of the laws of the United States and of Porto Rico, and especially by virtue of those acts and proclamations of Congress and of the President of the United States creating reservations in and about the island of Porto Rico, was "not authorized to levy or collect any tax in connection with property the [situs?] of which" was "within such reservation, or within any navigable waters or harbor areas of the said island of Porto Rico." (2) That the property was not subject to taxation "while being employed in the performance of" the dredging company's "contract with the United States of America and within the said harbor area."

These allegations are, as we have already seen, the basis of the contentions made and argued by the company. It is true that after discussing them counsel "invite **373]***the attention of the court" to "certain other considerations" expressed in the opinion of the court below. To analyze or summarize the opinion would extend our discussion unduly. Elements that are really independent are mingled somewhat, making it difficult to assign the exact strength

given to them respectively, but we think the basis of the decision was, as it is of the contentions discussed by counsel for the company, that the property was not subject to the taxing power of Porto Rico because of its situation within the harbor area and because the title to such area had been reserved to the national government,—an untenable position, as we have seen.

Decree reversed, with directions to sustain the demurrer and dismiss the bill.

Mr. Justice Day, with whom concurred Mr. Justice Hughes and Mr. Justice Lamar, dissenting:

We are unable to concur in the judgment just pronounced. The reversal of the judgment below is, in our view, inconsistent with decisions heretofore made in this court concerning the power of taxation.

We agree with the decision of the court that the territory of Porto Rico has jurisdiction for taxing purposes over the harbor and waters in question, and that the use of the property for government purposes does not exempt it from taxation, and therefore do not dissent from anything that is said in the opinion of the court upon those subjects. Our objection to the judgment of reversal is that, as we see it, there is a ground of decision in the court below, ample to sustain its decree, which does not turn upon the determination of the controversy as to the political jurisdiction over these waters. In our opinion, the property of the dredging company had not acquired a taxable situs within the jurisdiction of the territory of Porto Rico.

*The case was heard upon demurrer, **[374]** and we must therefore take the allegations of the bill, well pleaded, to be true. From them it appears that prior to the 1st day of April, 1908, complainant company, a corporation of the state of Delaware, having its principal office and place of business at Wilmington, in that state, entered into a contract with the United States to perform certain services in connection with the dredging of portions of the harbor of San Juan, Porto Rico, and the channel leading from the ocean to the harbor. The bill alleges:

"That by virtue of the requirements of the said contract your orator did, prior to the said 1st day of April, 1908, bring to and within the said harbor area of the said harbor of San Juan certain boats and machinery, to be used by it in connection with its operations under the said contract, to wit, one dredge, one tugboat, two scows for dumping material to be removed, one coal scow, and one launch. That the

said machinery and boats so brought by the said complainant and used in connection with its operations under said contract in the said harbor area of the harbor of San Juan were and are the property of the said complainant company, and since the same were so brought to the said harbor area the same have been constantly used by the said complainant, and engaged in its operations in carrying out its said contract with the said the United States; and the same have not been used in connection with any other business or operations whatsoever, and the same have at all times been entirely within the said harbor areas where the said operations under said contract were so being carried on. And your orator further states that it has not conducted or carried on any business in Porto Rico or in the waters adjacent thereto, except the said operations under the said contract with the United States aforesaid."

It is further alleged that on the 1st day of April, 1908, the taxing officer of Porto Rico undertook to levy a tax *of \$1,-200 upon a valuation of the property at \$75,000, under the laws of the territory, as of that date.

The case was submitted upon briefs without argument. In the brief of the attorney general, as well as that of the appellee, the question principally argued concerns the jurisdiction of the territory of Porto Rico over the harbor and waters of the bay. In the brief of the attorney general argument is made and cases are cited to sustain the claim that the situs of the property for the purposes of taxation was within the jurisdiction of the territory. In the brief submitted by the appellee reference is made to the opinion of the court for additional reasons for supporting the decree, which reasons are not adverted to at length in the brief. In the opinion of the court the allegations of the bill are treated, as might rightly be done, as raising the question of taxable situs of this property, and, among other things, the judge says:

"It has, we think, been settled by numerous recent decisions of the Supreme Court of the United States that the old rule of personal property following the domicile of the owner has been so varied and departed from as that it does not mean very much at the present time; the real question to be decided in every such case being whether the personal property—be the same rolling stock, machinery, merchandise, or even floating property, such as steamships, boats, or dredges—has been brought within the taxing jurisdiction of the government attempting to levy the
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tax. In other words, it must always be determined that the situs of the property is within the taxing jurisdiction. See *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, and the many cases cited. Also *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205, and cases cited, and *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, and citations."

After consideration of the subject the court reached the conclusion, not only that the local government of Porto Rico had no jurisdiction over the harbor and waters where this work was done, but that the property had no taxable situs in Porto Rico. See pp. 154 and 155, vol. 5, *Porto Rico Fed. Rep.*

It is well settled that property outside of the jurisdiction of a state cannot be taxed within the due-process clause of the 14th Amendment. *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

As a general rule, in the absence of a situs elsewhere, the domicile, of the owner is the place where personalty is taxable. As was said in *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189, by Mr. Chief Justice Waite, speaking for the court:

"Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court."

To the same effect, see *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

In *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732, this court, while recognizing the rule of taxable situs of personal property as distinguished from the domicile of the owner, held that notes temporarily within a state, although in the possession of an agent of the owner, and there held for collection, were not within the tax-

ing power, where the owner lived elsewhere.

It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than 377]that of the domicile *of the owner. *Com. v. American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443 (see *infra*).

The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a situs of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term "permanent" in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character.

As was said by this court in *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303, in declaring that a vessel engaged in interstate commerce was not subject to taxation in the city of Mobile, Alabama, although it was physically within the limits of the city in the course of navigation:

"It is the opinion of the court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only."

In *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, it was held that certain vessels engaged in interstate commerce and registered outside of the state of Virginia were taxable in that state, it appearing that they were continuously used in navigating the waters of that state. Of that case this court said in *Southern P. Co. v. Kentucky*, 222 U. S. 63, 72, ante, 96, 100, 32 Sup. Ct. Rep. 13, 16:

"The case of *Old Dominion S. S. Co. v. Virginia* affords an instance of where the domicile of the owner as a taxing situs was held to have been lost and a new taxing situs acquired by reason of a permanent location within another jurisdiction. But in that case the judgment was rested upon the fact that the vessels had for years been continuously and exclusively engaged in the navigation of the Virginia waters, 378]which state had *thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory."

In *Ayer & L. Tie Co. v. Kentucky*, supra, this court had occasion to consider the tax-

ation of vessels plying between the ports of different states, and it was held that where a vessel has acquired an actual situs in a state other than that which is the domicile of the owner, it may be taxed, because it is within the jurisdiction of the taxing authority; and, after reviewing the previous cases in this court, Mr. Justice White, speaking for the court, said (p. 423):

"But, if enrolment at that place was within the statutes, it is wholly immaterial, since the previous decisions to which we have referred decisively establish that enrolment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicile of the owner or the permanent situs of the property within the taxing jurisdiction."

As was said in one of the latest of this court's deliverances upon the subject (*Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499), "but personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere."

And in the latest deliverance of this court upon the subject (*Southern P. Co. v. Kentucky*, supra), decided at this term, the principle is again stated and applied, that tangible personal property, unless it has acquired an actual situs elsewhere, is taxable at the domicile of the owner.

In all the cases to which our attention has been called, decided in this court, the idea of permanency in the abiding place is emphasized as essential to taxable situs,—that is, the property sought to be taxed must become "commingled" with the property of the state (*Old Dominion S. S. Co. v. Virginia*, supra), or "intermingled" with *the general property of the state[379 (*Delaware, L. & W. R. Co. v. Pennsylvania*, supra), or "permanently located" there (*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493), or "incorporated in" the local property (*Southern P. Co. v. Kentucky*, supra). All these expressions indicate the idea of a permanent situs of the property.

The question then comes to this: When the Porto Rico authorities, on the 1st of April, 1908, undertook to levy this tax upon the dredging outfit, had it acquired a situs in that jurisdiction for the purpose of taxation? Answering this question, we must bear in mind that there is no showing that the property was permanently located in San Juan harbor, in the sense we have indicated, but that, on the contrary, it appears it was brought into

Porto Rico for the purpose of carrying out a government contract upon which the owner of the property had entered at the time of the attempted taxation; that it was not used in connection with any other business or operation whatsoever, but had been continuously and entirely engaged in carrying out the contract for which it was taken to Porto Rico, and that the owner of the property had not engaged in any operations in Porto Rico or the waters thereof, except only those under the contract with the United States.

Tangible personal property is taxable at the owner's domicil, except where it is shown to have an actual situs elsewhere, and, as we have seen, actual situs is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of a location in Porto Rico sufficient to subject it to the taxing power of that territory.

The cases relied upon and cited in the 380]brief of the attorney *general of Porto Rico (National Dredging Co. v. State, 99 Ala. 462, 12 So. 720, and North Western Lumber Co. v. Chehalis County, 25 Wash. 95, 54 L.R.A. 212, 87 Am. St. Rep. 747, 64 Pac. 909), are entirely different in their facts.

In the Alabama case the dredging outfit was held presumably to be in Mobile bay for the purpose of carrying out a series of contracts in the line of the dredging company's business. The court says:

"Indeed, as appears from this record, other property of the same kind which had previously been used by residents of Alabama in the prosecution of this work was purchased by the appellant company, and, being incorporated with that involved here, has all along been used like it in dredging the channel of Mobile bay, and one scow so used was built in the city of Mobile, and has never been, we assume, outside of the State."

And the court further says:

"In other words, taking into consideration the business of the corporation, the amount and continuing character of the work to be done in Mobile bay, the preparations made by the company for doing so much thereof as is authorized under one annual appropriation, it may be that this property will be for years engaged upon this work, as a part of that now being used by the company of like kind with this had been used thereon for a year or years

prior to 1891. On this state of the case,—or even leaving out of view the considerations last adverted to,—it is clear, we think, that this property is not merely temporarily within Alabama, but that, to the contrary, its presence here is for such an indefinite period as involves the idea of permanency, in the sense in which that term is used with respect to the situs of property for the purposes of taxation."

In the Washington case, the property sought to be taxed was certain tugboats, which were claimed to be exempt from taxation because they were registered at a *port in another state. The evidence[381 disclosed that these tugs had been in use in the state of Washington from four to seven years, and not elsewhere, and that the only absence of the tugs from the harbors of that state was for the temporary purpose of repairs; and further, that they were used for all those years appurtenant to and as a part of the lumber plant and business of the lumber company in the county and state where taxed. Under such circumstances the supreme court of Washington held that the tugs were permanently in Washington, transacting a local business, and had acquired a taxable situs within that state.

A statement of these cases readily distinguishes them from the one at bar. In the case now before us it was sought to tax the dredging property upon its removal from the domicil of its owner for the performance of a single contract and for the transaction of no other business whatsoever, and presumably, as the court below said, not to remain in the jurisdiction beyond the term of the contract for which it was used. To tax property in this situation, it seems to us, would be extending the doctrine of taxable situs elsewhere than at the owner's domicil beyond any authority shown, and certainly beyond the reason of the rule. If property thus located could be taxed, the same principle would permit the taxing of a dredging outfit upon the Great Lakes of the country, frequently moving from port to port, in the performance of dredging contracts, in every jurisdiction where it might temporarily be, as well as at the domicil of the owner, where such property could unquestionably be reached.

In Com. v. American Dredging Co. supra, where a dredging outfit was specifically involved, the supreme court of Pennsylvania held that so much of the capital stock of the corporation as was invested in the state of New Jersey in a dredging outfit, namely \$92,000 in four dredges which were built outside of the state of

*Pennsylvania, three of which had nev-[382

er been within the limits of that state, and the fourth of which had never been within its limits until after the end of the year; \$6,000 in a tug which was built outside of the state of Pennsylvania, and was not within its limits during the year, and \$38,500 in eleven scows, built outside of the state of Pennsylvania, and never within its limits, the property all being employed for corporate purposes in the states of New Jersey, Maryland, and Virginia, was nevertheless subject to taxation in the state of Pennsylvania, which was the domicile of the American Dredging Company, the owner of the property. In reaching that conclusion, Mr. Justice Paxson, who spoke for the court, said:

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs, for the purpose of taxation, is their home port of registry, or the residence of their owner, if unregistered. *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254.

"These vessels, if they may be so called, were not registered. Hence their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

That case was commented on in the opinion of this court in *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669, in which it was held that the capital stock of a corporation *represented by property in stocks of coal which had been sent out of the state, and were deposited in other states for sale, could not be taxed.

Of the *Dredging Company Case*, Mr. Justice Peckham, speaking for this court, said:

"Such property is entirely unlike the property involved in *Com. v. American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443. That property consisted of vessels, or scows, or tugs, only temporarily out of the state of Pennsylvania, for the purpose of engaging in business, and liable

to return to the state at any time, and was without any actual situs beyond the jurisdiction of the state itself."

We think, therefore, that the property in question was taxable in Delaware at the domicile of the owner, and we agree with the district court in its conclusion that it had not acquired a taxable situs in Porto Rico.

For this reason we dissent from the judgment of the court.

UNITED STATES OF AMERICA, Appt.,
v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS et al.

(See S. C. Reporter's ed. 383-413.)

Monopoly — combination of terminal systems.

1. The mere combining of several independent railway terminal systems into one does not necessarily operate as a forbidden restraint, under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), upon the interstate commerce which must use them.

[For other cases, see *Monopoly*, II. c, in Digest Sup. Ct. 1908.]

Monopoly — combination of terminal systems.

2. The combination and unification of the terminal facilities at St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them—the inherent conditions being such as to prohibit any other reasonable means of railway access to that city—violates the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1 and 2, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize such commerce which must pass through the gateway at St. Louis.

[For other cases, see *Monopoly*, II. c, in Digest Sup. Ct. 1908.]

Monopoly — combination of terminal systems — extent of relief.

3. Adequate relief from a combination of terminal facilities which offends against the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1, 2, because it places such facilities under the exclusive ownership and control of less than all the railroad companies under compulsion, from the peculiar local topographical conditions, to use them, will be afforded by a decree requiring the reorganization of the combination so that it will act as the impartial

NOTE.—On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

agent of every railway line which must use the terminal instrumentalities.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

[No. 386.]

Argued October 20 and 23, 1911. Decided April 22, 1912.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dismissing a bill to enforce the provisions of the Sherman anti-trust act against a combination of the railway terminal facilities at St. Louis. Reversed and remanded for the entry of a decree under which the combination shall be reorganized so as to act as the impartial agent of every railroad line which uses its facilities.

The facts are stated in the opinion.

Mr. Edward C. Crow, Special Assistant to the Attorney General, argued the cause, and, with Mr. Charles A. Houts, United States Attorney, and Attorney General Wickersham, filed a brief for appellant:

The Sherman anti-trust act is aimed at restrictions upon interstate commerce. Given a reasonable construction, as it must receive, its purpose is to permit commerce between the states and with foreign nations to flow in their natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever.

Hopkins v. United States, 171 U. S. 586, 43 L. ed. 293, 19 Sup. Ct. Rep. 40; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

Combinations between competing railroads engaged in interstate commerce unduly to restrain commerce, and combinations between *media*, or instruments, of interstate commerce, fall within the prohibition of the act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 319, 41 L. ed. 1020, 17 Sup. Ct. Rep. 548; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 244, 44 L. ed. 148, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502.

To monopolize interstate commerce or the *media*, or instruments, of interstate commerce, is to secure or adopt measures which may bring about an exclusive control
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of such commerce or of such instruments of commerce so as to prevent others from engaging therein, or using such instruments of commerce.

Re Greene, 52 Fed. 115; Northern Securities Co. v. United States, 193 U. S. 197, 402, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436; United States v. American Tobacco Co. 164 Fed. 700; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

It is not necessary, to bring a combination within the act, that the result of its operation shall be complete restraint or monopoly, or that it shall have resulted in actual injury to the public. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; United States v. E. C. Knight Co. 156 U. S. 16, 39 L. ed. 330, 15 Sup. Ct. Rep. 249; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 65.

The terminal association is necessarily engaged in interstate commerce.

United States v. Union Stock Yards, 161 Fed. 919; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 873; United States v. Northern Pacific Terminal Co. 144 Fed. 861.

Mr. H. S. Priest argued the cause, and, with Mr. T. M. Pierce, filed a brief for appellees:

Union terminals have been frequently before the courts for consideration, and have always been recognized and approved as legitimate agencies in the work of railroad transportation.

State ex rel. Atty. Gen. v. Terminal R. Asso. 182 Mo. 284, 81 S. W. 395; People ex rel. Bernard v. Cheeseman, 7 Colo. 376, 3 Pac. 716; Central R. & Bkg. Co. v. Perry, 58 Ga. 461; Bridwell v. Gate City Terminal Co. 127 Ga. 520, 10 L.R.A.(N.S.) 909, 56 S. E. 624; Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; Reisner v. Strong, 24 Kan. 410; State ex rel. Little v. Martin, 51 Kan. 462, 33 Pac. 9; Worcester v. Norwich & W. R. Co. 109 Mass. 103; Worcester v. Railroad Comrs. 113 Mass. 161; Fort-street Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. 228; Detroit Union R. Depot & Station Co. v. Detroit, 88 Mich. 347, 50 N. W. 302; State v. St. Paul Union Depot Co. 42 Minn. 142, 6 L.R.A. 234, 43 N. W. 840; St. Paul Union Depot Co. v. Minnesota & N. W. R. Co. 47

Minn. 154, 13 L.R.A. 415, 49 N. W. 646; Chicago, St. P. & K. C. R. Co. v. St. Paul Union Depot R. Co. 54 Minn. 411, 56 N. W. 129; Dewey v. Atlantic Coast Line R. Co. 142 N. C. 392, 55 S. E. 292; Riley v. Charleston Union Station Co. 71 S. C. 457, 110 Am. St. Rep. 579, 51 S. E. 485; Ryan v. Louisville & N. Terminal Co. 102 Tenn. 124, 45 L.R.A. 303, 50 S. W. 744; Collier v. Union R. Co. 113 Tenn. 96, 83 S. W. 155; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Chicago, R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. 15, 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309, 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

Mr. John C. Higdon filed a brief as *amicus curiæ*.

Mr. Justice **Lurton** delivered the opinion of the court:

The United States filed this bill to enforce the provisions of the Sherman act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, against thirty-eight corporate and individual defendants named in the margin,† as 391] a combination in restraint *of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four circuit judges, who, being equally divided in judgment, dismissed the bill, without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the terminal company. It is a corporation of the state of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis, with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the terminal company comprised the following: The Union Railway & Transit Company of

St. Louis and East St. Louis; the Terminal Railroad of St. Louis and East St. Louis; the Union Depot Company of St. Louis; the St. Louis Bridge Company; and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge,—the Eads or St. Louis bridge,—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in competition *with the term-[392 in]al system of the Wiggins Ferry Company, and upon the completion of the Merchants' bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wiggins Ferry Company had for many years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the rivers, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi river at St. Louis, known as the Merchants' bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' bridge with various railroad systems terminating

†The Terminal Railroad Association of St. Louis; the St. Louis Merchants' Bridge Terminal Railway Company; the Wiggins Ferry Company; the St. Louis Bridge Company; the St. Louis Merchants' Bridge Company; the Missouri, Kansas, & Texas Railway Company; the St. Louis & San Francisco Railway Company; the Chicago & Alton Railway Company; the Baltimore & Ohio Southwestern Railroad Company; the Illinois Central Railroad Company; the St. Louis, Iron Mountain, & Southern Railway Company; the Chicago, Burlington, & Quincy Railway Company; the St. Louis, Vandalia, & Terre Haute Railroad

Company; the Wabash Railroad Company; the Cleveland Cincinnati, Chicago, & St. Louis Railway Company; the Louisville & Nashville Railroad Company; the Southern Railway Company; the Chicago, Rock Island, & Pacific Railway Company; the Missouri Pacific Railway Company; the Central Trust Company of New York; A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher and S. D. Webster.

on either side of the river. The Merchants' bridge and its allied terminals were thereby able to afford many, if not all, of the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry **393**]Company, and *its railway terminal connections; second, the Eads Railroad bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge and connect with one another, constituting the system controlled by the terminal company; and, third, the Merchants' bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one another served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promoters of the terminal company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of the original agreement, as well as by the successive steps which followed. Thus, the proviso in the act of Congress authorizing the construction of the Merchants' bridge, which forbade the ownership of its stock by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the terminal company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer boats and with the termini of rail- **394**]roads on the Illinois side. *On the St. Louis side of the river it had like facilities

ties by which it was in connection with railway lines terminating on that side. That company was consequently able to interchange traffic between the systems on opposite sides of the river, and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the terminal company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in doubt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal properties which were operated by the terminal company, or which should be acquired by it. The shares in the ferry company bought by the Rock Island were transferred to the terminal company at cost, and were paid for by that company. These shares, united with those which had been acquired by the terminal company, enabled the latter to absorb the properties of the ferry company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable *restraint, forbidden by the act of Con- **395**]gress, as construed and applied by this court in the cases of Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, and United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted.

The consequences to interstate commerce

of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines, upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of car ferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it 396] *ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill creek might be reached, where the roads from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' bridge, like the Eads bridge, had no rail connections with any of the existing railroad systems, and these facilities, as in the case of the Eads bridge, were supplied by a number of independent railway companies who under-

took to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill creek, which crosses the city about *its center. Railways coming from the 397 west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast, and southeast have their termini in that valley. As a consequence, there have grown up numerous cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the terminal company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the terminal company, is therefore borne out by the facts of the situation. Nor is this effect denied; for the learned counsel representing the proprietary companies, as well as the terminal company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this

was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the terminal company. That the nonproprietary companies might have been compelled to use the instrumentalities of one or the other of the three systems then available, 398]and *that the advantages secured might not have been so great as those offered by the unified system now operated by the terminal company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was therefore a menace to complete domination, as keeping open the way for greater competition. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition, large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the terminal company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the terminal company is not an independent corporation at all is of the utmost significance. There 399]*are twenty-four railroads converging at St. Louis. The relation of the terminal company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other com-

panies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined is declared to be, "that said properties may be held in perpetuity as a unit, and developed and improved in the interest of the proprietary companies, for the purpose of furnishing adequate terminal facilities in St. Louis and East St. Louis." This purpose was carried out by the conveyance to "each of the proprietary companies . . . forever, a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company."

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to, which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the *directors of the first par-[400 ty, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company.

By that and the supplemental agreement of December, 1902, the ferry company and the Merchants' Bridge Company having then been absorbed, the proprietary companies prescribe that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guarantee to make good, though such payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the terminal company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application. That other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the terminal company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one third of the railroad mileage of the United States.

In acquiring these properties the terminal company has assumed mortgage and 401]stock dividend obligations of *the constituent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars have been issued in equal proportions to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies, or that in its treasury, if ever issued. Undoubtedly, the major part of this revenue arises from the business done by the proprietary companies through the terminal company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals may be true. But it is not clear that the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. That the proprietary companies have not availed themselves of the

full measure of their power to impede free competition of outside companies may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference between *terminal systems[402 properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce.

The argument that the combination of the instrumentalities operated by the terminal company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, is not well founded. This combination, if properly regarded as of parallel and competing lines, would have been obnoxious to the 17th section of the Constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the state instituted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

"A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result *in compelling the ship-[403 per to employ the railroad with which he has switch connection, or else cart his prod-

uct to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk-line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area, and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all in-coming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden." 182 Mo. 284, 299, 81 S. W. 395.

Among the cases in which the public utility of such companies has been recognized are: *Bridwell v. Gate City Terminal Co.* 127 Ga. 520, 10 L.R.A. (N.S.) 909, 56 S. E. 624; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *State ex rel. Little v. Martin*, 51 Kan. 462, 33 Pac. 9; *Worcester v. Norwich & W. R. Co.* 109 Mass. 103; *Fort-street Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. 228; *State v. St. Paul Union Depot Co.* 42 Minn. 142, 6 L.R.A. 234, 43 N. W. 840; *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 124, 45 L.R.A. 303, 50 S. W. 744.

404] *While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman act. The one in question, counsel say, is not antagonistic to, but in harmony with, the anti-trust act, "because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service." It is justified, they argue, by: "(1) The physical or topographical conditions peculiar to the locality; by (2) its com-

mercial, industrial, and railroad development and history; by (3) public opinion expressed legislatively and judicially; and (4) by the judgment of experienced railroad engineers and managers." From which consideration the same counsel say that the issue presented by this record is, "whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt, and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman act."

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a "common control or ownership." But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the anti-trust act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are "under compulsion" 405 to use the terminal system, and yet have no voice in its control.

It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The "physical or topographical condition peculiar to the locality," which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and

is the railway expert of the municipal bridge and terminal board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasurable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every 406]*company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the terminal company is, or by other means, the facilities would belong to each relatively to its own business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this terminal company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of non-proprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the terminal company is a terminal company and something more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads, and to assistance in the collecting and distributing of

traffic for the carrier companies. It, as well as several of the absorbed *term-[407]inal companies, was organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper,—differences pointed out by the Missouri supreme court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the terminal company is solely engaged in operating terminal facilities, defined in the briefs “as mechanical devices for the exchange, receipt, and distribution of traffic.” This terminal company, in addition to its schedule for terminal charges proper, such as switching, warehousing, etc., files its rate-sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river, over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from 1 to 200 miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception is made as to traffic originating within so much of this area as constitutes what is called “Green Line territory,” or which is destined to points within “Green Line territory.” This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridge as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said *that[408] it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the terminal company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequences

of this curious exception out of the 100-mile area rule, that "the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business." Again he says, that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this terminal company as a transportation company which interposed itself between railroads having their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be, we, as said by this court in *Standard Oil Co. v. United States*, 221 U. S. 1, 78, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, must not overlook the fact that in applying a remedy "injury to the public by the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest; and, moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies

under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.

The government has urged a dissolution of the combination between the terminal company, the Merchants' Bridge Terminal Company, and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies through the *means and with the object we have[410 stated, of dominating commerce among the states, carried on by other railroads entering or seeking to enter the city of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce, or to do so upon the terms imposed by the proprietary companies. This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination, even before completed by the acquisition of the Wiggins Ferry Company and its related terminals, was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river,—a practice so galling and universal as to practically "eliminate St. Louis from the railroad map," to quote the graphic, if extravagant, language of counsel for the United States, as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the

terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which *shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or *so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user, as herein pro-

vided for, and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the terminal company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future *combination of the said systems, in evasion of such decree or any part thereof.

Mr. Justice Holmes took no part in the hearing or determination of this case.

P. E. HECKMAN and Robert L. Owen,
Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 413-448.)

Indians — restriction on alienation — extension.

1. Congress could lawfully enact the provisions of the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), § 19, extending the period of inalienability fixed by the

NOTE.—On the power of Congress over the Indians—see note to *Worcester v. Georgia*, 8 L. ed. U. S. 484.

On multifariousness in bill—see note to *Gains v. Chew*, 11 L. ed. 402.

act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), §§ 11-15, with respect to lands allotted to the Cherokee Indians of the full blood.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

United States — right to sue — Indian allotments — restrictions on alienation.

2. The United States must be deemed to have the right to invoke the equity jurisdiction of its courts to cancel conveyances of allotted lands by members of the Cherokee Nation, upon the ground that they were in violation of existing restrictions upon the power of alienation, in view of the peculiar relationship of the United States to the Indians, and of the explicit recognition by Congress in the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), of the right of the government to enforce these restrictions by suit, and of the appropriation made in that and later acts for the maintenance of such suits.

[For other cases, see United States, 137-147, in Digest Sup. Ct. 1908.]

Necessary parties — representative suit — Indian grantors.

3. The Indian grantors are not necessary parties to a suit by the United States to cancel conveyances of allotted lands by members of the Cherokee Nation, upon the ground that they were in violation of existing restrictions upon the power of alienation.

[For other cases, see Parties, I. a, 5; II. a, 2, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — representative suit.

4. The decree in a suit by the United States to cancel conveyances by Indian allottees, upon the ground that they were in violation of existing restrictions on alienation, will necessarily preclude the prosecution by such allottees of any other suit for a similar purpose, relating to the same property.

[For other cases, see Judgment, 806-810, in Digest Sup. Ct. 1908.]

Pleading — multifariousness — misjoinder.

5. A bill filed by the United States to cancel conveyances by Indian allottees on the ground that they were in violation of existing restrictions upon the power of alienation is not open to the objection of multifariousness or misjoinder because the suit involves a large number of separate conveyances by individual Indian allottees to distinct grantees made parties defendant. [For other cases, see Pleading, I. t, in Digest Sup. Ct. 1908.]

[No. 496.]

Argued October 12 and 13, 1911. Decided April 1, 1912.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Oklahoma, sustaining a demur-

rer to, and dismissing, a bill filed by the United States to cancel certain conveyances of allotted lands, made by members of the Cherokee Nation. Affirmed.

See same case below, 103 C. C. A. 1, 179 Fed. 13.

Statement by Mr. Justice Hughes:

The United States, by its Attorney General, upon the recommendation of the Secretary of the Interior, brought this suit in the circuit court of the United States for the eastern district of Oklahoma to cancel certain conveyances of allotted lands, made by members of the Cherokee Nation. Demurrer to the bill was sustained by the circuit court and the bill was dismissed. *United States v. Allen*, and similar cases, 171 Fed. 907. The judgment was reversed by the circuit court of appeals, and the trial court was directed to proceed with the suits in accordance with the views expressed in its opinion. 103 C. C. A. 1, 179 Fed. 13.

The government states in its brief that between July 14, 1908, and October 12, 1909, the United States brought 301 bills in equity against some 16,000 defendants, to cancel some 30,000 conveyances of allotted lands, made by as many or more grantors, members of the Five Civilized Tribes, upon the ground that the conveyances were in violation of existing restrictions upon the power of alienation. It is said that the selection and grouping of defendants in each case was determined by the substantial identity of the facts and propositions of law upon which the question of alienability of the lands depended.

Forty-six bills were filed to cancel 3,715 conveyances of lands of Cherokee Indians.

This particular suit deals with conveyances by Cherokee allottees of the full blood of lands allotted subsequent to the act of April 26, 1906, 34 Stat. at L. 137, chap. 1876. The grantors were not made parties. There are involved a number of separate conveyances to distinct grantees, parties defendant, two of whom prosecute this appeal from the judgment of the circuit court of appeals.

The bill alleges that under the treaties between the United States and the Cherokee tribe of Indians and its members, the United States granted to the Cherokee tribe certain lands in the Indian territory, now the eastern district of Oklahoma, and obligated itself by the terms of these treaties and of its laws to protect the Cherokee tribe in the enjoyment of the lands granted; that, according to the terms of said treaties and laws, and of the patent to the lands, the Cherokee tribe and every member thereof have at all times been and now are without power to dispose of any interest in the lands

without the authority of the United States, or otherwise than in the manner it prescribed; that the government of the United States, by reason of the helpless and dependent character of the Indian tribes, and of their several members, is the guardian and has exclusive control of their property, by virtue of which there is imposed upon the United States the duty to do whatever may be necessary for their guidance, welfare, and protection; that the Cherokee tribe has always been and is now treated as a tribe of Indians by the government of the United States and its several branches; that this tribe is now under the care of an Indian agent duly appointed under the laws of Congress, and large sums are still appropriated by Congress for the benefit and protection of the tribe and of its individual members, and for the maintenance of schools; and that under the laws of Congress the government of the United States still has a large sum of money in its possession belonging to the tribe, and there still remains unallotted a large area of tribal lands, the common property of the tribe.

It is further alleged that in the exercise 417]of its powers to *regulate and govern the affairs of the Cherokee tribe of Indians and its members, having in view their welfare and the carrying out of its treaty obligations, Congress, by the act approved July 1, 1902 (32 Stat. at L. 716, chap. 1375), provided that the lands belonging to the Cherokee tribe in the present state of Oklahoma should be allotted in severalty among its members, but deeming the Indians to be untutored and improvident, and still requiring the protection and supervision of the general government, it was provided by this act that the portion of the lands so allotted as homesteads should be inalienable; and further, that the allotted lands other than homesteads should be alienable only in five years after the issuance of patent to the allottee, and that, in accordance with its provisions, the act of Congress was duly ratified by the Cherokee people on the 7th day of August, 1902.

The bill describes certain conveyances of lands situated in the eastern district of Oklahoma, made by Cherokee Indians to the defendants, respectively, with particulars as to the lands embraced in the conveyances, the consideration, the dates of execution, acknowledgment, and recording, and also the dates of the allotment certificates and of the recording of allotment deeds. The dates of the conveyances were between November 19, 1904, and May 7, 1908, and of the allotment certificates between April 30, 1906, and May 4, 1908. It is alleged that each of the tracts of land described was land of the Cherokee tribe which had

been allotted to full-blood Indians of that tribe; that is, to those mentioned as grantors in the conveyances specified; that they were so allotted as to be subject to restrictions upon their alienation and encumbrance, and were so subject at the date of the execution and recording of the deeds described, which restrictions have never been removed; that the facts concerning the allotments and restrictions were matters of public record and notorious, and that the restrictions were imposed *by pub-418 lic laws of the United States of which the defendants had knowledge, and by which they were put upon inquiry and notice as to all matters concerning the condition of the particular tracts of land mentioned in the bill; that the deeds had been secured by the defendants in wilful violation of law and of the duty which rested upon this Nation and every member thereof, and for the purpose of unlawfully encumbering the allotted lands; and that by causing the deeds to be recorded the defendants had unlawfully obtained an apparent title or interest of record in the lands described in defiance of said agency supervision, and in open violation and contempt of the laws of the United States, to the irreparable injury of the Indians, and in direct interference with the supervision and control, policy, and duty of the government of the United States in that behalf.

It is also averred on information and belief that the defendants have unlawfully secured from members of the Cherokee tribe other deeds, conveyances, mortgages, powers of attorney, and contracts for and about their allotments, which the Indians and freedmen were without authority to make; that as these have not been recorded, the complainant is unable to give a minute and correct description without the discovery prayed for; that the defendants are continuing to induce the members of the Cherokee tribe named in the bill, and other members of said tribe, to execute deeds and instruments for and about their allotments, and threaten that they will continue such unlawful acts; that this unlawful conduct will greatly harass the United States in the discharge of its duties and in the administration of its policy in relation to these Indians, and compel it to bring many suits in order to annul the deeds and instruments which the defendants have taken and are taking, as alleged; that in addition to the instruments specified in the bill, upward of four thousand instruments of a similar nature, purporting to convey *or to-419 encumber the title to lands located within the eastern district of Oklahoma, and duly allotted to members of the Five Civilized Tribes, or belonging to said tribes, have

been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between the United States and the several Indian tribes, and the laws of the United States; and that unless the United States shall be permitted to join in its bills numerous defendants, against each of whom it has a like cause of action, and against each of whom it seeks the same relief, and whose pretended claims are based upon similar facts, and involve precisely the same questions of law, it will be driven to the necessity of bringing a great number of distinct and separate suits, and that it will be practically impossible for the United States to prosecute, and for the courts to adjudicate and dispose of, so large a number of separate and distinct suits within any reasonable length of time.

The bill prays that the specified conveyances be declared void, and that the title to the lands described be decreed to be in the allottees or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. Discovery of all claims to lands allotted to any of the Cherokee tribe, or to unallotted lands of the tribe, and the surrender of instruments for cancelation, are sought; and it is also prayed that all defendants in possession, or claiming possession, be ordered to vacate or to cease making such claims, and that the United States have such other and further relief as may be proper.

The objections to the sufficiency of the bill as set forth in the demurrers are thus summarized in the appellants' brief:

(1) That the United States has no capacity to maintain the suit.

(2) That the bill is wholly without equity.

420] *(3) That there is a defect of parties.

(4) That there is a misjoinder of alleged causes of action.

(5) That the bill is multifarious.

The appeal from the judgment of the circuit court of appeals, which reversed the judgment of the circuit court, sustaining the demurrers, is taken under § 3 of the act of June 25, 1910, chap. 408 (36 Stat. at L. 837).

Messrs. Joseph C. Stone, Robert J. Boone, and S. T. Bledsoe argued the cause and filed a brief for appellants:

When the members of each of the Five Civilized Tribes select the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The 56 L. ed.

issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted, etc.," contained in the various agreements, is sufficient, when the land is selected and designated, to pass title to the allottee without the necessity of certificate or patent.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716; Jones v. Mechan, 175 U. S. 1, 16, 44 L. ed. 49, 55, 20 Sup. Ct. Rep. 1; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Quinney v. Denney, 18 Wis. 486; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; French v. Spencer, 21 How. 228, 16 L. ed. 97; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807; Best v. Polk (Best v. Doe) 18 Wall. 112, 21 L. ed. 805; Oliver v. Forbes, 17 Kan. 113; Clark v. Lord, 20 Kan. 390; Francis v. Francis, 136 Mich. 288, 99 N. W. 14, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; United States v. Torrey Cedar Co. 154 Fed. 263; United States v. Moore, 154 Fed. 712; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531.

Restrictions upon alienation do not vest an interest in the United States or limit a fee-simple title.

Libby v. Clark, 118 U. S. 250, 255, 30 L. ed. 133, 134, 6 Sup. Ct. Rep. 1045; Schrimpscher v. Stockton, 183 U. S. 290, 299, 46 L. ed. 203, 207, 22 Sup. Ct. Rep. 107.

The United States owns no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens generally against violations of law.

Oklahoma v. Atchison, T. & S. F. R. Co. 220 U. S. 277, 55 L. ed. 465, 31 Sup. Ct. Rep. 437; Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co. 220 U. S. 290, 55 L. ed. 469, 31 Sup. Ct. Rep. 441; Libby v. Clark, 118 U. S. 250-255, 30 L. ed. 133, 134, 6 Sup. Ct. Rep. 1045; Schrimpscher v. Stockton, 183 U. S. 290-299, 46 L. ed. 203-207, 22 Sup. Ct. Rep. 107; United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697.

The former members of the Five Civilized Tribes are citizens of the United States and the state of Oklahoma, and not wards of either state or national governments.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Boyd v. Nebraska, 143 U. S. 175, 36 L. ed. 114, 12 Sup. Ct. Rep. 375; Bolln v. Nebraska, 176 U. S. 38, 44 L. ed. 384, 20 Sup. Ct. Rep. 287; United States v. Allen, 171 Fed. 913; United

States v. Saunders, 96 Fed. 268; United States v. Kopp, 110 Fed. 161; *Ex parte* Viles, 139 Fed. 68; United States v. Dooley, 151 Fed. 697; United States v. Auger, 153 Fed. 671; *Ex parte* Savage, 158 Fed. 205; United States v. Hall, 171 Fed. 214; United States v. Boss, 160 Fed. 132.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by the majority of the circuit court of appeals.

Hadden v. The Collector (*Hadden v. Barney*) 5 Wall. 107-111, 18 L. ed. 518, 519; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1-36, 39 L. ed. 601-611, 15 Sup. Ct. Rep. 508; *Dewey v. United States*, 178 U. S. 510-521, 44 L. ed. 1170-1174, 20 Sup. Ct. Rep. 981; *Oklahoma v. Atchison, T. & S. F. R. Co.* 220 U. S. 277, 55 L. ed. 465, 31 Sup. Ct. Rep. 437; *Re Wolfe*, 122 Fed. 133; *Southern R. Co. v. Machinists' Local Union No. 14*, 111 Fed. 57; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; *United States v. Chong Sam*, 47 Fed. 884; *Opinion of Justices*, 66 N. H. 665, 33 Atl. 1095.

The authorization, even if attempted, to bring a suit in the name of the United States, for and on behalf of a citizen of the state of Oklahoma, over his protest and objection, or without his consent, is not a regulation of commerce with an Indian tribe.

And an agreement between the United States and the state of Oklahoma, that such might be done, would be violative of the Federal Constitution and void.

Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; *Pollard v. Hagan*, 3 How. 212-235, 11 L. ed. 565-576; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Dick v. United States*, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

There is a defect of parties.

Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 826; *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 187; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21 L. ed. 367; *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 599; *Chadbourn v. Coe*, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479; *Bates, Fed. Eq. Proc. § 40*; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Coiron v. Millaudon*, 19 How. 113, 15 L. ed. 575; *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. ed. 612; *Joy v. Wirtz*, 1 Wash. C. C. 417, Fed. Cas. No. 7,553; *Tobin v. Walkinshaw*, 1 McAll. 26, Fed. Cas. No. 14,068; *Bell v. Donohoe*, 8 Sawy. 435, 17 Fed. 710; *Florence Sewing-Mach. Co. v. Singer Mfg. Co.* 4 Fisher. Pat. Cas. 329, 8 Blatchf. 113, Fed. Cas. No.

4,884; *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 159, 37 L. ed. 1037, 14 Sup. Ct. Rep. 66; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Chadbourn v. Coe*, 45 Fed. 822, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479; *Clark v. Great Northern R. Co.* 81 Fed. 282.

But see *French v. Shoemaker*, 14 Wall. 314, 20 L. ed. 852; *West v. Duncan*, 42 Fed. 430; *Smith v. Lee*, 77 Fed. 779.

In every case where the parties acted in good faith the court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay.

Wrought Iron Bridge Co. v. Utica, 17 Fed. 316; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Tate v. Gaines*, 25 Olla. 141, 26 L.R.A.(N.S.) 106, 105 Pac. 193.

Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value, it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same.

Muskogee Development Co. v. Green, 22 Okla. 237, 97 Pac. 619; *White v. Brown*, 1 Ind. Terr. 98, 38 S. W. 335; *Poplin v. Clausen*, 1 Ind. Terr. 157, 38 S. W. 974; *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270; *Brockway v. Thomas*, 36 Ark. 518; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Potts v. Cullum*, 68 Ill. 217.

The bill is devoid of equity.

Frost v. Spitley, 121 U. S. 552, 556, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; *Orton v. Smith*, 18 How. 263, 15 L. ed. 393; *Dick v. Foraker*, 155 U. S. 404, 414, 39 L. ed. 201, 205, 15 Sup. Ct. Rep. 124; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *United States v. Saunders*, 96 Fed. 268; *Peirsoll v. Elliott*, 6 Pet. 96, 101, 8 L. ed. 332, 334; *Rich v. Braxton*, 158 U. S. 375, 407, 39 L. ed. 1022, 1033, 15 Sup. Ct. Rep. 1006; *Kennedy v. Hazelton*, 128 U. S. 667, 672, 32 L. ed. 576, 578, 9 Sup. Ct. Rep. 202; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Marsh v. Brooklyn*, 59 N. Y. 280.

The bill of complaint is multifarious.

Story, Eq. Pl. § 280; *Cooper, Eq. Pl.* 183; *Hale v. Allinsson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, 102 Fed. 790; 1 Pom. Eq. Jur. 3d ed. p. 371, §§ 251½, 251¾; *Best v. Drake*, 11 Hare, 371; *Barcus*

v. Gates, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 403, 410, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; Tribbette v. Illinois C. R. Co. 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; Turner v. Mobile, 135 Ala. 73, 33 So. 132; Van Auken v. Dammeier, 27 Or. 150, 40 Pac. 89; Tompkins v. Craig, 93 Fed. 885.

See also brief of these counsel in Mullen v. United States, post, 834, and Deming Invest. Co. v. United States, post, 847.

Solicitor General **Lehmann** and Messrs. **A. N. Frost** and **Harlow A. Leekley**, Special Assistants to the Attorney General, argued the cause and filed a brief for appellee:

The United States may by suit in equity enforce the restrictions imposed by it upon the alienation of allotted tribal lands by members of the Indian tribes.

Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; *United States v. Allen*, 103 C. C. A. 1, 179 Fed. 13; *Conley v. Ballinger*, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *Beck v. Flournoy Live-Stock & Real Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30; *United States v. Flournoy Live-Stock & Real Estate Co.* 69 Fed. 886; *Pilgrim v. Beck*, 69 Fed. 895; *United States v. Flournoy Live-Stock & Real Estate Co.* 71 Fed. 576; *Rainbow v. Young*, 88 C. C. A. 653, 161 Fed. 835.

The Indian allottees are not necessary parties to such a suit, as the United States has rights and interests of its own to conserve, and is, moreover, under obligation to protect the Indians in those restrictions.

United States v. Allen, 103 C. C. A. 1, 179 Fed. 13; *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States v. Hammers*, 221 U. S. 220, 55 L. ed. 710, 31 Sup. Ct. Rep. 593; *Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 56 L. ed.

738, 31 Sup. Ct. Rep. 578; *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; *Pilgrim v. Beck*, 69 Fed. 895.

The bill is not multifarious, for it joins only such transactions as depend for their validity or invalidity upon the same state of facts and the same propositions of law.

Story, Eq. Pl. 14th ed. § 539; *Jennison*, Ch. Pr. 26; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Illinois C. R. Co. v. Caffrey*, 128 Fed. 770; *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693.

Messrs. **A. N. Frost** and **Harlow A. Leekley** filed a separate brief for appellee:

There can be no question of the invalidity of all the conveyances complained of, included in this appeal.

Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court:

The conveyances which this suit was brought to cancel were executed by members of the Cherokee tribe of Indians, of the full-blood, of lands allotted to them in severalty. The statute under which the allotments were made (act of July 1, 1902, chap. 1375, 32 Stat. at L. 716, accepted by the Cherokee nation on August 7, 1902), provided that the lands should be inalienable for a period specified. Secs. 11-15 (id. p. 717). The lands in question were "surplus" lands; that is, those other than homesteads. While the restrictions applicable to lands of this character were still in force, Congress extended the period of inalienability by the act of April 26, 1906. 34 Stat. at L. 137, chap. 1876. Section 19 of this act (id. p. 144) is as follows:

"Sec. 19. That no full-blood Indian of the Choctaw, *Chickasaw, Cherokee, Creek, [427 or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of

the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment, and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions, be and the same is hereby declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

The power of Congress thus to extend the restriction upon alienation was sustained 428]by this court in *Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. There the question related to a conveyance of inherited lands, made by a Creek Indian of the full blood, without the approval of the Secretary of the Interior, as required by § 22 of the act of 1906. The conveyance had been executed after the expiration of the five-year limitation upon alienation, prescribed by the supplemental agreement with the Creek Nation (act of June 30, 1902, chap. 1323, § 16, 32 Stat. at L. 503); but meanwhile, and during the continuance of the original restriction, the act of 1906 had been enacted. It was held that the restriction of the later statute was valid.

The reasoning of this decision is conclusive as to the validity of the extension by § 19 of the act of 1906 of the period of inalienability of lands allotted, as in this case, to full-blood Cherokees. And the same principle governs the restrictions provided by the act of May 27, 1908, chap. 199, 35 Stat. at L. 312.

It is not open to dispute that, upon the facts alleged, all the conveyances specified in the bill in this suit were executed in violation of restrictions lawfully imposed.

The principal question now presented is with respect to the capacity of the United States to sue in its own courts to enforce these restrictions.

The relations of the United States to the

Cherokees have repeatedly been described in the decisions of this court. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *United States v. Rogers*, 4 How. 567, 11 L. ed. 1105; *United States use of Mackey v. Coxe*, 18 How. 100, 15 L. ed. 299; *Cherokee Trust Funds*, 117 U. S. 288, 29 L. ed. 880, 6 Sup. Ct. Rep. 718; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *United States v. Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; *Cherokee Nation v. Journeycake*, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *United States ex rel. Lowe v. Fisher*, 223 U. S. 95, ante, 364, 32 Sup. Ct. Rep. 196. But in view of the nature of the present controversy, the facts of main importance may be briefly restated.

*The United States made its first 429 treaty with the Cherokees on November 28, 1785 (7 Stat. at L. 18). Constituting one of the most powerful tribes of Indians which then inhabited the country, they claimed the principal part of the territory now comprised within the states of North and South Carolina, Georgia, Alabama, and Tennessee. By this treaty, the Cherokees acknowledged that they were under the protection of the United States of America, and of no other sovereign, the boundary of their hunting grounds was fixed, and it was provided that "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." Another treaty, with similar objects, was made on July 2, 1791 (7 Stat. at L. 39). In 1817, following a migration of a portion of the tribe to lands of the United States on the Arkansas and White rivers, the Cherokee Nation ceded to the United States certain tracts which they formerly held, and in exchange the United States bound themselves to give to that branch of the Nation on the Arkansas as much land as they had received, or might thereafter receive, east of the Mississippi. 7 Stat. at L. 156. A further cession of land was made to the United States in 1819. 7 Stat. at L. 195.

By the terms of the treaty of May 6, 1828 (7 Stat. at L. 311, 315), with the representatives of the Cherokee Nation, West, reciting the purpose of securing to

them and their friends and brothers from the East who might join them, "a permanent home," which should, "under the most solemn guaranty of the United States, be, and remain, theirs forever,—a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of a 430] territory or state,"—*the United States agreed to guarantee to the Cherokees forever seven millions of acres of land, as described, situated in what became known as the Indian territory, and, in addition, "a perpetual outlet, west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend." On May 28, 1830, Congress authorized the President to assure title to the Indians to such exchanged lands, and to execute a patent, if desired, "provided always, that such lands shall revert to the United States if the Indians become extinct or abandon the same." 4 Stat. at L. 412, chap. 148. A supplementary treaty confirming the guaranty of lands, and fixing boundaries, was made on February 14, 1833. 7 Stat. at L. 414.

The continued presence of the Eastern Cherokees gave rise to serious controversies and oppressive legislation in the states where they resided. To terminate these difficulties, and "with a view to reuniting their people in one body," a treaty was signed at New Echota, in the state of Georgia, on December 29, 1835. 7 Stat. at L. 478. The Cherokee Nation ceded to the United States all their land east of the Mississippi river in consideration of the payment of \$5,000,000; and in addition to the lands described in the treaties of 1828 and 1833, the United States agreed to convey to the Cherokees 800,000 acres for the sum of \$500,000. It was stipulated that the ceded lands should not at any future time, without the consent of the Cherokee Nation, be included "within the territorial limits or jurisdiction of any state or territory," and the United States agreed to secure to the Cherokee Nation "the right by their national councils" to make such laws as might be deemed necessary "for the government and protection of the persons and property within their own country, belonging 431] to their people, or such *persons as have connected themselves with them: provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and Army of 56 L. ed.

the United States as may travel or reside in the Indian country by permission, according to the laws and regulations established by the government of the same."

The two tracts—the one consisting of the 7,000,000 acres and the "outlet," together aggregating 13,574,135.14 acres, and the other of 800,000 acres—were conveyed to the Cherokee Nation by patent on December 31, 1838, subject to the condition specified in the act of 1830, that the land should revert to the United States if the Cherokee Nation should become extinct or abandon the same. On September 6, 1839, the Cherokees adopted a constitution for the reunited nation. Dissensions having arisen among the members of the tribe, a new treaty was made with the United States on August 6, 1846 (9 Stat. at L. 871), in which it was set forth that the lands occupied by the Cherokee Nation should "be secured to the whole Cherokee people, for their common use and benefit," and provision was made for the settlement of differences. There was a further treaty on July 19, 1866. 14 Stat. at L. 799.

The "Cherokee Outlet" was purchased by the United States in 1893 for the sum of \$8,595,736. 27 Stat. at L. 640, chap. 209.

At this time, the conditions in the Indian territory were most unsatisfactory. There had been a large accession of whites who made no claim to Indian citizenship, and were residing in the territory with the approval of the Indian authorities. These greatly outnumbered the Indians. The existing means of government had failed of their purpose, and an exigency had arisen, originally unforeseen, requiring the adoption of new measures. This led to the enactment of legislation which contemplated *the dissolution of the tribal organ-[432] izations and the distribution of the tribal property. By § 15 of the act of March 3, 1893, chap. 209 (27 Stat. at L. 645), it was provided: "The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred and sixty acres to any one individual, within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments, the individuals to whom the same may be allotted shall be deemed in all respects citizens of the United States, . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease." And by § 16 of the same act provision was made for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes, "for the purpose of the extinguishment of the national or tribal title to any

lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian territory."

But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfil the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees through suitable restrictions [433]*which were designed to secure them in their possession and to prevent their exploitation.

The necessity for legislative action, and the purposes to be subserved, were fully presented in the report submitted in May, 1894, by the Senate Committee on the Five Civilized Tribes (S. Rept. No. 377, 53d Cong. 2d Sess.), a portion of which is quoted in the statement of facts made by the court in *Stephens v. Cherokee Nation*, 174 U. S. pp. 447-451, 43 L. ed. 1041-1043, 19 Sup. Ct. Rep. 722. The committee said: "This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and nonparticipation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws, and civilization if they wished so to do. And if now the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the government of the United

States, but comes from their own acts in admitting whites to citizenship under their laws, and by inviting white people to come within their jurisdiction to become traders, farmers, and to follow professional pursuits."

And, referring to the tribal lands, the report continued: "The theory of the government was, when it made title to the lands in the Indian territory to the Indian tribes as bodies politic, that the title was held for all of the Indians *of such tribe.[434 All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case. A few enterprising citizens of the tribe, frequently not Indians by blood, but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe,—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri. . . . As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians, and its obligations to protect them in their property and personal rights. In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty, and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the government does interfere to administer such trust."

The commission for which provision was made by the act of 1893—known as the Dawes Commission—also made reports to Congress (November 20, 1894, and November 18, 1895), "finding a deplorable state of affairs and the general prevalence of misrule." In the report of November 18, 1895, the commission said: "There is no alternative left to the United States but to assume the responsibility for future conditions in this territory. It has created the forms of government which have brought *about these results, and the[435 continuance rests on its authority. . . . The commission is compelled by the evidence forced upon them during their ex-

amination into the administration of the so-called governments in this territory to report that these governments, in all their branches, are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens; much less their lives, which they scarcely pretend to protect." *Stephens v. Cherokee Nation*, supra, pp. 452, 453.

By the acts of June 10, 1896, chap. 398 (29 Stat. at L. 321, 339), and of June, 7, 1897, chap. 3 (30 Stat. at L. 62, 84), the authority of the Dawes Commission was continued and extended; and provision was made for the hearing and determination of applications for citizenship in the tribes and for the making of rolls of membership. It was further provided by the statute of 1897, that none of the acts, ordinances, and resolutions (with certain stated exceptions) of the council of either of the Five Tribes should take effect if disapproved by the President. Then followed the act of June 28, 1898, chap. 517 (30 Stat. at L. 495), a comprehensive statute embracing provisions as to the enrolment of members of the tribes and for the allotment of "the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment, among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of same." By this legislation "the United States practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." *Cherokee Nation v. Hitchcock*, 187 U. S. p. 306, 47 L. ed. 189, 23 Sup. Ct. Rep. 115.

Between 1898 and 1902, allotment agreements with *the Five Civilized Tribes were approved by Congress. The allotment act of July 1, 1902, which related to the Cherokees (32 Stat. at L. 716, chap. 1375), provided (§ 63) that the tribal government should not continue longer than March 4, 1906. But, by joint resolution of Congress, passed March 2, 1906, the tribal existence and government of this tribe and of the others were "continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law." 34 Stat. at L. 822. A similar provision was contained in the act of April 26, 1906. 56 L. ed.

34 Stat. at L. 148, chap. 1877, U. S. Comp. Stat. Supp. 1909, p. 529.

The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands was expressly decided in the case of *Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, in which the conclusions of the court were thus stated:

"Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. . . . Upon the matters involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in *citizenship incom- [437] patible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that, in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe permits no other conclusion. Out of its peculiar relation to these dependent peo-

ples sprang obligations to the fulfilment of which the national honor has been committed. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen." *United States v. Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109.

This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, 438] in 1838, patent was issued *to the Cherokees, providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. It was the intent of Congress that, for their sustenance, and as a fitting aid to their progress, they should be secure in their possession during the period specified, and should actually hold and enjoy the allotted lands. As was well said by the court below: "If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented, and, possibly, belligerent people." [103 C. C. A. 4, 179 Fed. 16.] The authority to enforce restrictions of this

character is the necessary complement of the power to impose them.

Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances *were[439 void was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case, in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. It was not essential that it should have a pecuniary interest in the controversy. In *United States v. American Bell Teleph. Co.* 128 U. S. 315, 367, 32 L. ed. 450, 461, 9 Sup. Ct. Rep. 90, where the suit was brought to obtain the cancellation of certain patents, this court, in commenting upon the statements which had been made in the case of *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850, with respect to the right of the United States to sue, said: "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States. It is insisted that these decisions have reference exclusively to patents for land, and that they are not applicable to patents for inventions and discoveries. The *argument very[440 largely urged for that view is the one just stated: that in the cases which had reference to patents for land, the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the

cases, notably in *United States v. Hughes*, 11 How. 552, 13 L. ed. 809, the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States."

And in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, where the question was as to the jurisdiction of a court of equity at the suit of the government to enjoin interference with the transportation of the mails, the court, while adverting to the fact that the United States had a property in the mails, declined to place its decision upon that ground alone, and rested it also upon governmental duty. The court said (pp. 584, 586): "Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. . . . The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

In *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, the suit was brought to restrain the collection of certain county taxes alleged to be due in respect of permanent improvements 441] on, and personal property used in the cultivation of, lands occupied by Sioux Indians in South Dakota. The lands had been allotted under the general allotment act of February 8, 1887, 24 Stat. at L. 389, chap. 119. One of the questions certified to this court was whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit; and the question was answered in the affirmative. It is true that, in that case, the statute provided that the United States should hold the land allotted for twenty-five years in trust for the sole use and benefit of the Indian allottee. But the decision rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation con-

flicting with the measures it had adopted for their protection. The court said (p. 444): "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians, it is clear that the United States is entitled to maintain this suit." By the act of August 15, 1894, chap. 290 (28 Stat. at L. 305), as amended by the act of February 6, 1901, chap. 217 (31 Stat. at L. 760), Congress authorized suits to be brought against the United States, in its circuit courts, "involving the right of any person, in whole or in part of Indian blood or descent" (with certain exceptions), "to any allotment of lands under any law or treaty." *Sloan v. United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570. Prior to the amendment of 1901, the United States could not be sued in such a case. But the amendment required that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Commenting upon this, the court said in *McKay v. Kalyton*, 204 U. S. 458, 469, 51 L. ed. 566, 571, 27 Sup. Ct. Rep. 346: "Nothing could more clearly *demonstrate than does this requirement, the conception of Congress that the United States continued, as trustee, to have an active interest in the proper disposition of allotted Indian lands, and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject." And in *Re Heff*, 197 U. S. 488, 509, 49 L. ed. 848, 857, 25 Sup. Ct. Rep. 506, this court said: "In *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, we sustained the right of the government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted), and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state court."

Not only was the United States entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealing which had finally led to the plan of separate allotments, accompanied by restrictions for the protection of the allottees, but

Congress has explicitly recognized the right of the government thus to enforce these restrictions, and has made appropriations for the maintenance of suits of this description. And, at least, the power of Congress to authorize the government to sue, in view of the relation of the United States to the subject-matter and of the nature of the question to be determined, cannot be doubted. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 388, 46 L. ed. 954, 962, 963, 22 Sup. Ct. Rep. 650.

By the act of May 27, 1908, chap. 199 (35 Stat. at L. 312), which defined restrictions with respect to allotments to members of the Five Civilized Tribes, the representatives of the Secretary of the Interior were authorized to advise all allottees having restricted lands, of their rights, and at the request of any such allottee to bring suit [443] in his name *to cancel any conveyance or encumbrance in violation of the act, and to take all steps necessary to assist the allottees in acquiring and retaining possession. But the following provision was added:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands, prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act"

It is urged that this clause did not confer authority to sue, but was inserted merely to rebut any possible inference of an intention to deny this right to the United States. This seems to us a strained construction, in view of the obvious purpose of the act. And it fails to give adequate effect to the words, "*such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.*" In addition to the appropriation of moneys for expenditure under the direction of the Secretary of the Interior, that act appropriated the sum of \$50,000, "to be immediately available, and available until expended as the Attorney General may direct," which was "to be

used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma;" with the proviso that \$10,000 of this amount, *or so much as might be necessary, [444] should be expended in the prosecution of cases in the western judicial district of that state. In 1909 (act of March 4, 1909, chap. 299, 35 Stat. at L. 1014), a further appropriation of a like sum for the same purposes was made under the heading, "Suits to set aside conveyances of allotted lands." Another appropriation was made in 1910 (act of June 25, 1910, chap. 384, 36 Stat. at L. 748), under a similar heading, with specific reference to the "Five Civilized Tribes," and also with the provision, "and not to exceed ten thousand dollars of said sum shall be available for the expenses of the United States on appeals to the Supreme Court of the United States;" and still another to the same effect in 1911 (act of March 4, 1911, chap. 285, 36 Stat. at L. 1425).

We conclude that the United States has the capacity to prosecute this suit.

It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands, and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. *Shields v. Barrow*, 17 How. 130, 139, 15 L. ed. 158, 160; *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184.

The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not *depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.

These considerations also dispose of the contention that, by reason of the absence of the grantors as parties, the grantees are placed in danger of double litigation; so that if they should succeed here, they would still be exposed to suit by the allottees. It is not pertinent to comment upon the improbability of the contingency, if it exists in legal contemplation. But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the 446]*decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. ed. 843, 845; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 611, 25 L. ed. 757, 758; *Beals v. Illinois M. & T. R. Co.* 135 U. S. 290, 295, 33 L. ed. 608, 611, 10 Sup. Ct. Rep. 314. And it could not, consistently with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question.

In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under the acts of Congress, to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the *Tiger*

Case. And, as already noted, the act of May 27, 1908, makes provision for proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy. And when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property.

It is said that the allottees have received the consideration, and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and *thrif[t]-[447] lessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 170, 171, 34 L. ed. 640, 644, 11 Sup. Ct. Rep. 57.

But it is suggested that there may be instances where the consideration could be restored without interfering with the policy which prohibited the transfer; that is, without in any way impairing the right to the recovery of the land or the assurance to the Indian of his possession free from encumbrance. It is said, for example, that there may have been an exchange of lands, and that the Indian grantor should not, on retaking the restricted lands, be permitted at the same time to retain those which he has received from the grantee. Or there may be other property held by the Indian grantor free from restrictions, so that restoration of the consideration may be enforced without working a deprivation of the restricted lands, contrary to the act of Congress. We need not attempt to surmise what cases of this sort may arise. It is sufficient to say that no such case is here presented. It is not presented by the mere allegation of the bill that the conveyances

assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancelation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary.

448] *A further objection is that the bill is multifarious. But in view of the numerous transfers which the government attacks, it was manifestly in the interest of the convenient administration of justice that unnecessary suits should be avoided and that transactions presenting the same question for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit.

Our conclusion is that the suit was well brought. The judgment of the court below is affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

Mr. Justice Lurton dissents on the question of jurisdiction, but not on the merits.

J. S. MULLEN and W. B. Jansen, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 448-458.)

United States — right to sue — Indian allotments — restrictions on alienation.

1. The United States must be deemed to have the right to invoke the equity jurisdiction of its courts to cancel conveyances of allotted lands made by Choctaw Indians, upon the ground that they were in violation of existing restrictions upon the power of alienation, in view of the peculiar relationship of the United States to the Indians, and of the explicit recognition by Congress in the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), of the right of the government to enforce these restrictions by suit, and of the appropriation made in that and later acts for the maintenance of such suits. [For other cases, see United States, 137-147, in Digest Sup. Ct. 1908.]

NOTE.—On the power of Congress over the Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

On multifariousness in bill—see Gains v. Chew, 11 L. ed. U. S. 402.

Necessary parties — representative suit — Indian grantors.

2. The Indian grantors are not necessary parties to a suit by the United States to cancel conveyances of allotted lands by Choctaw Indians upon the ground that they were in violation of existing restrictions upon the power of alienation.

[For other cases, see Parties, I. a, 5; II. a, 2, in Digest Sup. Ct. 1908.]

Pleading — multifariousness — misjoinder.

3. A bill filed by the United States to cancel conveyances by heirs of Indian allottees on the ground that they were in violation of existing restrictions upon the power of alienation is not open to the objection of multifariousness or misjoinder because the suit involves a number of separate conveyances by individual Indians to distinct grantees made parties defendant.

[For other cases, see Pleading, I. t, in Digest Sup. Ct. 1908.]

Indian allotments — homestead.

4. The requirement of ¶ 12 of the supplemental agreement of July 1, 1902 (32 Stat. at L. 641, chap. 1362), with the Choctaws and Chickasaws, that each Indian allottee shall designate a portion of his allotment as a homestead, does not extend to cases where a person, whose name appeared upon the rolls, died after the ratification of the agreement, and before receiving his allotment, in which cases the act specially provides in ¶ 22 for allotment in the name of the deceased person, and for the descent of the land to his heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — restrictions on alienation.

5. The restrictions upon alienation by the heirs of an Indian allottee of the land allotted in excess of that designated as a homestead, made by ¶ 16 of the supplemental agreement of July 1, 1902, with the Choctaws and Chickasaws, are not applicable where a person whose name appeared upon the rolls died after the ratification of the agreement, and before receiving the allotment, in which case provision was made in ¶ 22 for allotment in the name of the deceased person, and for the descent of the land to his heirs, with no requirement for the selection of any portion of the allotted lands as a homestead.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — alienation before patent.

6. The heirs of a deceased Indian allottee under the supplemental agreement of July 1, 1902, with the Choctaws and Chickasaws, have a complete equitable interest which, in the absence of restrictions, they may convey before patent.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — alienation before patent.

7. Conveyances by the heirs of an Indian allottee under the supplemental agreement of July 1, 1902, with the Choctaws and

Chickasaws, whose ancestor died after the ratification of the agreement and before receiving his allotment, not being under restriction, cannot be held invalid because made before the issuance of a patent, in view of the provision of the act of April 26, 1906 (34 Stat. at L. 144, chap. 1876), § 19, subsequently enacted, that conveyances theretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and to the removal of restrictions, where patents thereafter issue, shall not be held invalid solely because such conveyances were made prior to the patent.

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

[No. 404.]

Argued October 12 and 13, 1911. Decided April 15, 1912.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Oklahoma, sustaining a demurrer to and dismissing a bill filed by the United States to cancel certain conveyances of allotted lands made by Choctaw Indians. Reversed, and decree of Circuit Court affirmed.

See same case below, 103 C. C. A. 1, 179 Fed. 13.

The facts are stated in the opinion.

Messrs. **J. C. Stone, Robert J. Boone,** and **S. T. Bledsoe** argued the cause, and, with Mr. **J. R. Cottingham**, filed a brief for appellants:

Restrictions upon alienation do not vest an interest in the United States or limit a fee-simple title.

Libby v. Clark, 118 U. S. 250, 255, 30 L. ed. 133, 134, 6 Sup. Ct. Rep. 1045; *Schrimscher v. Stockton*, 183 U. S. 290, 299, 46 L. ed. 203, 207, 22 Sup. Ct. Rep. 107; *United States v. Paine Lumber Co.* 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697.

The United States owns no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens generally against violations of law.

United States v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; *United States v. Paine Lumber Co.* 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697; *United States v. Auger*, 153 Fed. 671; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *United States v. Paine Lumber Co.* 154 Fed. 263; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Kansas v. United States*, 204 U. S. 331, 51 L. ed. 56 L. ed.

510, 27 Sup. Ct. Rep. 388; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; *United States v. Texas*, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488; *Oklahoma v. Atchison, T. & S. F. R. Co.* 220 U. S. 277, 55 L. ed. 465, 31 Sup. Ct. Rep. 434; *Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co.* 220 U. S. 290, 55 L. ed. 469, 31 Sup. Ct. Rep. 437.

The former members of the Five Civilized Tribes are citizens of the United States and the state of Oklahoma, and not wards of either state or national governments.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *Minor v. Happersett*, 21 Wall. 162-167, 22 L. ed. 627, 628; *Boyd v. Nebraska*, 143 U. S. 175, 36 L. ed. 114, 12 Sup. Ct. Rep. 375; *Bolln v. Nebraska*, 176 U. S. 88, 44 L. ed. 384, 20 Sup. Ct. Rep. 287; *United States v. Saunders*, 96 Fed. 268; *United States v. Kopp*, 110 Fed. 161; *Ex parte Viles*, 139 Fed. 68; *United States v. Dooley*, 151 Fed. 697; *United States v. Auger*, 153 Fed. 671; *Ex parte Savage*, 158 Fed. 205; *United States v. Hall*, 171 Fed. 214; *United States v. Boss*, 160 Fed. 132.

Public policy is not a head of Federal equity jurisdiction.

Hadden v. The Collector (*Hadden v. Barney*) 5 Wall. 107-111, 18 L. ed. 518, 519; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1-36, 39 L. ed. 601-611, 15 Sup. Ct. Rep. 508; *Dewey v. United States*, 178 U. S. 510-521, 44 L. ed. 1170-1174, 20 Sup. Ct. Rep. 981; *Re Wolf*, 122 Fed. 133; *Southern R. Co. v. Machinists' Local Union No. 14*, 111 Fed. 57; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; *United States v. Chong Sam*, 47 Fed. 884; *Opinion of Justices*, 66 N. H. 665, 33 Atl. 1095.

The authorization, even if attempted, to bring a suit in the name of the United States, for and on behalf of a citizen of the state of Oklahoma, over his protest and objection, or without his consent, is not a regulation of commerce with an Indian tribe; and an agreement between the United States and the state of Oklahoma that such might be done would be violative of the Federal Constitution and void.

Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Pollard v. Hagan*, 3 How. 212-235, 11 L. ed. 565-576; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Dick v. United States*, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

The allottees are indispensable parties.

Barbey v. Baltimore, 6 Wall. 280, 18 L. ed. 825; *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21 L. ed. 367; *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600; *Chadburne v. Coe*, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479.

If the United States had the right, co-existent with the allottees, to sue, it would nevertheless be necessary to bring them before the court. *Bates*, Fed. Eq. Proc. § 40.

Every party to a contract of sale except one who has released his interest, or an agent through whom the title has passed, is a necessary party to set it aside.

Shields v. Barrow, 17 How. 130, 15 L. ed. 158; *Coiron v. Millaudon*, 19 How. 113, 15 L. ed. 575; *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. ed. 612; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21 L. ed. 367; *Joy v. Wirtz*, 1 Wash. C. C. 417, Fed. Cas. No. 7,553; *Tobin v. Walkinshaw*, McAll. 26, Fed. Cas. No. 14,068; *Bell v. Donohoe*, 8 Sawy. 435, 17 Fed. 710; *Florence Sewing-Mach. Co. v. Singer Mfg. Co.* 4 Fisher, Pat. Cas. 329, 8 Blatchf. 113, Fed. Cas. No. 4,884; *Chadburne v. Coe*, 45 Fed. 822; *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 159, 37 L. ed. 1037, 14 Sup. Ct. Rep. 66; *New Orleans Water-Works Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Chadbourne v. Coe*, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479; *Clark v. Great Northern R. Co.* 81 Fed. 282; *French v. Shoemaker*, 14 Wall. 314, 20 L. ed. 852; *West v. Duncan*, 42 Fed. 430; *Smith v. Lee*, 77 Fed. 779.

Where the consideration is yet in the hands of the allottees, they should be compelled to return it, and in the same suits in which they seek cancelation of their deeds. And in every case where the parties acted in good faith the court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay.

Wrought-Iron Bridge Co. v. Utica, 17 Fed. 316; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Tate v. Gaines*, 25 Okla. 141, 26 L.R.A.(N.S.) 106, 105 Pac. 193.

Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value, it should be decreed that the rentals or a part thereof be set aside each

year until compensation shall have been made for the same.

Muskogee Development Co. v. Green, 22 Okla. 237, 97 Pac. 619; *White v. Brown*, 1 Ind. Terr. 98, 38 S. W. 335; *Poplin v. Clausen*, 1 Ind. Terr. 157, 38 S. W. 974; *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270; *Brockway v. Thomas*, 36 Ark. 518; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Potts v. Cullum*, 68 Ill. 217.

The United States cannot maintain this bill because it is wholly devoid of equity.

Frost v. Spitley, 121 U. S. 552, 556, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; *Orton v. Smith*, 18 How. 263, 15 L. ed. 393; *Dick v. Foraker*, 155 U. S. 404, 414, 39 L. ed. 201, 205, 15 Sup. Ct. Rep. 124; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991.

The bill is multifarious.

Story, Eq. Pl. § 280; *Cooper*, Eq. Pl. 183; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, 102 Fed. 790; 1 Pom. Eq. Jur. § 251½ p. 371; *Best v. Drake*, 11 Hare, 371; *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 410, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; *Tribette v. Illinois C. R. Co.* 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; *Turner v. Mobile*, 135 Ala. 73, 33 So. 132; *Van Auker v. Dammeier*, 27 Or. 150, 40 Pac. 89; *Tompkins v. Craig*, 93 Fed. 885.

Allotted Indian lands are subject only to such restrictions upon alienation as are imposed by law.

Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; *Jones v. Meehan*, 175 U. S. 16, 44 L. ed. 55, 20 Sup. Ct. Rep. 1; *Quinney v. Denney*, 18 Wis. 485; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *Stoddard v. Chambers*, 2 How. 284, 11 L. ed. 269; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Marsh v. Brooks*, 8 How. 223, 12 L. ed. 1056; *Landes v. Brant*, 10 How. 348, 13 L. ed. 449; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Challefoux v. Ducharme*, 4 Wis. 554; *Ruggles v. Marsilliot*, 19 Wis. 159; *Stark v. Starr*, 3 Wall. 402, 18 L. ed. 925; *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759; *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807; *Elwood v. Flannigan*, 104 U. S. 562, 26 L. ed. 842; *Briggs v. Wash-puk-qua*, 37 Fed. 135; *United States v. Winona & St. P. R. Co.* 67 Fed. 948; *James v. Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606; *Oliver v. Forbes*, 17 Kan. 113;

Clark v. Lord, 20 Kan. 390; Best v. Polk (Best v. Doe) 18 Wall. 112, 21 L. ed. 805; United States v. Brooks, 10 How. 442, 13 L. ed. 489; Dole v. Wilson, 20 Minn. 356, Gil. 308; Francis v. Francis, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129, 136 Mich. 288, 99 N. W. 14.

An allottee, before patent, has full equitable title, and may, in the absence of restrictions upon alienation, make a valid conveyance without awaiting delivery of patent.

Jones v. Green, 41 Ark. 363; Kline v. Ragland, 47 Ark. 117, 14 S. W. 474; Clark v. Hall, 19 Mich. 356; Fisher v. Hallock, 50 Mich. 463, 15 N. W. 552; Douglass v. M'Coy, 5 Ohio, 523; Bernardy v. Colonial & U. S. Mortg. Co. 17 S. D. 637, 98 N. W. 166; Baldwin v. Root, 90 Tex. 546, 40 S. W. 3; Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553; Bush v. Marshall, 6 How. 284, 12 L. ed. 440; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Massey v. Papin, 24 How. 362, 16 L. ed. 734; Stanway v. Rubio, 51 Cal. 41; Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906; Johnson v. Newman, 43 Tex. 628; Morrison v. Faulkner, — Tex. Civ. App. —, 21 S. W. 984; Spiess v. Neuberg, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; Dunn v. Barnum, 2 C. C. A. 265, 10 U. S. App. 86, 51 Fed. 355; Jenkins v. Collard, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; Godfrey v. Iowa Land & Trust Co. 21 Okla. 293, 95 Pac. 792; McWilliams Invest. Co. v. Livingston, 22 Okla. 884, 98 Pac. 914.

The lands selected in allotment in the name of a deceased allottee under § 22 of the Choctaw-Chickasaw supplemental agreement descend to the heirs free from all restrictions upon alienation, and the conveyances here involved are therefore valid, and the bill cannot, for that reason, be maintained in any event.

Hancock v. Mutual Trust Co. 24 Okla. 391, 103 Pac. 566.

See also briefs of these counsel in Heckman v. United States, ante, 829, and Deming Invest. Co. v. United States, post, 847.

Messrs. A. N. Frost and Harlow A. Leekley, Special Assistants to the Attorney General, argued the cause and filed a brief for appellee:

While the restrictions as to land allotted as a homestead allotment are directed toward it while in the hands of the allottee himself, having once attached, the wording compels the conclusion that future specific legislation is necessary to remove it, even after the death of the allottee.

Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817.

56 L. ed.

The same is true of lands coming to heirs by virtue of allotments made in the names of deceased allottees.

United States v. Dowden, 194 Fed. 475.

The statute, having provided the way in which these lands could be sold, by necessary implication, prohibited their sale in any other way.

Smith v. Stevens, 10 Wall. 321, 326, 19 L. ed. 933, 935.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.

Tiger v. Western Invest. Co. 221 U. S. 286, 309, 55 L. ed. 738, 747, 31 Sup. Ct. Rep. 578; Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; United States v. Freeman, 3 How. 556, 11 L. ed. 724.

In cases admitting of doubt, the intention of the lawmaker is to be sought in the entire context of the section—statutes or series of statutes *in pari materia*.

Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 301, 21 L. ed. 841, 844.

See also brief on behalf of the United States in Heckman v. United States, ante, 820.

Solicitor General Lehmann also argued the cause for appellee.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the United States to cancel certain conveyances of allotted lands, made by Choctaw Indians in alleged violation of restrictions. The circuit court sustained a demurrer to the bill upon the grounds that the United States was not entitled to maintain a suit of this character, that there was a defect of parties, owing to the absence of the Indian grantors, and that the bill was multifarious. This judgment was reversed by the circuit court of appeals, which directed the trial court to proceed with the cause in accordance with its opinion. United States v. Allen, and similar cases, 103 C. C. A. 1, 179 Fed. 13. An appeal to this court is taken by certain defendants under § 3 of the act of June 25, 1910, chap. 408 (36 Stat. at L. 837). The lands conveyed to the appellants are described as those which had been allotted to Choctaws of the full blood, deceased, and the conveyances were made by their heirs (also Choctaws of the full blood) prior to April 26, 1906.

As early as 1786 a treaty was made with the representatives of the Choctaws by which it was acknowledged that these In-

450]dians were under the protection *of the United States, and it was provided that for their "benefit and comfort" and for the "prevention of injuries and oppressions," the United States should have "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." 7 Stat. at L. 21. By the treaty of 1820, in order "to promote the civilization of the Choctaw Indians by the establishment of schools amongst them, and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country beyond the Mississippi river, where all who live by hunting and will not work may be collected and settled together," there was ceded to the Choctaws a tract west of the Mississippi, situated between the Arkansas and Red rivers. 7 Stat. at L. 210. In furtherance of this purpose, another treaty was made in 1830 by which it was agreed that the United States should "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," and the Choctaws ceded to the United States all their lands east of the Mississippi, and promised to remove beyond that river as soon as possible. 7 Stat. at L. 333, 334. In 1837, with the approval of the President and Senate of the United States, an agreement was made between the Choctaws and the Chickasaws that the latter should have the privilege of forming a district within the limits of the Choctaw country, "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation." 11 Stat. at L. 573. Controversies having arisen between these tribes, a treaty was made in 1855 with the representatives of both, defining boundaries and providing for the settlement of differences. This contained the stip-
451]ulation: "And pursuant to an act.*of Congress approved May 28, 1830 [4 Stat. at L. 411, chap. 148], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." 11

Stat. at L. 612. After the Civil War, a new treaty was entered into, reaffirming the obligations arising out of prior agreements and legislation. April 28, 1866, 14 Stat. at L. 769, 774. While this treaty contemplated allotments in severalty, and made provision to that end, effective action was not taken until the legislation of 1893, and subsequent years, relating to the Five Civilized Tribes, which embodied the policy—of individual allotments and the dissolution of the tribal governments—made necessary by the changed conditions in the Indian country. Acts of March 3, 1893, chap. 209, 27 Stat. at L. 645; June 10, 1896, chap. 398, 29 Stat. at L. 321, 339; June 7, 1897, chap. 3, 30 Stat. at L. 62, 64; June 28, 1898, chap. 517, 30 Stat. at L. 495.

In the case of the Choctaws and Chickasaws, as in that of the other tribes, the scheme of allotments embraced certain restrictions upon the right of alienation which Congress deemed necessary for the suitable protection of the allottees. By virtue of the relation of the United States to these Indians (*Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; *United States v. Choctaw Nation & Chickasaw Nation*, 179 U. S. 494, 532, 45 L. ed. 291, 306, 21 Sup. Ct. Rep. 149), and the obligations it has assumed, it is entitled to invoke the equity jurisdiction of its courts for the purpose of enforcing these restrictions. The Indian grantors, being represented by the government, were not necessary parties, and in the interest of the convenient administration of justice it was competent to *embrace in one suit a class of[452 transactions presenting the same question for determination. *Heckman v. United States*, decided April 1, 1912. [224 U. S. 413, ante 820, 32 Sup. Ct. Rep. 424.]

The question remains whether, in the execution of the conveyances to the appellants, the restrictions imposed by Congress have been violated.

The Dawes Commission, constituted by the act of 1893, entered into an agreement with the Choctaws and Chickasaws—known as the Atoka agreement—which was approved by Congress and incorporated in § 29 of the act of June 28, 1898. 30 Stat. at L. 505, chap. 517. There was, however, a supplemental agreement, found in the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), which contains the restrictions in force at the time of the conveyances described in the bill.

This supplemental agreement provided that there should be allotted to each member of the Choctaw and Chickasaw tribes land equal in value to 320 acres of the

average allottable land of these tribes; and to each Choctaw and Chickasaw freedman, land equal in value to 40 acres. The scheme defined two classes of cases, (1) allotments made to members of the tribes, and to freedmen, living at the time of allotment, and (2) allotments made in the case of those whose names appeared upon the tribal rolls, but who had died after the ratification of the agreement, and before the actual allotment had been made.

With respect to allotments to living members, it was provided that the allottee should designate 160 acres of the allotted lands as a homestead, for which separate certificate and patent should issue. And the restrictions upon the right of alienation of the allotted lands are found in paragraphs 12, 13, 15, and 16 of the supplemental agreement, as follows:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred 453] *and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead, as herein provided, shall be alienable after issuance of patent as follows: One fourth in acreage in one year, one fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

It will be observed that the homestead lands are made inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment." The period of restriction is thus definitely limited, and the clear implication is that when the prescribed peri-

od expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes—each minor child *as well as[454 each adult, duly enrolled as required—was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16—which relates to the additional portion of the allotment, or the so-called "surplus" lands—contains a restriction upon alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively.

The question now presented—with regard to the conveyances made to the appellants—arises in the second class of cases; that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the supplemental agreement:

"22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution, as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

*In the cases falling within this[458 paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for

supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

In the agreement with the Creek Indians (act of March 1, 1901, 31 Stat. at L. 861, 870, chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, "and be allotted and distributed to them accordingly." The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: 456] "After a careful consideration *of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule." It is true that under the Creek agreement, in cases where the ancestor died before allotment,

the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and "descend to his heirs." This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell "surplus" lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands *respectively. Whatever the policy of 457 such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases, so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them.

There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were "allotted lands," and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was the subject of sale. The fact that they were "full-blood" Indians makes no difference in this case, for, at the time of the conveyances in question, heirs of the full blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs.

It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors be-

fore the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Jones v. Meehan*, 175 U. S. 1, 15-18, 44 L. ed. 49, 55, 57, 20 Sup. Ct. Rep. 1. And any contention that the conveyances were invalid, solely because they were made before the issuance of patent,—the lands not being under restriction,—would be met by the proviso contained in 458]§ 19 of the act of *April 26, 1906 (34 Stat. at L. 144, chap. 1876): "Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment, and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions, be and the same is hereby, declared void."

We are therefore of the opinion that the bill is without equity as against the appellants, for the reason that the conveyances were not executed in violation of any restrictions imposed by Congress, and that the demurrer should have been sustained upon this ground. It follows that, with respect to the appellants, the decree of the Circuit Court of Appeals must be reversed and that of the Circuit Court affirmed.

It is so ordered.

ALFRED F. GOAT et al., Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 458-471.)

Indian allotments — restrictions on alienation — homestead.

1. Conveyances by Seminole freedmen of lands allotted to them in severalty for homesteads under the act of July 1, 1898 (30 Stat. at L. 567, chap. 542), executed before the provisions of the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), removing the restrictions upon the aliena-

tion of such lands, became operative, were invalid, and the Federal government is entitled to have them set aside.

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — restrictions on alienation — surplus lands.

2. Conveyances of surplus lands by adult Seminole freedmen allottees under the act of July 1, 1898, executed before patent, and prior to the act of April 21, 1904 (33 Stat. at L. 189, chap. 1402), removing restrictions on alienation, are invalid, as are also conveyances by such allottees being minors, and expressly excepted from the provisions of that act.

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — alienation before patent.

3. The mere authorization by the act of April 26, 1906 (34 Stat. at L. 138, chap. 1876), of the execution of patents to Seminole allottees under the act of July 1, 1898, before the tribal government ceased to exist, when, by virtue of the earlier act, the allottees were to receive their deeds, did not operate as a repeal of the explicit provisions of that act making invalid all contracts for the sale, disposition, or encumbrance of any part of any allotment made prior to the date of patents.

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — alienation before patent — surplus lands.

4. The removal by the act of April 21, 1904, of restrictions upon alienation of lands of all allottees of either of the Five Civilized Tribes not of Indian blood, except minors, and except as to homesteads, left adult Seminole freedmen allottees under the act of July 1, 1898, free thereafter to convey before patent the surplus lands allotted to them in severalty under that act.

[For other cases, see *Indians* VIII., in Digest Sup. Ct. 1908.]

[No. 405.]

Argued October 12 and 13, 1911. Decided
April 29, 1912.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Oklahoma, sustaining a demurrer to and dismissing the bill in a suit by the United States to cancel conveyances by Seminole freedmen, alleged to be in violation of existing restrictions on alienation. Affirmed, with the modification that the cause shall proceed in conformity with the following opinion.

See same case below, 103 C. C. A. 1, 179 Fed. 13.

The facts are stated in the opinion.

Messrs. J. C. Stone, Robert J. Boone, and S. T. Bledsoe argued the cause, and Messrs. George C. Crump, H. H. Rogers, J. H. Moxey, J. H. Miley, and B. B. Blakeney filed a brief for appellants:

The United States has absolutely no interest in the lands of Seminole allottees.

Best v. Polk (*Best v. Doe*) 18 Wall. 112, 21 L. ed. 805; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Schow v. Harriman*, 154 U. S. 609, 22 L. ed. 556, 14 Sup. Ct. Rep. 1209; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; *New Mexico v. United States Trust Co.* 172 U. S. 182, 43 L. ed. 411, 19 Sup. Ct. Rep. 128; *Jones v. Mechan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 911.

Undoubtedly when the Seminole citizen had selected his allotment and received his certificate from the Dawes Commission, the land embraced in the allotment certificate was his property. It had been segregated from the national domain of the Seminole Nation.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 721; *Garfield v. United States*, 30 App. D. C. 165; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

A right to a patent, once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued.

Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925.

An Indian may convey his land, unless a conveyance is prohibited, after the communal relation is broken up.

Jones v. Meehan, 175 U. S. 1, 16, 44 L. ed. 49, 55, 20 Sup. Ct. Rep. 1; *Oliver v. Forbes*, 17 Kan. 113; *Briggs v. Wash-puk-qua*, 37 Fed. 135; *New York Indians v. United States*, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584.

Patent has never been necessary in order to permit the equitable owner to convey his land.

Flanagan v. Forsythe, 6 Okla. 225, 50 Pac. 152; *McClung v. Penny*, 12 Okla. 303, 70 Pac. 404; *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453; *Johnson v. Borin*, 7 Kan. App. 369, 54 Pac. 804; *Black v. Jackson*, 177 U. S. 360, 44 L. ed. 805, 20 Sup. Ct. Rep. 648; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; *Quinney v. Denney*, 18 Wis. 485; *Ruggles v. Marsilliott*, 19 Wis. 160.

An allottee may convey his land when he has selected an allotment, unless he is

prohibited from doing so by positive provisions of law.

Marsh v. Brooks, 8 How. 223, 12 L. ed. 1056; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759; *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807; *Elwood v. Flannigan*, 104 U. S. 562, 26 L. ed. 842; *Briggs v. Wash-puk-qua*, 37 Fed. 135; *United States v. Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; *James v. Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606; *Oliver v. Forbes*, 17 Kan. 113; *Clark v. Lord*, 20 Kan. 390; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Best v. Polk* (*Best v. Doe*) 18 Wall. 112, 21 L. ed. 805; *United States v. Brooks*, 10 How. 442, 13 L. ed. 489; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *Francis v. Francis*, 136 Mich. 288, 99 N. W. 14.

An allottee, upon the selection of his allotment, has the full equitable title thereto, and may make a valid conveyance thereof; and when the legal title passes to him, it immediately vests in his grantee.

Mitchel v. United States, 15 Pet. 52, 10 L. ed. 658; *Jones v. Green*, 41 Ark. 363; *Kline v. Ragland*, 47 Ark. 117, 14 S. W. 474; *Steeple v. Downing*, 60 Ind. 478; *Clark v. Hall*, 19 Mich. 356; *Fisher v. Hallock*, 50 Mich. 463, 15 N. W. 552; *Douglass v. M'Coy*, 5 Ohio, 522; *Bernardy v. Colonial & U. S. Mortg. Co.* 17 S. D. 637, 98 N. W. 166; *Baldwin v. Root*, 90 Tex. 546, 40 S. W. 3; *Barr v. Gratz*, 4 Wheat. 553, 4 L. ed. 553; *Bush v. Marshall*, 6 How. 284, 12 L. ed. 440; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Massey v. Papin*, 24 How. 362, 16 L. ed. 734; *Stanway v. Rubio*, 51 Cal. 41; *Nicodemus v. Young*, 90 Iowa, 423, 57 N. W. 906; *Johnson v. Newman*, 43 Tex. 628; *Morrison v. Faulkner*, — Tex. Civ. App. —, 21 S. W. 984; *Spiess v. Neuberg*, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Dunn v. Barnum*, 2 C. C. A. 265, 10 U. S. App. 86, 51 Fed. 355; *Jenkins v. Collard*, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; *Godfrey v. Iowa Land & Trust Co.* 21 Okla. 293, 95 Pac. 792; *McWilliams Invest. Co. v. Livingston*, 22 Okla. 884, 98 Pac. 914.

The act of April 21, 1904, authorized a citizen not of Indian blood to convey his surplus allotment.

Godfrey v. Iowa Land & Trust Co. 21 Okla. 293, 95 Pac. 792.

Messrs. **A. N. Frost** and **Harlow A. Leekley** argued the cause and filed a brief for appellee:

All the transactions set out in the bills of complaint were void because had in violation of acts of Congress prohibiting the alienation of the lands included in the attempted conveyances.

A. Because no patent to any of the lands has been delivered.

B. Acts of Congress imposing restrictions generally upon lands allotted to members of the Five Civilized Tribes prohibited the alienation of lands of some of the particular classes of Seminole Indians mentioned in the two classes of cases under consideration, and were, and still are, in full force and effect; and, as to the lands of other particular classes of Seminole Indians, were in full force and effect at the date of the execution of the instruments complained of.

See also brief on behalf of United States in *Heckman v. United States*, ante, 820.

Solicitor General **Lehmann** also argued the cause for appellee.

Mr. Justice **Hughes** delivered the opinion of the court:

The question presented by this appeal is with respect to the right of Seminole freedmen to convey the lands allotted to them in severalty pursuant to the act of July 1, 1898, chap. 542, 30 Stat. at L. 567. The United States sued to cancel conveyances alleged to have been made contrary to the statute. Demurrer to the bill was sustained by the circuit court, and its judgment was reversed by the circuit court of appeals. *United States v. Allen*, and similar cases, 103 C. C. A. 1, 179 Fed. 13. So far as the demurrer contested the capacity of the United States to bring a suit of this character, the case stands upon the same footing, in all 460] *material respects, as that of *Heckman v. United States*, decided April 1, 1912 [224 U. S. 413, ante, 820, 32 Sup. Ct. Rep. 424], and the right of the United States to enforce such restrictions as may have been imposed upon the alienation of the allotted lands is no longer open to dispute.

The inquiry must be, What are the restrictions in the case of allotments to Seminole freedmen, and have they been violated?

As to each of the tracts of land in question, it was alleged:

"And your orator further shows that each of the tracts of land hereinafter, in paragraph numbered six, described, is situated in the eastern district of Oklahoma, and was, at the time of the transactions of sale or encumbrance mentioned in that paragraph, allotted lands of the members of the

Seminole tribe of Indians, allotted to freedman members of said tribe, and none were lands which had been patented to individuals at the time of the transactions in question; that they were not lands of heirs of allottees; that all contracts for the sale, disposition of any of said allotments prior to the date of patent, were expressly declared by law to be void; that this law applied to all allotments of Seminole lands not inherited from allottees; that accordingly, defendants had knowledge, and were, by said law, put upon inquiry and notice, as to the inalienability of said unpatented lands, and had notice accordingly that the particular tracts had not been patented, any such patenting being a matter of public record and of public action; that, moreover, the unpatented condition of said allotted lands was notorious and of common knowledge, since none of the Seminole allotted lands have been patented; and that other public laws of Congress and public agreements imposed further restrictions upon the transfer and encumbrance of the particular lands herein, in paragraph six, described, belonging to the particular class of tribal members herein *mentioned, in addition to those arising from the absence of patenting, and these restrictions were known, notified, and notorious in like manner."

While it appears that a large number of conveyances are involved in the suit, only two are specifically described in the printed record on this appeal, the descriptions of the others, as set forth in the bill, having been omitted by stipulation. In the two cases particularly mentioned, the conveyances were made in August, 1906, and March, 1907. It is not stated whether the lands embraced therein were homestead or so-called "surplus" lands, but it is conceded in argument that they were of the latter class. The government says in its brief: "In the printed record it happens that the transactions set out include only lands allotted other than homestead, but other transactions complained of in the bill, omitted from the printed record for the sake of brevity, include lands allotted as homesteads as well." The broad ground is taken by the government that all conveyances of the lands allotted to members of the Seminole tribe are void because made prior to the date of patent.

By the treaty of 1832 (7 Stat. at L. 368) the Seminoles relinquished to the United States their claim to the lands then occupied in the territory of Florida, and agreed to emigrate to the lands assigned to the Creeks, west of the Mississippi, it being understood that an additional extent of territory proportioned to their numbers should "be added to the Creek country," and that

they should be received "as a constituent part of the Creek Nation." Provision to this effect was made in the Creek treaty of 1833 (7 Stat. at L. 417, 419), which was satisfactory to the Seminoles, and territory was assigned to them accordingly. 7 Stat. at L. 423. There were further agreements in 1845 (9 Stat. at L. 821) and in 1856 (11 Stat. at L. 699). In 1866 (14 Stat. at L. 755), lands which had been ceded to the Seminoles by the Creeks were conveyed to the United States at a stipulated price; 462] *and the United States, having obtained from the Creeks the westerly half of their lands, granted to the Seminoles a tract of 200,000 acres, which was to constitute the national domain of the latter. Subsequently, the United States purchased for the Seminoles another tract, on the east, consisting of 175,000 acres. Acts of March 3, 1873, 17 Stat. at L. 626, chap. 322, August 5, 1882, 22 Stat. at L. 265, chap. 390. It was provided in the treaty of 1866, inasmuch as there were among the Seminoles "many persons of African descent and blood, who have no interest or property in the soil and no recognized civil rights," that "these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe."

Pursuant to the policy of allotting tribal lands among the individual members of the Five Civilized Tribes (act of March 3, 1893, chap. 209, 27 Stat. at L. 645), an agreement was made by the Dawes Commission with the Seminoles on December 16, 1897, which was ratified by the act of July 1, 1898. This agreement provided (30 Stat. at L. 567, chap. 542):

"All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to 463]him, *during the existence of the present tribal government, and until the members of said tribe shall have become citizens

of the United States. Such allotment shall be made under the direction and supervision of the Commission to the Five Civilized Tribes, in connection with a representative appointed by the tribal government; and the chairman of said commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

Leases by allottees were permitted upon certain conditions.

The deeds of the allotted lands were to be executed at the termination of the tribal government, and each allottee was to designate 40 acres which, by the terms of the deed, should be inalienable and nontaxable as a homestead in perpetuity. The provision on this subject was as follows:

"When the tribal government shall cease to exist, the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee, a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guaranty by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of *forty acres, which shall, by the terms[464 of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

A supplemental agreement was made with the Seminoles on October 7, 1899, ratified on June 2, 1900 (31 Stat. at L. 250, chap. 610), which provided for the enrolment of children born to Seminole citizens to and including December 31, 1899, and all Seminole citizens then living, and also that if any member of the tribe should die after that date, the lands, money, and other property to which he would be entitled if living, should descend to his heirs.

The act of March 3, 1903, chap. 994, § 8 (32 Stat. at L. 982, 1008), contained the following provisions as to the duration of the tribal government, the execution, delivery, and recording of deeds and the inalienability of homesteads:

"Sec. 8. That the tribal government of the Seminole Nation shall not continue

longer than March fourth, nineteen hundred and six: Provided, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation, contained in the act of July first, eighteen hundred and ninety-eight (30 Stat. at L. 567, chap. 542), and said principal chief shall execute and deliver said deeds to the Indian allottees, as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery, and without expense to the allottee, until further legislation by Congress, and such records shall have like effect as other public records: Provided further, That the homestead referred to in said act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

465] *The restriction upon the alienation of homestead lands applied as well to the freedmen as to the other allottees; but it was removed, with respect to the freedmen, by the act of May 27, 1908, chap. 199 (35 Stat. at L. 312). This statute, in fixing the status—after sixty days from the date of the act—of the lands of allottees of the Five Civilized Tribes, theretofore or thereafter allotted, provided: "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions." The present bill was filed on July 23, 1908, and the conveyances it assails were executed before this provision of the act of 1908 became operative. Previous conveyances were not validated by the statute, but, on the contrary, it declared any attempted alienation or encumbrance of allotted lands, prior to the removal of restrictions, to be void. Section 5, *id.* 313. It follows that the instruments described in the bill, in so far as they may have purported to convey homestead lands, were executed in violation of law, and the government was entitled to have them set aside.

The "surplus" lands were embraced in the general restriction contained in the agreement of December 16, 1897, ratified by the act of July 1, 1898, that "all contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void." Apart from the provisions as to leases, this was the only restriction upon the alienation of surplus

lands imposed by that agreement, and no further restriction applicable to the freedmen allottees was placed upon such lands by subsequent statute.

The situation with respect to the Seminole allotments may be briefly stated. The commissioners to the Five Civilized Tribes found little difficulty in preparing the rolls of the Seminoles or in making the allotments. The enrolment following the ratification of the agreement of 1897 *was[466 begun in July, 1898, and was finished in August of that year. The rolls containing the additional names, provision for which was made by the supplemental agreement of 1899, were forwarded to the Department in December, 1900, and were approved by the Secretary of the Interior on April 2, 1901. Reports of Commission to Five Civilized Tribes, 1900, p. 12; 1901, p. 30. In June, 1901, the commission undertook the making of allotments, and this was practically completed at an early date. In their report for 1903 (pp. 36, 37), the commissioners said: "The last annual report of the commission showed the completion of allotment in the Seminole Nation, save as to the recording of a small number of allotments, and the issuance of certificates therefor, which was finished early in the past year." Subsequently there were additional allotments to after-born children, in accordance with the act of March 3, 1905. 33 Stat. at L. 1071, chap. 1479. As already noted, the allottees were to receive their deeds on the expiration of the tribal government, which, by the act of 1903, was not to continue longer than March 4, 1906. By joint resolution of March 2, 1906, Congress provided for the continuance of "the tribal existence and present tribal governments" of the Five Civilized Tribes "in full force and effect for all purposes under existing laws," until all the property of the tribes should be distributed (34 Stat. at L. 822); and by the act of April 26, 1906, they were continued "until otherwise provided by law" (§ 28, 34 Stat. at L. 137, 148, chap. 1876). While the duration of the tribal government was thus extended, the last-mentioned statute expressly authorized the principal chief of the Seminoles meanwhile, that is, before its termination, to execute deeds to allottees. Section 6, *id.* 139. These deeds, however, had not been delivered at the time of the conveyances in question. None of the lands, says the bill, had been patented to individuals, and they were not lands of heirs of allottees.

*It is urged that the time for the is-[467 suance of patents was fixed as the 4th of March, 1906, and that in law they will be deemed to have been delivered on that date or within a reasonable time thereafter; that

although provision was made for the continuance of the tribal government, there was likewise authority for the delivery of the deeds prior to its termination. The contention that the restriction was thus removed cannot be sustained. The agreement of 1897 did not fix a definite time for the termination of the tribal government, and while the act of 1903 set a limit to its existence, Congress was competent to extend it. This was done, and the mere authorization of the execution of patents before the tribal government ceased to exist cannot be regarded as a repeal of the explicit provision that contracts for the sale or encumbrance of the allotted lands prior to the date of patent should be void. The one did not override the other; they could stand together.

But, in 1904,—after the allotments to the Seminoles had been made,—the restrictions upon the alienation by adult allottees of the Five Civilized Tribes, who were not of Indian blood, of lands other than homesteads, were removed. The provision was as follows (act of April 21, 1904, chap. 1402, 33 Stat. at L. 189, 204):

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that 468]such *removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing, and shall be recorded in the same manner as patents for lands are recorded."

This statute undoubtedly applied to allottees of the Seminole Nation, as one of the Five Civilized Tribes, and the enrolled freedmen of that tribe, according to the classification of the commission in making the rolls, fell within the description of allottees "not of Indian blood." The freedmen were persons of African descent,—embracing former slaves and their descendants,—who had been admitted to the rights of native citizens under the treaty of 1866. Report of Dawes Commission, 1898, pp. 11, 13. While the law did not prescribe that a separate roll of freedmen should be made

in the case of the Seminoles, the commission in fact made one. As to this they said in their report for 1898 (p. 13), referring to the Seminoles: "Indeed, it is essentially a nation of full bloods, save as to its colored citizens, who, under treaty provision, are on an equal footing with the citizens by blood. About one third of the citizens of the Seminole Nation are freedmen, and while the law does not specifically require a separate roll of each of these classes, the commission's data will enable it to so separate them." Accordingly the freedmen in the rolls of the Seminoles, upon which the allotments were based, appear as a class distinct from the citizens by blood. Final Rolls of Citizens and Freedmen of the Five Civilized Tribes, pp. 615, 627. And the commissioner to the Five Civilized Tribes in his report for 1908 (p. 7), in stating the total number of the enrolled Seminoles, with the degree of blood of each, gives the number of the citizens of full blood and of mixed blood, three fourths or more, one half to three fourths, and less than one-half blood, and then the number of the enrolled freedmen as a separate group. The bill does not allege that the allottees in *ques-[469 tion had any Indian blood, but describes them simply as "freedmen members of said tribe;" and in the specifications of the conveyances which appear in the record the grantors are named as Seminole freedmen whose names are on the freedmen roll. The import of the allegation, then, is that these grantors were not of Indian blood, and, so far as they were adults, they came within the provision of the act of 1904, removing restrictions upon the alienation of surplus lands.

These adult grantors stood in precisely the same position—after the act of 1904—as though they had received their allotments without any restriction upon their right to alienate the interest thus acquired. It is insisted, however, that this interest was not of such a character as to be susceptible of transfer. This is not a tenable proposition. Stress is laid upon the provision in the agreement of 1897 that each allottee should have "the sole right of occupancy of the land so allotted to him." But it is not to be supposed that by this form of words Congress intended in the case of the Seminoles to provide that, by virtue of the allotment, the member of the tribe should receive an interest of a different nature from that received by allottees of other tribes. The lands were allotted to the members of the tribe in severalty, so that each should have his distinct portion. The allotments constituted their respective shares of the tribal property, set apart to them as such, and while the execution of the

deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. The nature of the allottee's interest is sufficiently shown by other provisions of the agreement of 1897, as ratified by Congress, and by statutes *in pari materia*. In the agreement it was provided that any allottee might lease his allotment on certain conditions. With respect to the townsite of Wewoka, which was to be controlled and disposed of according to the provisions of the act of the general council 470] of the *Seminole Nation of April 23, 1897, it was provided that, on extinguishment of the tribal government, deeds should issue "to owners of lots," as in the case of allottees. The interests of the allottee was a descendible interest. By the supplemental agreement of 1900, in the case of the death of a member of the tribe after December 31, 1899, the lands "to which he would be entitled if living" were to descend to his heirs. Section 5 of the act of April 26, 1906, relating to "patents or deeds to allottees in any of the Five Civilized Tribes" to be thereafter issued—thus including those to be issued to the Seminole allottees—provided that if any such allottee should die before the deed became effective, the title to the lands described therein should "inure to and vest in his heirs;" and further, that "in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life" (34 Stat. at L. 138, chap. 1876); and § 19 of that act contained a proviso declaring that conveyances theretofore made "by members of any of the Five Civilized Tribes subsequent to the selection of allotment, and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed."

The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed. Their equitable interest was one which, in the absence of restriction, they could convey. *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. ed. 1063, 1064; *Jones v. Meehan*, 175 U. S. 1, 15-18, 44 L. ed. 49, 55-57, 20 Sup. Ct. Rep. 1; *Godfrey v. Iowa Land & Trust Co.* 21 Okla. 293, 95 Pac. 792; *Mullen v. United States*, decided April 15, 1912. [224 U. S. 448, ante, 834, 32 Sup. Ct. Rep. 494.] And hence, on the removal of the restrictions upon alienation, the adult allottees not of 471] *Indian bloods were entitled to con-

vey their surplus lands. So far as the bill assails such conveyances, it is without equity.

As all the conveyances made to the appellants are not particularly described in the printed record before this court, it is impossible to specify those which were lawful and those which were obnoxious to the statute. We are of opinion (1) that the bill should be sustained so far as it relates to conveyances of homestead lands; (2) that it should also be sustained to the extent that it is directed against conveyances of surplus lands made by freedmen allottees who were minors, and thus excepted from the provision of the act of April 21, 1904, and those made by adult allottees prior to that date; and (3) that so far as the bill relates to conveyances of surplus lands, made by adult freedmen allottees subsequent to April 21, 1904, it should be dismissed.

The judgment of the Circuit Court of Appeals will therefore be affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

DEMING INVESTMENT COMPANY,
Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 471-473.)

This case is governed by the decision in *Goat v. United States*, ante, 841.

[No. 434.]

Argued October 12 and 13, 1911. Decided April 29, 1912.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Oklahoma, sustaining demurrers to and dismissing the bill in a suit by the United States to cancel conveyances by Seminole freedmen, alleged to be in violation of existing restrictions on alienation. Affirmed, with the modification that the cause shall proceed in conformity with the following opinion.

See same case below, 103 C. C. A. 1, 179 Fed. 13.

The facts are stated in the opinion.

Messrs. Robert J. Boone, J. C. Stone, and S. T. Bledsoe argued the cause and filed a brief for appellant:

Although the government alone can purchase lands from an Indian nation, it does

not follow that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest.

Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; *Jones v. Meehan*, 175 U. S. 16, 44 L. ed. 55, 20 Sup. Ct. Rep. 1.

The allotment certificate, when issued, like a patent, to lands, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it is issued is entitled to the land, and it is a conveyance of the right to this title to the allottee.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948.

The same rules apply in Indian matters of this kind as to the acts of the Interior Department in public land matters.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716.

The right to a patent once vested is treated by the government when dealing with the public lands, as equivalent to a patent issued.

Francis v. Francis, 203 U. S. 238, 51 L. ed. 166, 27 Sup. Ct. Rep. 129; *Stark v. Starr*, 6 Wall. 418, 18 L. ed. 929.

An act giving an Indian allottee a right to a patent was a sufficient authority for a sale by him, and when the patent subsequently issued to him, it inured to the benefit of the grantee.

Quinney v. Denney, 18 Wis. 486.

The right to a patent was absolute and complete, and the duty of the Secretary of the Interior to issue the patent was imperative.

Briggs v. Wash-puk-qua, 37 Fed. 135; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The certificate of allotment of an Indian citizen, delivered, is a conveyance of the land to the allottee.

Carter v. Ruddy, 6 C. C. A. 3, 15 U. S. App. 129, 56 Fed. 542; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Porter v. Parker*, 68 Neb. 338, 94 N. W. 123; *Flanagan v. Forsythe*, 6 Okla. 225, 50 Pac. 152; *Godfrey v. Iowa Land & Trust Co.* 21 Okla. 293, 95 Pac. 792; *DeGraffenreid v. Iowa Land & Trust Co.* 20 Okla. 687, 95 Pac. 624; *McWilliams Invest. Co. v. Livingston*, 22 Okla. 884, 98 Pac. 914.

In the progress of proceedings to acquire, under the laws of the United States, a title to public lands, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed, and it cannot withhold delivery of the patents.

United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

The failure of the officers to issue the patent at the time it ought to be issued does not affect the right of any person.

Leonard v. Ross, 23 Kan. 292.

The courts, both Federal and state, have declared that the restrictions on this class of Seminole allottees were removed after April 21, 1904.

Godfrey v. Iowa Land & Trust Co. 21 Okla. 293, 95 Pac. 792; *United States v. Crouch*, C. C. E. D. Okla. No. 1112.

Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the state court.

Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Bacon v. Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

If the lands involved in this action are not restricted, then the government has no right to maintain this suit under the act of May 27, 1908, or otherwise, and it becomes very essential to determine the question of restriction in order to determine the jurisdiction of the court.

United States v. Rundell, 181 Fed. 887.

See also briefs of these counsel in *Heckman v. United States*, ante, 820, and in *Mullen v. United States*, ante, 834.

Messrs. **A. N. Frost** and **Harlow A. Leekley** argued the cause and filed a brief for appellee.

For contentions of counsel, see their brief as reported in *Goat v. United States*, ante, 841.

Solicitor General **Lehmann** also argued the cause for appellee.

Mr. Justice **Hughes** delivered the opinion of the court:

The United States sought by this suit to cancel certain deeds and mortgages of lands allotted to members of the Seminole tribe of Indians. The judgment of the circuit court, sustaining demurrers to the bill, was reversed by the circuit court of appeals. *United States v. Allen*, and similar cases, 103 C. C. A. 1, 179 Fed. 13.

The suit was brought on July 22, 1908, and embraced several conveyances to distinct grantees. This appeal is prosecuted—under § 3 of the act of June 25, 1910, chap. 408, 36 Stat. at L. 837—by only one of the defendants, the Deming Investment Company, of Oklahoma City.

The bill attacks mortgages made to this appellant, by others than the allottees, during the months of August, October, and De-

cember, 1906. It is alleged that they were attempted encumbrances of allotted lands of members of the Seminole tribe; that none of these lands had been patented to individuals at the time of the transactions; and that all contracts for the sale, disposition, and encumbrance of the lands prior to the date of patent were expressly declared by law to be void. Agreement of December 16, 1897, ratified by the act of July 1, 1898, chap. 542, 30 Stat. at L. 567.

In its brief the appellant states that "each conveyance only involves the surplus 473] allotment, and not the homestead, *of the particular allottee,"—a statement which we do not understand the government to challenge so far as the mortgages to the appellant are concerned. The bill does not allege that these mortgages, or any of them, embraced homestead lands.

Nor is it alleged in the bill that any of the allottees whose allotments had been mortgaged to the appellant were of Indian blood, but the lands are described as those which had been allotted to Seminole freedmen whose names appear upon the freedmen rolls of that tribe. Upon the allegations of the bill, these allottees, so far as they were adults, must be held to come within the provision of the act of April 21, 1904, chap. 1402 (33 Stat. at L. 189, 204), which removed all restrictions upon alienation by adult allottees not of Indian blood, with respect to their surplus lands; and, by virtue of the allotment, they had an interest in the allotted lands which, on the removal of the restriction, they were entitled to convey. *Goat v. United States*, decided this day [224 U. S. 458, ante, 841, 32 Sup. Ct. Rep. 544].

Minors were excepted from this enabling provision of the act of 1904; and in one instance the mortgage is described as covering a portion of the allotment of a minor freedman allottee, Ellen Sango, age seventeen. In this, as in other cases, the age of the allottees is given apparently as of the time when the mortgage was executed. The dates of the conveyances made by the allottees are not set forth.

Upon the authority of *Goat v. United States*, supra, the bill, with respect to the appellant, should be sustained so far as it relates to mortgages covering lands which had been conveyed by minor allottees, or by adult allottees before April 21, 1904; and it should be dismissed as to the surplus lands conveyed by adult freedmen allottees subsequent to that date. The judgment of the Circuit Court of Appeals is affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

*INTERSTATE COMMERCE COM-[474
MISSION, Plff. in Err.,
v.

UNITED STATES OF AMERICA EX REL.
HUMBOLDT STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 474-485.)

Territories — Alaska — interstate commerce act.

1. Alaska is a territory of the United States within the meaning of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), extending the provisions of the interstate commerce act to carriers engaged in the transportation of passengers or property from one state or territory of the United States to any other state or territory, or from one place in a territory to another place in the same territory.

[Matters as to territories, see *Territories*, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — railway rates in Alaska.

2. The authority of the Secretary of the Interior to review and modify railway rates in Alaska, conferred upon him by the act of May 14, 1898 (30 Stat. at L. 409, chap. 299, U. S. Comp. Stat. 1901, p. 1576), § 2, was superseded by the amendment of June 29, 1906, to the interstate commerce act, which gave to the Interstate Commerce Commission the power to prescribe rates, and extended the provisions of the act to intraterritorial commerce.

[Matters as to Interstate Commerce Commission, see *Interstate Commerce Commission*, in Digest Sup. Ct. 1908.]

Appeal — to commerce court.

3. An appeal will not lie to the commerce court to review the action of the Interstate Commerce Commission in refusing to entertain a petition, on the ground that the subject-matter was not within the scope of the Commission's powers.

Mandamus — to Interstate Commerce Commission.

4. Mandamus lies to compel the Interstate Commerce Commission to take jurisdiction of a petition alleging violations of the interstate commerce act by a railway company operating in Alaska, where the Commission refused to entertain the petition, upon the ground that Alaska was not a territory of the United States, and that the subject-matter of the petition was therefore not within the scope of the Commission's powers.

[For other cases, see *Mandamus*, II. d, in Digest Sup. Ct. 1908.]

[No. 859.]

NOTE.—As to when mandamus is the proper remedy—see notes to *United States ex rel. International Contracting Co. v. Lamont*, 39 L. ed. U. S. 160; *McCluny v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

Argued April 16, 1912. Decided April 29, 1912.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which reversed a judgment of the Supreme Court of the District, dismissing a mandamus proceeding directed to the Interstate Commerce Commission, and remanded the cause with directions to issue the writ. Affirmed.

See same case below, 37 App. D. C. 266. The facts are stated in the opinion.

Mr. **P. J. Farrell** argued the cause and filed a brief for plaintiff in error:

This court will consider itself bound by the interpretation of the Commission, which is the tribunal primarily charged with the enforcement of the provisions of the act to regulate commerce.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

Mandamus is not a proper proceeding in which to correct an error of law like that alleged in the petition.

Commissioner of Patents v. Whiteley (Holloway v. Whiteley) 4 Wall. 522, 18 L. ed. 335; United States ex rel. West v. Hitchcock, 19 App. D. C. 342; Decatur v. Paulding, 14 Pet. 497, 514, 516, 10 L. ed. 559, 567, 568; United States ex rel. Dunlap v. Black, 128 U. S. 40, 48, 32 L. ed. 354, 357, 9 Sup. Ct. Rep. 12; United States ex rel. Goodrich v. Guthrie, 17 How. 284, 15 L. ed. 102; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; United States ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814, 11 Sup. Ct. Rep. 197; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 319, 35 L. ed. 183, 187, 11 Sup. Ct. Rep. 607; United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 308, 39 L. ed. 160, 163, 11 Sup. Ct. Rep. 97; Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 655.

Mr. **Charles D. Drayton** argued the cause, and, with Messrs. John B. Daish and James Wickersham, filed a brief for defendant in error:

Alaska is a territory of the United States.

Grigsby v. United States, 43 Ct. Cl. 426; The Coquitlam v. United States, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; Rassmussen v. United States, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514; Nagle v. United States, 111 C. C. A. 621, 191 Fed. 141.

Where the intention of Congress is mani-

fest, it is settled beyond any question that even a later general act will repeal a prior special act in conflict therewith.

Louisville Water Co. v. Clark, 143 U. S. 1, 11, 36 L. ed. 55, 57, 12 Sup. Ct. Rep. 346; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 523, 28 L. ed. 1101, 5 Sup. Ct. Rep. 601; Cass v. Dillon, 2 Ohio St. 610; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 128, 43 L. ed. 639, 19 Sup. Ct. Rep. 327.

Mandamus lies if there be no other specific legal remedy.

Marbury v. Madison, 1 Cranch, 163, 2 L. ed. 69; Knox County v. Aspinwall, 24 How. 376, 16 L. ed. 735; United States v. Boutwell, 17 Wall. 604, 21 L. ed. 721; Taxing Dist. v. Loague, 129 U. S. 493, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; Re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Seymour v. United States, 10 App. D. C. 567.

This is a proper case for the issuance of the writ.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Garfield v. United States, 211 U. S. 249, 261, 262, 53 L. ed. 168, 174, 175, 29 Sup. Ct. Rep. 62.

The question of jurisdiction in a particular case, where the facts are admitted or found, is a pure question of law; and although the deciding body may have exercised a discretion, if there has been an abuse thereof, mandamus will lie to correct the error.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Re Christensen Engineering Co. 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A. (N.S.) 392, 31 Sup. Ct. Rep. 324; Ex parte Brown, 116 U. S. 401, 29 L. ed. 676, 6 Sup. Ct. Rep. 587; United States v. Fossatt, 21 How. 445, 16 L. ed. 186; Ex parte Russell, 13 Wall. 664, 20 L. ed. 632; Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; Roberts v. United States, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607.

The paramount and essential duty conspicuously enjoined upon the Commission is found in the mandatory language of § 12; "The Commission is hereby authorized and required to execute and enforce the provisions of this act."

The power given is the power to execute and enforce, not to legislate. The power

given is partly judicial, partly executive and administrative, but not legislative.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 501, 42 L. ed. 243, 253, 17 Sup. Ct. Rep. 896.

Any act in connection with a judicial or quasi-judicial proceeding for which there is no legal excuse is subject to the control of the courts by mandamus.

United States ex rel. West v. Hitchcock, 19 App. D. C. 333.

The relief now sought by relator, therefore, is that the Commission be required to perform two duties:

(1) Judicial, by assuming jurisdiction of relator's complaint and deciding the same upon its merits; the Commission heretofore having erred as a matter of law in refusing to entertain jurisdiction and decide.

(2) A duty which is administrative or ministerial, by requiring certain carriers to comply with the act by filing schedules of rates, fares, and charges.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; *Marbury v. Madison*, 1 Cranch, 163, 2 L. ed. 69; *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *Craig v. Leitensdorfer (Downs v. Hubbard)* 123 U. S. 189, 31 L. ed. 114, 8 Sup. Ct. Rep. 85.

Under the decision of the lower courts, relator's right to have his case entertained by the Commission and determined upon the merits was guaranteed to him under the act, and, as observed by Mr. Justice Field, delivering the opinion of this court in *Re Parker*, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708: "Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise."

The Commission is not an arm of the "judicial system." It is neither a Federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567. Hence, when the Commission has erred in a matter of statutory construction, it is for the courts to correct the error.

Upon the adoption by the court of the view that the act to regulate commerce applies in Alaska, the duty of the Commission thereupon immediately became "ministerial," is to be considered as having been such *ab initio*, and never to have been in any degree "discretionary."

Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559.

Power to make the order, and not the 56 L. ed.

mere expediency or wisdom of having made it, is the question.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

Congress has not attempted to delegate authority to the Commission "to make the law" for Alaska.

Marshall, Field & Co. v. Clark, 143 U. S. 649, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

Mr. Justice McKenna delivered the opinion of the court:

The ultimate question in the case is whether Alaska is a territory of the United States within the meaning of the interstate commerce act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision in *Re Jurisdiction Over Rail & Water Carriers Operating in Alaska*, 19 Inters. Com. Rep. 81.

The steamship company instituted an action in the supreme court of the District of Columbia, praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned, *herein-[478 after specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other territory, and over those carriers operating between the state of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The court of appeals, to which court the case was taken by the steamship company, entertained the same view of the interstate commerce act as that expressed by the supreme court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the supreme court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission, requiring it to take jurisdiction of said cause and proceed therein as by law required."

To this ruling the Interstate Commerce Commission prosecutes this writ of error.

The proceedings before the Commission were instituted by the steamship company filing a petition (No. 2,578) against the White Pass & Yukon Route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, to require said companies to file with the Commission, in the form prescribed by the act to regulate commerce, and to print and keep open for public inspection, schedules showing their rates and charges for transportation of passengers and property between 479]points in Alaska and *points in the Dominion of Canada and other places; to establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the state of Washington; to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; and to cease and desist from preventing by sundry devices the carriage of freights from being continuous from place of shipment to place of destination when such freight is originated or in any wise handled by the Humboldt Steamship Company.

The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was "without jurisdiction" to make the order sought by complainant," resting its ruling upon the authority of its decision in *Re Jurisdiction over Rail & Water Carriers Operating in Alaska*, supra.

Section 1 of the interstate commerce act provides that the provisions of the act "shall apply to any . . . common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, . . . or from any place in the United States through a foreign country to any other place in the United States. . . ." 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150.

The pivotal words are: "From one state or territory of the United States . . . 480]to any other state or *territory, . . .

or from one place in a territory to another place in the same territory," "territory" being the especially significant word.

If we may venture to reduce to a single proposition an elaborate discussion of elements and considerations, we may say that the Commission gave to the word "territory" the signification of "organized territory," the chief and determining feature of which is a local legislature, as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed.

To this signification and distinction the arguments of counsel are addressed, and much of the reasoning of the lower courts. That field, however, has been traversed by cases in this court, and it need not again be passed over. We may accept and apply the conclusions which have been reached and expressed.

In the case of *The Coquitlam v. United States*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117, the relation of the courts of Alaska to the Federal judicial system, and the applicability of certain statutes concerning the same, were decided, after a review of those statutes and those defining the status of Alaska.

By the 15th section of the act of March 3, 1891, creating the circuit court of appeals, it is provided that the circuit court of appeals, in cases in which the judgments of the circuit courts of appeal are made final by this act, shall have "the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories, as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. at L. 826, 830, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 554.

In execution of the duty imposed by that section, this *court, by an order promulgated May 11, 1891, assigned Alaska to the ninth judicial circuit.

Subsequent to this order, the United States brought a suit in admiralty in the district court of Alaska for the forfeiture of the steamer *Coquitlam* because of an alleged violation of the revenue laws. A decree was rendered for the United States, and an appeal was prosecuted to the circuit court of appeals for the ninth circuit. The United States disputed the jurisdiction of the court on the grounds: (1) that the district court of Alaska was not a district court within the meaning of the 6th section of the circuit court of appeals act; and (2) that the district court of Alaska was

not a supreme court of a territory, within the meaning of that act and the order of this court assigning Alaska to the ninth circuit.

The court certified the question to this court. We answered the first in the negative and the second in the affirmative. We said, through Mr. Justice Harlan, that the circuit court of appeals act was necessarily interpreted by this court as conferring appellate jurisdiction upon the circuit court of appeals when, by the "order of May 11 (139 U. S. 707, 34 L. ed. 1128b, 11 Sup. Ct. Rep. IV.), Alaska was assigned to the ninth circuit." And it was further said: "Alaska is one of the territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 [providing for a civil government for Alaska (23 Stat. at L. 24, chap. 53)] is the court of last resort within the limits of that territory. . . . No reason can be suggested why a territory of the United States, in which the court of last resort is called a supreme court, should be assigned to some circuit established by Congress, that does not apply with full force to the territory of Alaska, in which the court of last resort is designated as the district court of Alaska. The title of the territorial court is not so material as its character."

The case needs no comment. It clearly defines the *relation of Alaska to the rest of the United States. It was not a description of a definite area of land or "landed possession," but of a political unit, governing and being governed as such.

This view is reinforced by other cases. In *Binns v. United States*, 194 U. S. 486, 490, 48 L. ed. 1087, 1088, 24 Sup. Ct. Rep. 816, we said, through Mr. Justice Brewer, that we had held in *The Coquitlam v. United States* that "Alaska is one of the territories of the United States." And also: "Nor can it be doubted that it is an organized territory, for the act of May 17, 1884 (23 Stat. at L. 24, chap. 53), entitled, 'An Act Providing a Civil Government for Alaska,' provided 'that the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven [15 Stat. at L. 539], and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided.'"

In *Binns v. United States* the fact of a local legislature, or indeed any special form of government, was not considered as necessarily a feature of an organized territory. "It must be remembered," it was said, "that Congress, in the government of the territories as well as of the District of Columbia,

has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories." There is much more in that case which might be quoted as establishing that the status of Alaska is that of an organized territory. See also *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514.

It is contended further by the Commission that railways were first authorized to be constructed in Alaska by the act passed May 14, 1898 [30 Stat. at L. 409, chap. 299, U. S. Comp. Stat. 1901, p. 1576], and that § 2 of the act provided as follows:

"That all charges for the transportation of freight and passengers on railroads in the district of Alaska shall be *printed[483 and posted as required by § 6 of an act to regulate commerce, as amended on March 2, 1889 [25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158], and such rates shall be subject to revision and modification by the Secretary of the Interior."

The argument is that this provision brings into force § 6 of the interstate commerce act, and that, it is said, "under familiar rules of construction, excludes the application of every other section in that act," and that, besides, the provision that the rates on the Alaskan railroads should be subject to revision and modification by the Secretary of the Interior "negated the jurisdiction of the Interstate Commerce Commission, even if Alaska was apprehended to be within § 1 of the interstate commerce act."

These contentions do not seem to have been made in either the supreme court of the District or in the court of appeals. It was referred to very briefly as a circumstance to be considered in a majority report of the Interstate Commerce Commission in the ruling case, and more at length in the minority report. In the latter report important circumstances were pointed out. The interstate commerce law preceded that which gave authority to the Secretary of the Interior to revise and modify railroad rates, and the authority was confined to that special exercise; and, so far, it may be said to have amended the interstate commerce act. At that time it had been held in the *Maximum Rate Cases* (162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896, and 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45), that Congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum, or absolute. The power to prescribe a rate was conferred by the amendment of June 29, 1906, and that amend-

ment extended the provisions of the act for the first time to intraterritorial commerce. The amendment made the act completely comprehensive of the whole subject, and 484] *entirely superseded the minor authority which had been conferred upon the Secretary of the Interior. As said by the minority of the Commission: "There is no suggestion of doubt that the ends of justice require as much the application of the same principle and regulation in Alaska as in New Mexico or Arizona." The two latter at the time this was said were territories.

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity, to require it or him to proceed, the manner of doing so being left to his or its discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363, 55 L. ed. 252, 31 Sup. Ct. Rep. 324. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the act creating it. It may act of its own motion in certain instances,—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed? The answer of the Commission is, by "a reversal by the tribunal of appeal." And such a tribunal, it is intimated, is the United States commerce court.

But the proposition is plainly without 485] merit, even although *it be conceded, for the sake of argument, that the commerce court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an application was not entitled to relief. This is so because the action of the Commission refus-

ing to entertain a petition on the ground that its subject-matter was not within the scope of the powers conferred upon it would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand.

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to do so as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the court of appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in *Re Jurisdiction over Rail & Water Carriers* operating in Alaska, 19 Inters. Com. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

Judgment affirmed.

*WASHINGTON HOME FOR IN-CURABLES

v.

AMERICAN SECURITY & TRUST COMPANY, Garfield Memorial Hospital, Children's Hospital of the District of Columbia, and Lotta L. Frank.

BENJAMIN L. VERMILLION

v.

BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 486-490.)

Appeal — from District of Columbia courts — pending causes.

The right to a review in the Federal Supreme Court by writ of error or appeal of a judgment or decree of the court of appeals of the District of Columbia in a case in which the matter in dispute exceeds \$5,000 was not saved as to a cause pending in the court of appeals on January 1, 1912, when the Federal Judicial Code of March 3, 1911 (36 Stat. at L. 1087, chap. 231) took effect, by § 299 of that Code, providing

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to *United States ex rel. Taylor v. Taft*, 51 L. ed. U. S. 269.

that its repealing provisions "shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

[No. —.]

Submitted April 15, 1912. Decided April 29, 1912.

APPPLICATIONS for the allowance of an appeal from the Court of Appeals of the District of Columbia, and for a Writ of Error to that court, to review respectively a decree and a judgment in causes in which the matter in dispute exceeds \$5,000. Denied.

See same case below, 38 App. D. C. 421. The facts are stated in the opinion.

Messrs. **Henry B. F. Macfarland**, **Charles Cowles Tucker**, and **J. Miller Kenyon** submitted the cause for the Home for Incurables.

Messrs. **John A. Kratz, Jr.**, and **Joseph W. Cox** submitted the cause for Vermilion.

Where the words of a statute are plain, there is no room for construction.

Dewey v. United States, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224.

Where Congress in a subsequent act adopts the provisions of a former act, and in the main its language, it must be presumed that Congress intended the provisions of the subsequent law to accomplish the same thing and to have the same force and effect as the earlier law. Especially is this so where the courts have construed the earlier law, before the enactment of the subsequent law, to be in harmony with the plain meaning of the words employed.

Bechtel v. United States, 101 U. S. 597, 25 L. ed. 1019; May v. Logan County, 30 Fed. 250.

Mr. Justice Holmes delivered the opinion of the court:

These are applications for the allowance of an appeal and writ of error, respectively. The cases come before the court under the 56 L. ed.

same circumstances as the application for a writ of error, just decided. American Secur. & T. Co. v. District of Columbia [224 U. S. 491, post, 856, 32 Sup. Ct. Rep. 553.]

The first named is a bill in equity that was pending in the court of appeals on January 1, 1912, and decided on March 4, 1912. The matter in dispute in both, exclusive of costs, exceeds the sum of \$5,000. The law before the enactment of the Judicial Code of March 3, 1911, chap. 231, 36 Stat. at L. 1087, U. S. Comp. Stat. Supp. 1911, p. 128, allowed a writ of error or appeal in such cases (act of February 9, 1893, chap. 74, § 8, 27 Stat. at L. 436, U. S. Comp. Stat. 1901, p. 573), and the applicants contend that the appeal and writ of error are rights saved by § 299 of the Code. That section is as follows: "The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within *the same time, [490 and with the same effect, as if said repeal or amendments had not been made." This act took effect when this suit was pending in the court of appeals, on January 1, 1912.

The purpose of the act in the matter of appeals from the court of appeals of the District was to make a substantial change and to do away with them except in classes of cases of which this is not one. There seems to be little if any more reason for preserving a further appeal in cases then before the court of appeals than there is in those in which no writ had been sued out, but the cause of action had accrued before January 1, 1912, which is nothing at all. It must appear clearly, therefore, that this case is saved, or it will fall under the general rule. We find no clear expression of such intent. The general provision that the repeal shall not affect any right or suit is ambiguous, and is qualified and explained by the words, "including those pending on appeal," etc., which suggest that but for them appeals already taken would have fallen. Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231. If express words were thought necessary to save pending appeals, a fortiori such words were needed to save appeals not yet taken, and no such words were used. The first part of the section, declaring what shall not hap-

pen, is elucidated by the antithetical statement, in the last part, of what shall take place. We gather from that that all suits upon causes of action that arose before January 1 stand alike. We cannot suppose that a suit not yet begun can be taken to this court on the ground that a sum of more than \$5,000 is involved, and we are of opinion that the applicant makes no better case. We agree with the court of appeals that the act saves jurisdiction when an appeal has been taken, but does not save an appeal for all suits in causes of action accrued before this year.

Leave to appeal and writ of error denied.

**491] *AMERICAN SECURITY & TRUST
COMPANY et al.,
v.
COMMISSIONERS OF THE DISTRICT
OF COLUMBIA.**

(See S. C. Reporter's ed. 491-495.)

**Appeal — from District of Columbia
courts — construction of Federal law.**

Congressional enactments having general application throughout the United States, and not the purely local laws of the District of Columbia, are what are meant by the provision of the Federal Judicial Code, of March 3, 1911 (36 Stat. at L. 1087, chap. 231), § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District in cases in which the construction of "any law of the United States" is drawn in question by the defendant.

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

[No. —.]

Submitted April 15, 1912. Decided April 29, 1912.

PETITION for a Writ of Error to the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, confirming an assessment in a street extension proceeding. Denied.

See same case below, 38 App. D. C. 32.

The facts are stated in the opinion.

Mr. William G. Johnson submitted the cause for the American Security & Trust Company et al.:

The words "any law of the United States" embrace the statutes the construction of which was drawn in question in this case.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

Century Dict. "Any;" United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; The Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 15, 20 L. ed. 272, 276.

The distinction made by the court of appeals in its opinion, between general and local statutes, is, moreover, opposed to the decision of this court.

Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

Mr. Justice Holmes delivered the opinion of the court:

This is an application for a writ of error to the court of appeals of the District of Columbia under the new Judicial Code. Act of March 3, 1911, chap. 231. 36 Stat. at L. 1087, U. S. Comp. Stat. Supp. 1911, p. 128. The court of appeals denied the writ. Thereupon application was made to the Chief Justice. He referred it to the court. Briefs were called for and one was submitted by the applicants. It now is to be decided whether the writ should be allowed.

By § 250 of the Code any final judgment or decree of the court of appeals may be re-examined "in the following cases: . . . Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant." This is the clause relied upon. The case was a suit for the condemnation of land, brought by the commissioners under a special act of February 6, 1909, chap. 75, 35 Stat. [494 at L. 597, for the extension of New York avenue. By that act the procedure was to follow subchapter 1 of chapter 15 of the District Code, which provides, among other things, for the separate assessment of benefits. Act of March 3, 1901, chap. 854. 31 Stat. at L. 1189, 1266. The jury were instructed that, by the extension of the avenue, they were to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare. The applicants contended that, as there was no present provision for grading, paving, laying water mains or sewers, or otherwise opening the avenue to traffic, any advantage that would accrue from such improvements, if made, must be disregarded; and so they say that they drew the construction of the special act and perhaps of the Code in question, and that these were laws of the United States.

We do not stop to consider whether any question of construction properly can be said to have been raised, rather than a question of general law in the application of words that were colorless so far as the point in controversy was concerned. It might not be just to assume that the gen-

eral averment of the application was not justified by exceptions more clearly turning on the construction of the local laws than the example given in the brief. The ground on which the writ was refused by the court of appeals was that the words quoted from § 250 should not be construed to apply to the purely local laws of the District, and with that view we agree.

Of course there is no doubt that the special act of Congress was, in one sense, a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: "Cases involving the constitutionality of any law of the United States." *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. But it needs no authority to show that the same phrase may have different meanings in different connections. 495] *Some reasons for strict construction apply here. We are entirely convinced that Congress intended to effect a substantial relief to this court from indiscriminate appeals where a sum above \$5,000 was involved, and to that end repealed the former act. See *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 179, 37 L. ed. 1041, 1043, 14 Sup. Ct. Rep. 63; *Cochran v. Montgomery County*, 199 U. S. 260, 272, 273, 50 L. ed. 182, 188, 26 Sup. Ct. Rep. 58, 4 Ann. Cas. 451. But all cases in the District arise under acts of Congress, and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants, the appellate jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result.

A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; we may refer further to *Cochran v. Montgomery County*, *ubi supra*. In the case at bar, if the words "construction of any law of the United States" are confined to the construction of laws having general application throughout the United States, the jurisdiction given to this court by § 250 is confined to what naturally and properly belongs to it. If they are construed the other way, it would have been less arbitrary to provide that every question of law could be taken up. That they were not to be understood as the applicants contend is to be inferred not only from the sense of the thing, but from clause first: "In cases where the juris-

diction of the trial court is in issue," with provision for certifying that question alone. It is difficult to imagine a case in which the jurisdiction of the trial court is in issue where the construction of a special law of the United States would not be drawn in question.

Writ of error denied.

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*HERNDON-CARTER COMPANY, [496
Appt.,
v.

JAMES N. NORRIS, SON & COMPANY

(See S. C. Reporter's ed. 496-503.)

Appeal — from circuit court — jurisdiction below — service of process.

1. A decree of a Federal circuit court sustaining a plea to the jurisdiction may be brought to the Federal Supreme Court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, by direct appeal, where the question presented involves issues of fact as to whether the corporate defendant was doing business in the state, and whether the person attempted to be served as agent was such at that time.

[For other cases, see Appeal and Error, 908-911, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — jurisdiction below — certificate.

2. A decree showing dismissal for want of jurisdiction only takes the place of the certificate required by the act of March 3, 1891, § 5, governing a direct review in the Federal Supreme Court of decrees of the circuit courts.

[For other cases, see Appeal and Error, 919-937, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — time.

3. A direct appeal from a Federal circuit court to the Supreme Court in a case in which the lack of a certificate of jurisdiction is supplied by the decree which shows dismissal for want of jurisdiction only may be perfected after the term, if

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333; and *B. Altman & Co. v. United States*, post, 894.

On practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

As to service of process upon foreign corporations—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L.R.A. 490; *Eldred v. American Palace-Car Co.* 45 C. C. A. 3; and *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.

As to who is managing agent of foreign corporation for purposes of service of process—see note to *Federal Betterment Co. v. Reeves*, 4 L.R.A. (N.S.) 460.

within two years from the entry of the decree.

[For other cases, see Appeal and Error, 2545-2558, in Digest Sup. Ct. 1908.]

Writ and process — service on foreign corporation — local agent.

4. Service of process upon a foreign corporation should not be quashed on the theory that when the attempted service was made the person served was not the corporation's agent, where the decided preponderance of the testimony is to the effect that, notwithstanding the prior formation of a partnership between him and certain of the officers of the corporation, which is claimed to have terminated his agency, he still remained the corporation's local managing agent, and continued doing business for it in the state.

[For other cases, see Writ and Process, 58-66, in Digest Sup. Ct. 1908.]

[No. 923.]

Submitted April 1, 1912. Decided April 29, 1912.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree sustaining a plea to the jurisdiction in a suit against a foreign corporation. Reversed.

The facts are stated in the opinion.

Mr. Helm Bruce submitted the cause for appellant.

Messrs. John H. Chandler and William B. Fleming submitted the cause for appellee.

Mr. Justice Day delivered the opinion of the court:

In this case a suit was brought by the Herndon-Carter Company, a corporation of the state of Kentucky, against James N. Norris, Son & Company, a corporation of the state of New York. The bill of complaint sought an accounting and settlement of transactions between the parties, growing out of shipments of poultry from the Kentucky corporation to the New York Corporation, sold by the latter on commission. A subpoena was issued and served on March 10, 1911, upon James N. Norris, Son & Company by delivering a copy to W. J. Adams, as manager and chief agent, and the highest officer of the company in the district. The defendant company entered a special appearance, and filed an objection and plea to the jurisdiction, setting up that it was a corporation of the state of New York; that since December, 1904, it had not had any place of business in the state of Kentucky, and had not conducted any business in that state; that since that time it had had no agent in the state of Kentucky; and that W. J. Adams was not, at

the time of the service of the writ, the manager and officer or agent of the defendant. The defendant averred further that for a little more than two years before the 1st of January, 1905, Adams was employed by it, and acted as its agent in Kentucky in the purchase and shipment of poultry and produce, but that, at the end of the year 1904, he severed his connection with defendant, and ceased to be its agent for any purpose whatever; that on January 1, 1905, Adams, James N. Norris, and William H. Norris formed a partnership, in which Adams had an one-half interest and James N. *Norris and William H. [498 Norris each a one-quarter interest, and that since the 1st of January, 1905, the partnership had conducted the business of buyers and shippers of poultry, butter, and eggs in Louisville and other parts of Kentucky.

Upon testimony, to be hereinafter referred to, the circuit court heard the parties upon the issues made by the plea to the jurisdiction and replication thereto, and concluded that Adams was not the agent at the time of the attempted service upon him as such, and that James N. Norris, Son & Company was not then doing business in the state of Kentucky.

The case is brought directly here under § 5 of the circuit court of appeals act of March 3, 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.] It is evident from a statement of the question made that it only involves issues of fact as to whether the defendant company was doing business in Kentucky, and whether Adams was its agent at the time of the attempted service. It is well settled that a question of this character may be brought to this court by direct appeal under the circuit court of appeals act. *Remington v. Central P. R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 256, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

The appellee objects that the statutory requirement that the question of jurisdiction only shall be certified to this court was not complied with, and therefore the case should be dismissed. The record, however, discloses that the case was dismissed for the want of jurisdiction, and for that reason only. Where the decree of dismissal is in such form, it is sufficient to take the place of a certificate, within the requirements of the act. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

It is further objected that, if the decree could be held to take the place of a cer-

tificate, the present appeal was not taken at the term during which the case was decided and *the decree of dismissal entered. The record shows that an appeal was taken to the circuit court of appeals from the decree of dismissal entered at the March term, 1911, of the circuit court. It was there dismissed, and at the October term, 1911, another appeal was allowed from the circuit court directly to this court. This court has held that the jurisdictional certificate must be issued during the term at which the question is decided. *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185. It has also been held that the certificate being supplied by a decree in due form, showing dismissal for want of jurisdiction only, the appeal may be perfected subsequently, within two years, as are other appeals. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* supra.

The appellee further contends that the record shows two decrees or orders,—an order quashing the service of summons, and, separately, a decree of dismissal for want of jurisdiction,—and this is said to be shown because the opinion of the court, sent up with the record, states the decision upon the question of quashing service of summons to have been first made. An inspection of the record shows but one final order or decree, which, at the same time, quashes the service of summons and dismisses the case for want of jurisdiction, and that is the decree appealed from, and which brings to this court the question of jurisdiction of the defendant.

It has frequently been held in this court that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the state of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldrey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513. We are therefore brought to review the correctness of the decision of the circuit court, holding that James N. Norris, Son & Company was not doing business in the 500] *state of Kentucky, and that Adams was not its agent at the time of the attempted service.

The substance of the plea to the jurisdiction, already indicated, is that, while Adams had previously been the agent of the defendant, he ceased to be such on the 1st of January, 1905, when the copartnership was formed between James N. Norris and

William H. Norris, officers of the defendant company, and Adams, and that thereafter he ceased to represent the corporation in Kentucky, and it ceased to do business in that state. To support this plea the defendant offered the affidavits of James N. Norris and William H. Norris to the effect that after January 1, 1905, the corporation did no business in Kentucky, and that the partnership then formed thereafter carried on the business in that state under the name of James N. Norris, Son & Company. The testimony of the bookkeeper was taken. She testified that she had been in the employ of James N. Norris, Son & Company for some time prior to January 1, 1905, and that at that date a change was made owing to the formation of the partnership. She further testified that the profits were divided on the books, but no settlements were made while she was with the firm; that she drew no checks for the distribution of the profits, and that there was no such distribution while she was with the firm, which was until December, 1908; that the books did not show the individual accounts of the various members of the firm; that Mr. Adams had an individual account, but she, the bookkeeper, did not keep it, Mr. Adams keeping it himself; that Mr. Adams was paid a salary, and that statements were sent to New York, giving the condition of the business. Mr. Adams was called as a witness and testified that he worked for the New York corporation prior to January 1, 1905, when the partnership was formed, and that since that time he had no connection with the New York company in any way, and was not, on the 9th of *March, 1911, its agent. Upon cross-[501 examination he testified that after January 1, 1905, and until the date of his examination as a witness, his relations to the house of James N. Norris, Son & Company had been the same, and that his relations to the New York corporation had not changed in any way since February, 1905.

To meet this testimony the complainant offered testimony tending to show that James N. Norris, Son & Company was sued in the Jefferson circuit court of Kentucky as a corporation of the state of New Jersey. The corporation appeared and answered that it was organized under the laws of New York, admitted that it executed and delivered a certain letter attached to plaintiff's petition, and marked "Exhibit A," dated June 25, 1907, the letter being written from Louisville, Kentucky, signed James N. Norris, Son & Company, by W. J. Adams, manager. In that action an affidavit for a continuance was filed on April 17, 1908, in which Adams deposed that the defendant, James N. Norris,

Son & Company, was a corporation of New York, and that deponent was the manager of its Louisville office. On April 23, 1903, an amended answer was filed, which Adams verified, making oath that he was the local manager of James N. Norris, Son & Company. In the course of the action defendant took and filed a deposition in which the witness testified that he was the manager of James N. Norris, Son & Company at Bryan, Ohio; that in 1907 he lived in Louisville, Kentucky, and that Adams was then the manager of the Louisville district.

In another suit against James N. Norris, Son & Company, Inc., an answer was filed by W. J. Adams on December 12, 1905, and in verifying which Adams made oath that he was then, and at the time mentioned in the answer had been, the agent of the defendant in Kentucky, and had sole charge of its business in Jefferson county.

In an action brought by the corporation 502] in a magistrate's *court in Kentucky, certain dray tickets on a printed form were introduced in evidence, which showed them to be the tickets of James N. Norris, Son & Company, 135 E. Jefferson Street, Louisville, Kentucky, and that J. N. Norris was president, W. H. Norris, vice president and treasurer, and W. J. Adams, manager, the tickets being dated November 20, 1908, and January 1 and 4, 1909.

Letters were introduced in evidence in which the defendant company referred the plaintiff company to Mr. Adams for a settlement of differences. On July 7, 1909, the defendant company wrote to the plaintiff company as follows:

The Herndon-Carter Company,
Louisville, Ky.

Gentlemen:—

I am just in receipt of your several letters in which you call attention to the unpleasantness you are having with our house in Louisville.

Now, I would like to make myself plain in this matter. As I have always stated to you and everyone else, there is never any good in fighting, but, on the contrary, lots of money lost and harm done. Our Mr. Adams, who runs our house in Louisville, has a certain interest in the profits, and it would be pretty hard for me to say that he shouldn't do this or that, which, in his judgment, curtails his profits.

Examining and considering the evidence tending to show that Adams, after the formation of the alleged partnership on January 1, 1905, continued to represent the defendant company in Louisville, we are forced to the conclusion that the decided preponderance of the evidence supports the

complainant's contention that Adams was the authorized managing agent of the defendant company in Kentucky, and doing business for it in that state.

The learned judge of the circuit court reached the contrary conclusion, and his opinion is justly entitled to great weight; but it seems to proceed upon the theory that the testimony did not show the continuance of the *agency down to March[503 10, 1911, the time of the service of the subpoena. We think the testimony clearly shows that the relation of Adams to the defendant company was the same at that time as it had been when the various transactions, to which we have referred, were taking place in the years 1905 and the following. There could hardly be stronger testimony than the defendant's own letter of July 7, 1909, in which it is distinctly stated that "Mr. Adams, who runs our house in Louisville, has a certain interest in the profits," etc.

Reaching this conclusion, we are constrained to hold that the court below erred in quashing the return to the subpoena and in dismissing the case, and therefore the judgment must be reversed and the case remanded, with directions to overrule the order quashing the return and to set aside the decree denying the jurisdiction of the court.

Reversed.

GULF, COLORADO, & SANTA FE RAIL-
WAY COMPANY, Plff. in Err.,

v.

W. R. DENNIS.

(See S. C. Reporter's ed. 503-509.)

Error to state court — scope of review — non-Federal question — changed condition.

1. The exercise of the appellate jurisdiction of the Federal Supreme Court over state courts extends to the inquiry whether, by some intervening event, the Federal questions presented have ceased to be material to the right disposition of the cause, and to the disposition of the cause in the light of that event.

[Scope of review on error to state courts, see Appeal and Error, 2070-2256, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal question — changed condition.

2. The rule which ordinarily would confine the scope of review in the Federal Supreme Court on a writ of error to an in-

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Doekery, 63 L.R.A. 571.

ferior state court, presenting questions of the validity, under the Federal Constitution, of a state statute under which an attorneys' fee was awarded to the successful plaintiff below, to the consideration and determination of the Federal question, does not preclude it from recognizing the changed situation produced by a decision of the highest state court pending the writ of error, by which the statute was adjudged invalid because the subject was not sufficiently expressed in the title, and from reversing the judgment so that the inferior state court may apply the decision of the highest state court by awarding a new judgment in conformity therewith.

[Scope of review on error to state courts, see Appeal and Error, 2070-2256, in Digest Sup. Ct. 1908.]

[No. 203.]

Submitted March 6, 1912. Decided April 29, 1912.

IN ERROR to the County Court of Milam County, State of Texas, to review a judgment awarding an attorneys' fee to the successful plaintiff in an action to recover damages for the killing of live stock by a railway company. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. J. W. Terry, Gardiner Lathrop, A. H. Culwell, A. B. Browne, Alexander Britton, and Evans Browne submitted the cause for plaintiff in error.

No counsel for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover damages from a railway company for the killing of a cow by one of its trains in Milam county, Texas. The case originated in a justice's court, and was carried by appeal to the county court, where the plaintiff obtained a judgment for \$75 as damages and \$20 as attorneys' fee. The attorneys' fee was awarded under a statute of the state (Laws of 1909, chap. 47) which the company insisted was repugnant to the due process of law and equal protection clauses of the 14th Amendment to the Constitution of the United States. The insistence was overruled and the company sued out this writ of error, the county court being the highest court in the state to which the case could be carried, considering the amount involved.

505] *Since the case was brought here the statute under which the attorneys' fee was awarded has been adjudged invalid under the state Constitution, by the highest court of the state, because the subject to which it relates is not sufficiently expressed in its title. *Ft. Worth & D. C. R. Co. v. Loyd*, 56 L. ed.

— *Tex. Civ. App.* —, 132 S. W. 899. Thus, the judgment of the county court and the later decision of the highest court of the state are not in accord. The former proceeds upon the theory that the statute is valid under the state Constitution, while the latter conclusively establishes that it is invalid. In these circumstances, what is the duty of this court respecting this matter of local law? Must we proceed upon the same theory as did the county court, or must we give effect to the later decision of the highest court of the state? If we take the latter course, and reverse the judgment for the attorneys' fee, the question of the validity of the statute under the 14th Amendment need not be considered; otherwise, it must be. The intervening decision does not in itself annul the judgment for the fee or prevent its enforcement, and so does not render the Federal question a moot one, unless it operates to place upon us the duty of reversing the judgment without regard to the merits of that question.

The case is still pending. The right to the attorneys' fee is still *sub judice*. It depends entirely upon the statute, and the highest court of the state has pronounced the statute invalid under the state Constitution. How, then, can we sustain the right or give effect to the statute? Should we not in this situation apply the settled rule, that the decision of the highest court of a state, declaring a statute of the state valid or invalid under the state Constitution, must be accepted by this court? If this were a criminal case wherein the accused had been convicted of a violation of a state statute, alleged to be repugnant to the Constitution of the United States, would we not give effect to an intervening decision of the highest court of the state, declaring the [506] statute invalid under the state Constitution? These questions may not be directly answered by the prior decisions of this court, but their right solution is more than suggested by the well-recognized rule of decision that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered. *United States v. The Peggy*, 1 Cranch, 103, 110, 2 L. ed. 49, 51; *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101; *The Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239; *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807; *Hartung v. People*, 22 N. Y. 95; *Musgrove v. Vicksburg & N. R. Co.* 50 Miss. 677; *Montague v. State*, 54

Md. 481; *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 598; 19 Pac. 673; *Sheppard v. State*, 1 Tex. App. 522, 28 Am. Rep. 422; *Kenyon v. State*, 31 Tex. Crim. Rep. 13, 23 S. W. 191; *Cooley*, Const. Lim. 6th ed. 469; 2 *Sutherland*, Stat. Constr. 2d ed § 286. In the first of the cases cited it was said by Chief Justice Marshall:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws; and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

We think what was there said is, in principle, applicable here. For while, on a writ of error to a state court, our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question, it does not follow that where, pending the writ, a statute of the state or a decision of its highest judicial tribunal intervenes and put an end to the right which the judgment sustains, we should ignore the changed situation, and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision, or to set aside the judgment and remand the case so that the state court may do so. To do this is not to review, in any proper sense of the term, the decision of that court upon a non-Federal question, but only to give effect to a matter arising since its judgment, and bearing directly upon the right disposition of the case.

This view of the subject received practical recognition in the case of *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805. It was an action in a California court to recover half-pilotage fees allowed by a law of that state to a licensed port pilot whose services were tendered and declined. Objections of a Federal nature were interposed, but judgment was given for the plaintiff, and the case was then brought here. During its pendency in this court the legislature of the state passed a new statute, embodying the provisions of the prior law, with some modifications, and also in terms repealing it. The point was then made that the repealing clause terminated the right to recover, and therefore that the action

could no longer be maintained. And while the question whether the simultaneous reenactment and repeal of the prior law interrupted its continuity was a question of local law, it was fully considered, and the conclusion was reached that in practical operation and effect there was no repeal, but only a continuance of the prior law, with modifications not there material, thus leaving the right to recover and the Federal questions unaffected. The latter were then considered, and, being found untenable, the judgment was affirmed. In a dissenting opinion, having the approval of three members of the court, it was maintained that the new act abrogated the prior law, thereby putting an end to the right to recover, and that in consequence the judgment should be reversed, with a direction to dismiss the action. Thus, the entire court proceeded upon the theory that it was necessary to inquire whether the intervening statute put an end to the right to the fees in question, and, if so, to give effect to the statute accordingly.

Almost from the beginning it has been the settled rule in this court that when, pending a writ of error to a lower Federal court, and without the fault of the defendant in error, an event occurs which renders it impossible, if the case was decided in favor of the plaintiff in error, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the writ. And in *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639, it became necessary to consider whether this rule was applicable to a case brought here on a writ of error to a state court. The question was resolved in the affirmative, and it was said:

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County v. Glidden*, 113 U. S. 222, 225, 226, 28 L. ed. 981, 982, 5 Sup. Ct. Rep. 428; *Mills v. Green*, 159 U. S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132. The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a circuit court of the United States, on which the jurisdiction of this court extends to the whole case."

We conclude that in the exercise of our appellate jurisdiction over the courts of the several states we are not absolutely confined to the consideration and decision of the Federal questions presented, but, as

a necessary incident of that jurisdiction, are authorized to inquire whether, by some intervening event, those questions have ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event.

The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorneys' fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment, so that the state court may apply the decision by awarding a new judgment in conformity therewith.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

510] *STATE OF WASHINGTON EX REL. OREGON RAILROAD & NAVIGATION COMPANY, Plff. in Err.,
v.

H. A. FAIRCHILD, John C. Lawrence, and Jesse S. Jones, Railroad Commissioners of the State of Washington.

(See S. C. Reporter's ed. 510-533.)

Constitutional law — due process of law — notice and hearing — compulsory trackage connection.

1. An adequate opportunity to defend will not sustain, as affording due process of law, an order of a state railroad commission requiring trackage connections between competing railway companies for the interchange of business, if the order was arbitrary or unreasonable, and not justified by any public necessity.

[For other cases see Constitutional Law, 764-773, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — hearing — scope of judicial review.

2. Confining the scope of the judicial review of the reasonableness of an order of the state railroad commission requiring trackage connections between railway com-

panies for the interchange of business to the testimony which has been submitted to the commission, as is done by Wash. Laws 1907, chap. 226, does not take the property of the carriers without due process of law, where the statute provides for a "full hearing" before the commission, at which the carriers may show that the order asked for, if granted, will be unreasonable.

[For other cases, see Constitutional Law, 696-724, in Digest Sup. Ct. 1908.]

Error to state court — review of facts.

3. Whether or not as a matter of law, the facts proved show the existence of such a public necessity for trackage connections between competing railway companies for the interchange of business as authorizes a taking of property, is a question for consideration in the Federal Supreme Court on writ of error to a state court, in a case in which the order of a state railway commission requiring such connections is attacked as denying due process of law.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compulsory trackage connections.

4. The places and persons interested, the volume of business to be affected, and the saving in time and expense to the shipper, as against the cost and loss to the carrier, must be considered in determining the reasonableness of, and the public necessity for, an order of a state railroad commission requiring trackage connections at certain points between competing railway companies for the interchange of business, which is attacked as taking property without due process of law.

[For other cases, see Constitutional Law, 458-474, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compulsory trackage connections.

5. No public necessity is shown which will justify, under the due process of law clause of the Federal Constitution, an order of a state railroad commission requiring trackage connections at certain points between competing railway companies for the interchange of business, where the commission acted without any evidence of inadequate service, with no proof of public complaint or of a public demand, with no testimony that any freight had been offered in the past for shipment between those points, or that any such freight would be offered in the future, and with no proof as to the volume of business at any of these points, nor the amount of freight that would be routed over the track connections

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to **56 L. ed.**

Kuntz v. Sumption, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

On review of questions of fact on writ of error to a state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

if they were constructed, and with no testimony as to the probable revenue that would be derived from the use of the track connections, or of the saving in freight or otherwise that would result to the shippers. [For other cases, see Constitutional Law, 458-474, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compulsory trackage connections.

6. The insufficiency of the evidence before the state railroad commission to sustain, on the ground of public necessity, under the due process of law clause of the Federal Constitution, its order requiring trackage connections between competing railway companies at certain points for the interchange of business, cannot be supplied on judicial review by a presumption arising from the failure of the carrier to produce its records to disprove what had not been established, where the statute under which the commission acted confines the scope of the judicial review of the reasonableness of the order to the testimony which has been submitted to the commission. [For other cases, see Constitutional Law, 458-474, in Digest Sup. Ct. 1908.]

[No. 118.]

Argued December 18, 1911. Decided April 29, 1912.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Thurston County, in that state, dismissing a petition for the review of an order of the state railroad commission, requiring trackage connections between competing railway companies at certain points for the interchange of business. Reversed without prejudice to the institution of new proceedings.

See same case below, 52 Wash. 17, 100 Pac. 179.

Statement by Mr. Justice Lamar:

A statute of the state of Washington authorizes the railroad commission, upon complaint made, or on inquiry upon its own motion "after a full hearing . . . to order that additional trackage or sidings be constructed . . . and that additional connections be made."

In pursuance of this act, and by direction of the commission, the attorney general filed a complaint against the Oregon Railroad & Navigation Company, chartered under the laws of Oregon, the Northern Pacific Railway Company and the Spokane & Inland Railroad, praying for an order requiring them to connect their tracks at Pullman, Colfax, Garfield, Oakesdale, Rosalia, Waverly, Thorton, Farmington, Connell, and Palouse. The complaint averred that four of these towns were important

shipping points, and that at all of them there was a demand that cars should be transferred from one line to the *oth-[512 er, and a public necessity that track connection should be made between the roads at all these points. The Oregon Company filed an answer in which it denied that the towns named were important shipping points; denied that there was, or had ever been, any public demand for the interchange of business at any of the places, or that there was any public necessity for the connection.

At the hearing, evidence was introduced showing that the Spokane & Inland was an electric road not yet completed; that all the roads had the same gauge; that in three of the towns they crossed at grade; that in the others the tracks were generally on the same level, and separated by distances varying from a few feet up to 600 feet; that the connecting tracks would generally be on the right of way of the carriers, though in some instances it would be necessary to acquire other property by purchase or condemnation. There was evidence as to the price of switches and the cost per lineal foot of laying a track with two necessary connecting switches.

The principal witness on behalf of the state was an inspector of the commission, who testified that the three roads were competitors, and ran from Spokane through each of the towns named in the complaint; that wheat was the principal product of the country, and that it was shipped to Spokane or Portland, reached by each of the roads or their connections; that the main business of the towns named in the complaint was with Spokane; and that the business between local stations was small. From his testimony and a map it appears that, with the exception of Connell, all of the towns named lay in a strip about 50 miles long and 15 miles wide, one road on each side, with the Spokane running about half way between the other two; that the roads were generally parallel to each other, but by curves and branch lines reached these towns. In answer to specific inquiries he gave the route a car would take if shipped from named stations on one *line to named stations on another,[513 under present conditions; and said that if the connections were made and cars took that route, the distance would be shortened; and that if wheat, cattle, or other property was thus shipped to and from such stations there would be a saving in time and distance. He testified that he had no knowledge as to the amount of business done at any of the towns named, or that such shipments had been offered or would be made. He and the other witnesses on behalf of the commission testified that every pur-

pose would be served if there was a connection between the various roads at one of the points named, some of them thinking Garfield the best point and others that it should be at Oakesdale, from which, it was said, the tracks radiated like the spokes of a wheel. It appeared that the Oregon already connected with the Northern Pacific at Garfield. The inspector and other witnesses were not asked specifically as to all points, but in answer to inquiries testified, without contradiction, that there was no necessity for connecting the tracks at Farnington, Thornton, Colfax, Waverly, nor at Garfield or Oakesdale except as indicated above.

The witnesses for the carrier testified that a connection at Garfield would accommodate all transfers that might be offered; that there had been no demand at any of the towns for such transfers in the past, and that there was no necessity for making them.

Only one shipper was called as a witness. He testified that a connection at Oakesdale would serve all purposes, but gave no information as to the amount of his freight business, nor the saving that would result to him or others if the connection was put in. No merchants or shippers from any of the towns named in the complaint, or referred to in the evidence, were called. There was no proof as to the volume of business at any of these places, nor as to the amount of freight that would be routed over these track connections if they were constructed. 514] Nor was there any *testimony as to the probable revenue that would be derived from the use of the track connections, or of the saving in freight or otherwise that would result to shippers. The inspector of the commission testified that these connections would develop very little business.

After the conclusion of the evidence, the commission dismissed the complaint as to Rosalia and Palouse, where the crossings were not at grade, and made an order in which it found that the roads crossed at grade at two points and ran in close proximity to each other through all the other places; that there was a public necessity for track connection, the cost of which, at each point, was stated, varying from \$316 to \$1,460, and aggregating about \$7,000. It thereupon ordered that the companies should agree among themselves as to the particular places in said towns where the tracks should be laid, and how the expense should be divided, in default of which the commission would make a supplemental order designating the particular places where the connections should be made and the

proportion in which the expense should be borne by each company.

The Oregon Company, being dissatisfied with this order, filed in the superior court of Thurston county a petition for review, alleging the unconstitutionality of the statute under which the order had been made, and also attacking its reasonableness on the ground that "there was no evidence showing or tending to show that there was any public demand or public necessity for such track connection, or for the interchange of freight at either of said points in carload lots . . . or that any public convenience would be subserved;" but, on the contrary, that the only evidence offered tended to show that there was no public necessity, and that it would be obliged to acquire additional property, and to incur large expense to make the connection, without any public necessity, and be thereby deprived of its property without compensation *and without due process of law, in[515 violation of the Constitution of the United States.

This method of attacking the order by petition for review was in compliance with the provisions of the Washington statute which declared that "the order of the commission shall, of its own force, take effect and become operative twenty days after notice thereof has been given. . . . And any railroad or express company affected by the order of the commission, and deeming it to be contrary to the law, may institute proceedings in the superior court . . . and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Pending such review, if the court having jurisdiction shall be of the opinion that the order or requirement of the commission is unreasonable or unlawful, it may suspend the same . . . pending such litigation. . . . Said action of review shall be taken by the said railroad or express company within twenty days after notice of said order, and if said action of review is not taken within said time, then in all litigation thereafter arising between the state of Washington and said railroad or express company, or private parties and said railroad or express company, the said order shall be deemed final and conclusive. If, however, said action in review is instituted within said time, the said railroad or express company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the supreme court of the state of Washington, as in civil actions. . . . The action in review of such order, whether by writ of review or appeal or otherwise, shall be heard by the court without intervention of a jury. and

shall be heard and determined upon the evidence and exhibits introduced before the commission and certified to by it. . . ."

The bill of exceptions recites that on the hearing in the superior court, the Oregon 516] Company offered competent *and non-cumulative testimony in support of its contention on the issues between it and the commission, which, if received, would have tended to show that there was no public necessity for such track connections at either of the places; that no public convenience would be served by making them, and that the cost, instead of aggregating \$7,500, would be \$21,000 (the amount at each place being specified), besides the expense of acquiring additional land and franchises needed for the construction and operation of the tracks. The court rejected all this evidence on the ground that, under the statute, the petition for review must be determined on the testimony which had been submitted to the commission. After argument the petition was dismissed and the Oregon Company excepted. All of the evidence introduced before the commission, and attached as an exhibit to its answer, was duly incorporated in the bill of exceptions, which also contains a recital that the photographs and maps identified by one of the witnesses had not been forwarded by the commission, nor were they considered by the court. There was, however, no motion by the defendant for an order requiring such omitted papers to be sent up so as to complete the record. Neither did it appear that any motion was made before the commission to require a more definite statement of the location of the proposed tracks.

The judgment dismissing the petition was affirmed by the supreme court of the state. 52 Wash. 17, 100 Pac. 179. It held that the statute was valid; that it gave the defendant every opportunity to make its defense, and granted an adequate judicial review by which to test the validity of the order. In answer to the contention that the evidence showed that the order was unreasonable and amounted to a taking of property without public necessity, the court merely said: "As to the public necessity for the track connections, we are not pre- 517] pared to say that the *finding of the commission in that respect was not justified by the testimony." The cause was brought here by writ of error, in which it is contended that the Washington statute failed to furnish an adequate hearing or opportunity for judicial review, especially in prohibiting the submission to the court of competent evidence as to the unreasonableness of the order; and, further there was no evidence of a public necessity, and

that the order was void as taking property without due process of law.

Mr. Maxwell Evarts argued the cause, and, with Messrs. W. W. Cotton and Zera Snow, filed a brief for plaintiff in error:

All regulation of the business of common carriers, whether taking the form of a regulation of rates or the making of track connections, must be reasonable; and the question of the reasonableness or unreasonableness of all such attempted regulation is essentially a judicial question, which, if not permitted by the law under which it is undertaken, constitutes the taking of property without due process of law, and amounts to a denial of the equal protection of the law.

Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 697, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Louisiana & A. R. Co. v. State, 85 Ark. 18, 106 S. W. 960.

Section 3 of the railroad commission act of Washington, requiring cases to be heard by the courts only upon evidence taken before the commission and certified to by it, does not provide the necessary judicial review to constitute due process of law.

Davidson v. New Orleans, 96 U. S. 107, 24 L. ed. 620; Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 240, 41 L. ed. 986, 17 Sup. Ct. Rep. 581.

The railway commission law is unconstitutional because of the excessive penalties which follow a refusal to comply with the commission's orders, rendering a compliance necessary rather than resort to the courts for a decision as to the validity and reasonableness of the orders of the commission.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

There was no public necessity or public convenience to be subserved by the track

connections ordered; the order was an unreasonable and arbitrary exercise of bald power, and as such it constituted a taking of the property of the plaintiff in error without due process of law.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960.

When the question of the reasonableness of the regulation of a carrier is up for consideration, the evidence leading up to the regulation must be examined.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960.

Mr. W. V. Tanner, Attorney General of Washington, argued the cause, and, with Messrs. Walter P. Bell and S. H. Kelleran, filed a brief for defendants in error:

It is no violation of the 14th Amendment that a state statute permits the property of an individual to be taken from him in an eminent domain proceeding, wherein the value of that property is fixed by a board of commissioners, and the decision of the commissioners upon the question of value is final, leaving open to the court reviewing the proceeding only the inquiry whether an erroneous basis was adopted by the tryers in their appraisal, or other errors in their proceedings.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 695, 41 L. ed. 1168, 17 Sup. Ct. Rep. 718.

A state statute providing that benefits for street improvements may be assessed by the city council upon notice to the property owner, without any right of appeal to, or review by, the courts, does not violate the 14th Amendment.

Voigt v. Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397. See also Ross v. Wright County, 128 Iowa, 427, 1 L.R.A. (N.S.) 438, 104 N. W. 506; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

Due process is not necessarily judicial process.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 56 L. ed.

1040, 25 Sup. Ct. Rep. 644; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372.

Nor is the right of appeal essential to due process of law.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

The state legislature could not, if it would, deny to a railroad company, access to the Federal courts to set aside, by injunction or other appropriate procedure, a schedule of rates or a requirement of service or facilities which was so low, or otherwise so unreasonable, as to amount to confiscation of the property of the railroad.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The Washington act does not undertake to deprive the Federal courts of jurisdiction. It is true that if relief were sought in the Federal courts, the right of the court to review the order of the commission would be limited to an inquiry as to whether the rates were so low as to amount to confiscation.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

In order to determine the question as to whether the judicial review provided by the act in question satisfies the requirements of the 14th Amendment, it will be necessary to review the definitions of the term "due process of law," as used in that Amendment, and we confidently submit that after a consideration of those expressions of the courts, the courts will not hesitate to conclude that the act in question has not deprived and will not deprive the plaintiff in error of its property without due process of law.

Davidson v. New Orleans, 96 U. S. 107, 24 L. ed. 620; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Hurtado v. California, 110 U. S. 516-537, 28 L. ed. 232-239, 28 Sup. Ct. Rep. 111, 292; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230-236, 44 L. ed. 747-750, 20 Sup. Ct. Rep. 620; Iowa C. R. Co. v. Iowa, 160 U. S. 389-393, 40 L. ed. 467-469, 16 Sup. Ct. Rep. 344; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Hagar v. Recla-

mation Dist. No. 108, 111 U. S. 701-708, 28 L. ed. 569-572, 4 Sup. Ct. Rep. 663; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

1. The commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained 524] merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 236, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 416, 41 L. ed. 494, 17 Sup. Ct. Rep. 130. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336.

2. This was recognized by the supreme court of the state, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the superior court. Both of these rulings are assigned as error by the Oregon Company. It complains that the statute did not afford it the means of making a defense before the commission and yet required it to attack the

reasonableness of the order on such evidence as it might have been able to produce before the administrative body. If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere *form. The carrier must have the right[525 to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute, which declared that the commission, "after a full hearing," might require track connection. On such investigation the company could have objected to the sufficiency of the complaint, and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents, and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the commission, and the privilege of offering evidence on every matter material to the investigation.

3. The defendant insists, however, that, no matter how complete the right to be heard before the commission, the statute, having denied all other opportunity for testing the validity of the order in the state courts, furnished an utterly inadequate judicial review because, as the carrier could not anticipate what decision would be made, it was unjust to require it to produce evidence to show in advance the unreasonableness of an order the terms of which were not known. From this it argues that the statute was unconstitutional in so far as it prevented the court from receiving competent and noncumulative testimony tending to prove that there was no public necessity for making the track connection, and that the order was void.

This position would be true if the defendant had not been put on notice as to what order was asked for, and *then[526 given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points, and that at all of them there was a public necessity that the roads should be connected. The defendant denied each of these allegations. The hearing, both on the law and the facts, was necessarily limited

to that issue. There could have been no valid order which was broader than that claim. The defendant was charged with notice that if the allegations of the complaint as to necessity were established, the order could then be lawfully granted, unless there was also proof that the cost, in comparison with the receipts, or other fact, made it unjust to require the connections to be made. The carrier was therefore given the right both to meet the charge of public necessity, and also to establish any fact which would make it unjust to pass the order for which the complainant prayed. The act further provided that after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the superior court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the commission, it was obliged to weigh and consider the testimony, and to give full effect to what was established by the evidence, since it acted judicially, "under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties." *Louisville & N. R. Co. v. Kentucky*, 115 U. S. 334, 29 L. ed. 417, 6 Sup. Ct. Rep. 57.

4. Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order, and having adopted the statutory method of review, this company cannot complain. It had the 527]right to offer all competent *testimony before the commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review because additional testimony could not be submitted to the chancellor. The statute enlarges what this court has recognized to be proper practice in equity cases attacking such regulations. There the hearing is *de novo*, and there is no prohibition in equity against offering all competent evidence to prove that the order was unreasonable. But in *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 196, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, it was said: "We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad company as should lead them to with-

hold the larger part of their evidence from the Commission, and first adduce it in the circuit court. . . . The theory of the act evidently is, as shown by the provision, that the findings of the Commission shall be regarded as *prima facie* evidence that the facts of the case are to be disclosed before the Commission." See also *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 238, 239, 40 L. ed. 954, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 649.

There is no claim here that the evidence rejected by the superior court was newly discovered, or that its materiality could not have been anticipated, or that for any reason the defendant had been prevented from submitting to the commission the testimony it offered in court to show that the cost would be \$21,000 instead of \$7,500. Nor was there any allegation of surprise, mistake, or other extraordinary fact requiring the admission of such evidence in order to preserve the right guaranteed by the Constitution. There is therefore no call for a decision as *to whether, under those[528 circumstances, such evidence should be admitted, or the case remanded, so that the commission might consider material and probably controlling testimony which the carrier, without fault on its part, had failed to submit on the first hearing.

5. If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing. That being so, it leaves for consideration the contention that, as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact, but, as said in *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* 223 U. S. 591, ante, 565, 32 Sup. Ct. Rep. 320, from an inspection of the "entire record including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter." *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, ante, 594, 32 Sup. Ct. Rep. 389; *Graham v. Gill*, 223 U. S. 643, ante, 586, 32 Sup. Ct. Rep. 396. Here the question presented is whether, as matter of law, the facts proved show the existence of such a public necessity as authorizes a taking of property.

6. Since the decision in *Wisconsin, M. &*

P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town, and country, regardless of the amount of business to be done, *or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 174, 44 L. ed. 420, 20 Sup. Ct. Rep. 336), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though "the furnishing of such necessary facilities may occasion an incidental pecuniary loss." But even then the matter of expense is "an important criteria to be taken into view in determining the reasonableness of the order." Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 27, 51 L. ed. 945, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined. This was done in Wisconsin, M. & P. R. Co. v. Jacobson, in which for the first time, it was decided that a state commission might compel two competing interstate roads to connect their tracks.

It appeared on an examination of the facts in that case that on one of the lines there was an immense supply of wood, for which there was a great demand at points on the other, where there was none, and

that if the connecting track was installed there would be a saving in time and *freight on this large volume of business. It also appeared that many cattle were raised on one line, for which there were important markets on the other, and that without the track connection these cattle would have to be hauled over a much longer route, with a resulting loss in weight and value. The advantage to the public was so great that the order requiring the track connection was sustained, in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise have received for the longer haul.

But the court said that—

"in so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connection between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute or a regulation provided for therein is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity or the reverse of legislative action."

7. The complaint in this case was framed in recognition of this principle, and alleged that several of the towns were important shipping points, and that at all of them there was a public demand and a public necessity for track connection between the lines of the several roads. As there is no presumption that connection should be made merely because the roads are in proximity to each other, the burden was on the commission. If no evidence whatever had been offered, the order could not have been granted; or, *if granted, would necessarily have been set aside by the court on the hearing of the petition for review, because there was no proof of the fact on which only the order could issue taking the defendant's property. The same result must have followed if the testimony that was so submitted to the commission was insufficient to establish the existence of the public necessity alleged to exist. For, even if, under the statute, the burden was cast on the defendant when the petition for review came on to be heard, the company could, in view of the limited character of the proceedings permitted, successfully carry that burden by showing to the

court that there was before the commission a lack of evidence to prove the existence of a public necessity. That it was bound to sustain the allegations of the complaint seems to have been recognized by that body, and witnesses in its behalf were examined as to the cost of laying the track, and also on the subject of the public demand and necessity. It was testified, however, without contradiction, that there was no necessity for connection at Waverly, Thornton, Farmington, or Colfax. They were not asked specifically as to the connections at all of the other towns, though there was proof of the general proposition that if the connections were laid, it would shorten the haul between given points in case goods were routed over these tracks. But as to the essential elements of a public necessity, there was nothing at all comparable to what was established in the Jacobson Case.

There the evidence of necessity was clear and convincing, it being shown that a large volume of business would be served and a great saving in rates effected and loss in value of cattle prevented if the two roads were united by a switch track. Here there is no evidence of inadequate service, no proof of public complaint or of a public demand, and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there 532] any evidence whatever as to the volume of freight that would use these tracks, or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, whether that expense be \$7,500, as found by the Commission, or \$21,000, as claimed by the carrier.

Neither do the undisputed facts establish what appeared in *Minnesota & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396, where, under the statute, the order was *prima facie* binding in so far as it required the company to build stations in towns and villages. The court found that this *prima facie* case had not been overcome, and that at the town named there was no station; that, in view of the increase in population since a prior refusal to grant the order, "it was necessary for the accommodation of the citizens of the town and vicinity, the public at large, and the public necessity required that the company should build and maintain a station house." But here there was no evidence whatever warranting a finding that there was any public necessity for the track connections.

8. The chairman of the commission dissented as to so much of the order as required connections to be made at Thornton, Waverly, Farmington, and Pullman, on 56 L. ed.

the ground that there was no evidence of any public necessity therefor at those points, and it would involve expense which would ultimately have to be paid by the people. And it is practically conceded here that the proof was insufficient,—the attorney general in his brief filed in this case saying that "it must be admitted that the testimony introduced before the commission as to the character of the traffic, and the nature of the traffic movement in the territory served by the lines of railway, is not of a very satisfactory or definite character." He argues, however, that there is nothing to show that the commission acted arbitrarily, and that the carriers ought to have produced their records for the purpose of showing that there was no need for physical connection at the place where the *commis-[533 sion was seeking to have been installed. That might have been true if the evidence was peculiarly within their knowledge, or if the company had been permitted to file a bill in equity attacking a final order in the usual and ordinary manner, without being restricted by statute as to the evidence that might be considered by the court. In this case the witnesses for the railroad confirmed what had been stated by those for the commission, and testified that there had been no demand for track connections, and that there was no necessity to put them in. The company was not permitted to offer additional testimony for the purpose of establishing its defense, since the statute declared that the validity of the order was to be determined by the court on what had been proved before the commission. The burden was on the commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the commission could not, under this statute, be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established.

A careful examination of this record fails to show what, if any, business would be routed over these connections, or what saving would come to the public if they were constructed. There is nothing by which to compare the advantage to the public with the expense to the defendant, and nothing to show that, within the meaning of the law, there is such public necessity as to justify an order taking property from the company. The judgment is therefore reversed without prejudice to the power of the commission to institute new proceedings.

534] *MARY NIELSEN, Administratrix,
etc., and in Her Own Right, Appt.,

v.

ALBERT STEINFELD et al.

(See S. C. Reporter's ed. 534-541.)

**Appeal — from territorial supreme court
— statement of fact.**

1. A territorial supreme court does not discharge its duty under the act of April 7, 1874 (18 Stat. at L. 27, chap. 80), to make an adequate statement of facts in the nature of a special verdict, where it merely hypothetically assumes the findings of the trial court to be correct, and upon such mere hypothesis bases a judgment which reverses a decree for complainant below and remands the cause, with a direction to enter a final decree against such complainant.

[For other cases, see Appeal and Error, V. o., in Digest Sup. Ct. 1908.]

Appeal — from territorial supreme court — absence of statement of facts — rendering proper judgment.

2. The hypothetical assumption by a territorial supreme court of the correctness of the findings of the trial court, and the basing upon such mere hypothesis of a judgment which reversed a decree in favor of complainant below, and remanded the cause, with a direction to enter a final decree against such complainant, instead of discharging its duty under the act of April 7, 1874, to make a statement of the facts in the nature of a special verdict, calls for a reversal in the Federal Supreme Court, rather than the usual affirmance, where such action arose from the court's misconception as to the nature and extent of its power in discharging its statutory duty, and where the initial action by which the error was committed was ambiguously manifested, and may have misled the unsuccessful party, and the final order which made clear the court's intent and misconception was not entered until months after the appeal to the Federal Supreme Court had been taken.

[For other cases, see Appeal and Error, IX. e., in Digest Sup. Ct. 1908.]

[No. 218.]

Argued April 17 and 18, 1912. Decided
May 13, 1912.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which reversed a decree of the District Court of Pima County, in that territory, in favor of complainant in a suit to set aside a transfer of stock, with directions to enter a final decree in favor of defendants. Reversed and remanded for further proceedings.

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

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See same case below, 12 Ariz. 381, 100 Pac. 1094.

The facts are stated in the opinion.

Mr. Edwin F. Jones argued the cause, and Mr. William Herring filed a brief for appellant.

Mr. Eugene S. Ives argued the cause and filed a brief for appellees.

Mr. Chief Justice White delivered the opinion of the court:

Mary Nielsen, individually and as administratrix of the estate of her deceased husband, Carl S. Nielsen, commenced this action in 1905 in the district court of *Pima county, in the then territory [535 of Arizona. Albert Steinfeld and the Nielsen Mining & Smelting Company, now the Silver Bell Copper Company, were named as defendants. The relief sought was the setting aside of a transfer made by Nielsen to Steinfeld of 300 shares of stock in the Nielsen Company, and for a decree adjudging Mary Nielsen (who is the appellant), as administratrix of her husband's estate, to be the legal owner of the stock. An accounting from Steinfeld of moneys received by him as dividends on the stock was also prayed.

The cause was tried by the court, without a jury, and evidence, both oral and documentary, was introduced on behalf of the plaintiff and defendants. The trial court made elaborate findings of fact upon which it entered judgment against Steinfeld for \$23,300, with interest, and the shares of stock in controversy were decreed to be the property of the administratrix. The defendants appealed to the supreme court of the territory. With the judgment roll there was filed in the office of the clerk of that court various exhibits of both plaintiff and defendants, and the reporter's transcript of evidence, copies of which papers so filed, it was recited, were omitted from the transcript by direction of the attorneys for appellants. (Steinfeld et al.)

What errors were assigned on the appeal to the supreme court of the territory do not appear in the transcript of record. It was conceded, however, in the argument at bar, by the counsel of both parties, that in the supreme court of the territory it was insisted, on behalf of the appellants (Steinfeld et al.), that the decree of the trial court should be reversed, not only because there was no evidence sustaining various findings of the trial court which were material to its decree, but also because, taking the findings to be sufficiently supported by proof, they were nevertheless inadequate to sustain the decree which had been based on

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them. It therefore may be assumed **536**] *that the errors thus admitted to have been assigned in the supreme court are those referred to in the minute entry contained in the record, stating that a "motion and objection of the appellee to the consideration of assignments of error set forth and specified in appellants' brief" were denied by the supreme court.

The supreme court reversed the judgment of the trial court, and remanded the cause, with directions to enter judgment for the defendants. (12 Ariz. 381, 100 Pac. 1094.) The opinion is preceded by what is denominated in the body of the opinion a statement of the facts. The statement begins with a brief recital of the nature of the controversy, the entry of judgment in the trial court, and the taking of the appeal; and after the declaration that "the court (trial court) found the facts as follows," there appears a literal copy of the findings made by the trial court. In the opinion which next follows it is first declared that it was "contended by the appellants that the facts found do not constitute legal fraud, and that therefore the court erred in not so finding, and in rendering judgment for the plaintiff and against the defendants, based thereon." A summary is then made of what were styled "the facts upon which the court predicated fraud in the purchase of the shares of stock of Nielsen," followed by the statement that "unless these facts constituted legal fraud, the judgment of the trial court cannot be sustained." The court then considers whether the facts so found amounted to legal fraud, and concludes its consideration of the subject by saying: "In our judgment the findings do not support the legal conclusion made by the trial court that such fraud was perpetrated by Steinfeld in the purchase of the stock, as to warrant the rescission of the contract and the recovery of the stock and of the dividends which have been received by Steinfeld thereon." It is then stated that "for this reason the judgment of the trial court must be reversed and the **537**]case remanded, *with directions to the trial court to enter judgment for the defendants." The chief justice of the supreme court of the territory dissented in the following words:

"I dissent from the conclusion and the result reached by my associates in the foregoing opinion. I think the judgment of the trial court was correct."

A motion for a rehearing was denied on May 1, 1909, and on the same day the appeal now under consideration was allowed by the chief justice of the court.

On June 10, 1909, there was filed *nunc pro tunc* as of May 1, 1909, what was styled **56 L. ed.**

in the journal entry "a certain statement of facts," in which, under the title of the cause, it was recited as follows:

"I, Edward Kent, chief justice of the supreme court of the territory of Arizona, do hereby certify that the supreme court of the territory of Arizona, having adjudged that the facts as found by the district court in this cause did not sustain the conclusions of law or the judgment of the district court, did, without passing in this court upon the corrections (correctness?) of the facts as found by the district court, remand this cause to the district court, with directions to that court to enter judgment absolute for the defendants.

"And on behalf of the said supreme court of the territory of Arizona, I do hereby certify to the Supreme Court of the United States upon the appeal herein, that the following were the facts as found by the district court upon which the said judgment of the supreme court of the territory of Arizona was based."

This certificate was followed by a reproduction of the findings made by the trial court, and the certificate concluded with the date of May 1, 1909, and the signature of the chief justice.

On June 12, 1909, a bond on appeal was duly filed. Five months afterwards, *viz.*, on November 12, 1909, the following order was entered in the court below:

"*At this day, it is ordered by the **538** court that all former statements of facts filed in this cause in this court be, and the same are hereby, withdrawn, and a certificate of the chief justice in regard to statement of facts filed."

The certificate referred to appears in the transcript of record following a recital of the entry of an order enlarging the time for preparing and filing such transcript. Omitting the title of the cause, date, and signature of the chief justice, the certificate reads as follows:

"I, Edward Kent, chief justice of the supreme court of the territory of Arizona, do hereby certify that the supreme court of the territory of Arizona, having adjudged that the facts as found by the district court in this cause did not sustain the conclusions of law or the judgment of the district court, did, without passing in this court upon the correctness of the facts as found by the district court, remand this cause to the district court, with directions to that court to enter judgment absolute for the defendants, and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict."

In the argument at bar it is urged on behalf of appellant—citing Stringfellow v.

Cain, 99 U. S. 610, 25 L. ed. 421, and William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524,—that as the supreme court of the territory reversed the judgment of the trial court “for the reason that the facts as found are not sufficient to support the judgment,” the court below must be held to have adopted as its own the findings of the trial court, and therefore there is an adequate statement of the facts in the nature of a special verdict, as required by the act of Congress of April 7, 1874 (18 Stat. at L. 27, chap. 80). The appellees, on the other hand, relying upon the last certificate made by the chief justice on behalf of the court, direct attention to the fact that the court did not either adopt the findings of the trial court or make express findings of its own, since it simply accepted the findings made by the 539] trial *court for a limited purpose; that is, with the object of determining whether the findings, if hypothetically taken for true, were adequate to sustain the judgment which the trial court had based on them. It is not, however, suggested that this state of the record precludes a determination of whether the court below erred in deciding that, upon the assumption of the correctness of the findings of the trial court, they were inadequate to sustain its decree, but it is urged that under the circumstances, if it be deemed that the court below erred, it would be a gross injustice to reverse, with directions to affirm the judgment of the trial court, because thereby the appellants in the court below, the appellees here, would be denied a hearing on the contention urged in the court below that there was no evidence sustaining some of the essential findings of the trial court.

As it is obvious from the final action of the court below, as manifested by the last certificate of the chief justice, that the premise upon which the suggestions last referred to rest is well founded, it is clear that the court below made no statement of facts complying with its statutory duty. It is equally clear, under the circumstances stated, that although the appellees apparently do not expressly assert the inadequacy of the purported statement of facts to sustain our jurisdiction to review, in effect their contention is equivalent to that proposition. This is true because the result of the proposition insisted upon is to contend that the statement of facts which the court below accepted for a particular purpose is sufficient to enable a review of its action if the conclusion be that the court below did not err, but is not sufficient to justify correction of its action if it be found that error was committed.

The evident duty imposed upon the court

below by the statute, as long since established and repeatedly pointed out, was to make a statement of the facts in the nature of a special verdict either by adopting as correct *the findings of fact made by[540 the trial court, or by making its own express findings,—a duty which was plainly disregarded by merely hypothetically assuming the findings of the trial court to be correct, and basing upon such mere hypothesis a judgment of reversal, with a direction to enter a final decree against the complainant.

The general rule is to affirm a judgment on an appeal from a territorial court where the record contains no exceptions to rulings upon the admission or rejection of evidence, and where there is an absence of the statement of facts required by the statute to enable the reviewing power to be exerted, and when there is no showing that the appellant has used due diligence to exact a compliance with the statute, so as to enable an appeal to be prosecuted. *Gonzales v. Buist*, 224 U. S. 126, ante, 693, 32 Sup. Ct. Rep. 463. We are of opinion, however, that the facts of this case cause it to be an exception to this general rule. First, because the action of the court below was plainly the result not of a mere omission to perform its duty to make a statement of facts, but arose from a misconception as to the nature and extent of its powers in discharging that statutory duty,—a misconception not arising from any action of the party appellant here, and which in itself therefore intrinsically we think constituted reversible error. Second, because the initial action by which the error was committed was ambiguously manifested and may have misled the unsuccessful party. Third, because the final order which made it indubitably clear that the court intended to make no findings of fact, and deemed that, consistently with the right to review its action which was vested in this court, it had the power to decide the case upon a mere hypothesis as to the correctness of the findings of the trial court, was entered months after the appeal now before us had been entered.

Considering the whole situation, we think we must treat the case upon the theory that the court below committed *reversible[541 error in refusing to perform the duty imposed upon it by law, and the reversal of its decree because of such error will have the legal effect of causing the case to be as though it were yet pending undetermined on the appeal from the trial court. As, since the filing of the record here, the territory of Arizona has been admitted as a state, and the case before us is of a character which, by the terms of the enabling act (36 Stat. at L. chap. 310, § 33, p. 577),

should be remanded to the supreme court of the state, our duty therefore is to reverse the decree of the Supreme Court of the Territory of Arizona, and to remand the case to the Supreme Court of the State of Arizona for further proceedings not inconsistent with this opinion.

And it is so ordered.

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
OZRO CASTLE.

(See S. C. Reporter's ed. 541-546.)

Appeal — affirmance on motion.

1. A judgment of a Federal circuit court will be affirmed on motion, under Supreme Court rule 6, subd. 5, where the questions urged as a basis for reversal have been so plainly foreclosed by the decisions of the Supreme Court as to make further argument unnecessary.

[For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.]

Constitutional law — police power — modifying doctrine of contributory negligence.

2. The police power of the state justifies a statutory modification of the doctrine of contributory negligence by providing that such negligence on the part of an injured employee shall not be a bar to a recovery against the employer, where the employee's negligence was slight, and that of the employer gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

[For other cases, see Constitutional Law, 891-894, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — privileges and immunities — injuries to railway employees — comparative negligence.

3. Railway companies are not denied the equal protection of the laws, nor are their

privileges and immunities as citizens of the United States abridged, by Neb. Comp. Stat. chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged in train service will not bar a recovery from the company, where his negligence was slight, and that of the company gross in comparison, the damages being diminished in proportion to the amount of negligence attributable to the injured employee.

[For other cases, see Constitutional Law, 286-291, in Digest Sup. Ct. 1908.]

Commerce — state regulation — congressional inaction — comparative negligence.

4. Until Congress acted in the matter, there was no repugnancy to the commerce clause of the Federal Constitution in the provisions of Neb. Comp. Stat. chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged in interstate commerce did not bar a recovery from the company, where his negligence was slight and that of the company was gross in comparison, the damages being diminished in proportion to the amount of negligence attributable to the injured employee.

[For other cases, see Commerce, 68-79, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

5. The validity of Neb. Comp. Stat. chap. 21, §§ 3, 4, in so far as they impose liability upon a railway company for an injury to an employee engaged in interstate commerce, arising from the negligence of a coemployee, and modify the rule of contributory negligence, is not affected because such statute also covers subjects dealt with by the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), such as acts of negligence of railway companies in respect of their cars, roadbed, machinery, etc. [For other cases, see Statutes, 61-88, in Digest Sup. Ct. 1908.]

Federal courts — diverse citizenship — foreign corporations.

6. A corporation originally incorporated under the laws of the state of Missouri, which admits in its answer the existence of

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to the validity of class legislation—see notes to State v. Goodwin, 6 L.R.A.; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On state regulation of relations between railroad companies engaged in interstate commerce and their employees—see notes to State v. Northern P. R. Co. 15 L.R.A. (N.S.) 134, and People v. Erie R. Co. 29 L.R.A. (N.S.) 240.

On statutes part valid and part invalid 56 L. ed.

—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

As to diverse citizenship as ground of Federal jurisdiction—see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, & N. Co. 11 L.R.A. 216; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtis, 2 L. ed. U. S. 435; and McDonald v. Smalley, 7 L. ed. U. S. 287.

On citizenship of corporation for purpose of Federal jurisdiction—see notes to Hope Ins. Co. v. Boardman, 3 L. ed. U. S. 36, and National S. S. Co. v. Tugman, 27 L. ed. U. S. 87.

the diverse citizenship relied upon to support the jurisdiction of the Federal circuit court for the district of Nebraska over a suit against it, cannot successfully urge, to defeat such jurisdiction, that it had become a Nebraska corporation under the Constitution and laws of that state, as construed by its courts.

[For other cases, see Courts, 637-664, in Digest Sup. Ct. 1908.]

[No. 344.]

Submitted April 22, 1912. Decided May 13, 1912.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of plaintiff in an action by a railway employee to recover damages from the railway company for personal injuries. Affirmed.

The facts are stated in the opinion.

Mr. Balie P. Waggener submitted the cause for plaintiff in error:

The Missouri Pacific Company had become a domestic corporation in the state of Nebraska.

State ex rel. Leese v. Missouri P. R. Co. 25 Neb. 164, 41 N. W. 127; Winn v. Wabash R. Co. 118 Fed. 55; Fitzgerald v. Missouri P. R. Co. 45 Fed. 816; Missouri P. R. Co. v. Meeh, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

If it appears from the record that the requisite diverse citizenship did not exist at the time of the institution of the suit, the circuit court was without jurisdiction to render a judgment against the defendant railway company, and to do so is reversible error.

Thomas v. Ohio State University, 195 U. S. 210, 49 L. ed. 163, 25 Sup. Ct. Rep. 24; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 689, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 98, 42 L. ed. 673, 675, 18 Sup. Ct. Rep. 264; Minnesota v. Northern Securities Co. 194 U. S. 48, 62, 63, 48 L. ed. 870, 877, 878, 24 Sup. Ct. Rep. 598; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 177, 55 L. ed. 164, 31 Sup. Ct. Rep. 185.

Will not this court take judicial notice of the fact, as disclosed by the Constitution and laws of Nebraska, and decisions of the supreme court of that state, that the Missouri Pacific Railway Company had no status in that state except as a domestic corporation, organized, created, and existing under the laws of that state?

Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 23 L. ed. 67; Lamar v. Mi-

cou, 114 U. S. 223, 29 L. ed. 95, 5 Sup. Ct. Rep. 857; Robertson v. Cease, 97 U. S. 649, 24 L. ed. 1058; Börs v. Preston, 111 U. S. 255, 28 L. ed. 420, 4 Sup. Ct. Rep. 407; Patch v. Wabash R. Co. 207 U. S. 277, 281-284, 52 L. ed. 204, 207, 208, 18 Sup. Ct. Rep. 80, 12 Ann. Cas. 518; Texas & P. R. Co. v. Cody, 166 U. S. 606-610, 41 L. ed. 1132-1134, 17 Sup. Ct. Rep. 703.

Congress, by its legislation on the subject of "safety appliances" on interstate trains, has certainly superseded the right of the state of Nebraska to legislate on the subject.

Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169; Northern P. R. Co. v. Washington, 222 U. S. 370, ante, 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140; Prigg v. Pennsylvania, 16 Pet. 539, 618, 10 L. ed. 1060, 1090; Sinnot v. Davenport, 22 How. 231, 16 L. ed. 244; Hall v. De Cuir, 95 U. S. 506, 24 L. ed. 554; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Houston v. Moore, 5 Wheat. 23, 5 L. ed. 24; Southern R. Co. v. United States, 222 U. S. 20-27, ante, 72, 74, 32 Sup. Ct. Rep. 2; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 212, 40 L. ed. 945, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Second Employers' Liability Cases, 223 U. S. 1-53, ante, 327-347, 32 Sup. Ct. Rep. 169; Chicago Junction R. Co. v. King, 222 U. S. 222, ante, 173, 32 Sup. Ct. Rep. 79.

The laws of the several states, in so far as they cover the same field, were superseded by the enactment by Congress of the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce.

Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1-53, ante, 327-347, 32 Sup. Ct. Rep. 169; Southern R. Co. v. Reid. 222 U. S. 424, 444, ante, 257, 263, 32 Sup. Ct. Rep. 140, 145.

A right of action or remedy founded solely upon a statute, or suit to enforce such remedy, not prosecuted to judgment, is determined by the repeal of the statute.

Bennet v. Hargus, 1 Neb. 419; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Assessors v. Osborne (Gates v. Osborne) 9 Wall. 567, 19 L. ed. 748; District of Columbia v. Hutton, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369; United States v. Ranlett, 172 U. S. 133, 43 L. ed. 393, 19 Sup. Ct. Rep. 114; Ex parte McCordle, 7 Wall. 514, 19 L. ed. 265.

Will it be said that the repeal of the statute by the legislature which enacted it would have been more effective as to existing causes of action under it than the suspension and superseding of the same act by Congress, which has, when it does act, exclusive power over the same subject?

Merchants' Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540.

The classification is arbitrary and unreasonable.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 152, 166, 41 L. ed. 667, 672, 17 Sup. Ct. Rep. 255; *Vanzant v. Waddel*, 2 Yerg. 270; *Stratton Claimants v. Morris Claimants* (*Dibrell v. Lanier*) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 95.

The Federal Constitution is the supreme law of the land, and state statutes, even when avowedly enacted in the exercise of the police power, must yield to that law.

Central R. Co. v. Murphey, 196 U. S. 194-206, 49 L. ed. 444-449, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540-558, 46 L. ed. 679-689, 22 Sup. Ct. Rep. 431; *Ritchie v. People*, 155 Ill. 110, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *People v. Gillson*, 109 N. Y. 398, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 29 Am. St. Rep. 868, 10 S. E. 285.

If the statute, although enacted under the police power, in its operation amounts to a denial to persons within the state of the equal protection of the laws, it must be held to be unconstitutional.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540-559, 46 L. ed. 679-690, 22 Sup. Ct. Rep. 431; *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227-242, 16 L. ed. 243-247; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613-626, 42 L. ed. 878-883, 18 Sup. Ct. Rep. 488.

An unwarranted and arbitrary interference with the property rights of the citizen renders the act unconstitutional and void.

Dobbins v. Los Angeles, 195 U. S. 223, 236-239, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18; *Lawton v. Steele*, 152 U. S. 133-137, 38 L. ed. 385-389, 14 Sup. Ct. Rep. 499; *Jew Ho v. Williamson*, 103 Fed. 19; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 874; *Crescent Liquor Co. v. Platt*, 148 Fed. 898; *Hume v. Laurel Hill Cemetery*, 142 Fed. 563; *Colon v. Lisk*, 153 N. Y. 196, 60 Am. St. Rep. 609, 47 N. E. 302; *State v.* 56 L. ed.

Marble, 72 Ohio St. 33, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395.

No right or privilege granted or secured by the Constitution of the United States can be withdrawn or impaired by the statute of any state, even though enacted in the exercise of the police power.

Crescent Liquor Co. v. Platt, 148 Fed. 898; *Dobbins v. Los Angeles*, 195 U. S. 223-234, 49 L. ed. 169-174, 25 Sup. Ct. Rep. 18; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836.

To justify the interposition by the state of the police power, it must appear that the interest of the public generally, as distinguished from a class, requires such legislation.

Lawton v. Steele, 152 U. S. 133-137, 38 L. ed. 385-389, 14 Sup. Ct. Rep. 499; *Hume v. Laurel Hill Cemetery*, 142 Fed. 565; *Colon v. Lisk*, 153 N. Y. 196, 60 Am. St. Rep. 609, 47 N. E. 302; *State v. Redmon*, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836.

Mr. T. J. Mahoney submitted the cause for defendant in error. Mr. J. A. C. Kennedy was on the brief:

The first section of the Nebraska statute is not in violation of the Federal Constitution, in that it makes a railway company liable to one employee engaged in train service for an injury inflicted through the negligence of another employee in the same service.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169.

The same reasons which justify a departure from the common-law rule in respect to the negligence of a fellow servant will likewise justify a similar departure in regard to the effect of contributory negligence in the same class of hazardous occupation, as the classification is identical in both instances.

Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169.

In the absence of Federal legislation un-

on the subject, the enactment of such laws as this falls within the police power of the state.

Ibid.; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482, 31 L. ed. 508, 510, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Reid v. Colorado*, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

Mr. Chief Justice White delivered the opinion of the court:

Alleging himself to be a citizen of Nebraska, and averring that the railway company was a citizen of Missouri, Castle sued the railway company to recover for injuries received by him while in the service of the railway company as a brakeman upon a freight train operating in the state of Nebraska, the injury having been occasioned through the negligence of a coemployee. The right to recover under such circumstances was based upon a Nebraska statute adopted in 1907, consisting of two sections which are now §§ 3 and 4 of chapter 21 of the Compiled Statutes of Nebraska. The 1st section made every railway company liable to its employees who, at the time of the 543] injury, *were engaged in construction or repair works, or in the use and operation of any engine, car, or train for said company, for all damages which may result from the negligence of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways, or work. The 2d section provided that contributory negligence shall not be a bar to recovery where the negligence of the injured employee was slight and that of the employer was gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee. In its answer the railway company admitted that it was then, and was at all of the times mentioned in the petition, "a railroad corporation organized and existing under and by virtue of the laws of the state of Missouri," and set up that the injury to the plaintiff was caused by the negligence of a fellow servant or coemployee, and was also the result of the contributory negligence of the plaintiff. The validity of the 2d section of the statute was challenged because it deprived "of the defense of contributory negligence accorded to all other liti-

gants, persons or corporations, within the state of Nebraska," and because the statute established and enforced against railroads a rule of damages not applicable to any other litigant in similar cases, whereby the privileges and immunities of the company as a citizen of the United States within the jurisdiction of the state of Nebraska were abridged, and it was denied the equal protection of the laws, in violation of the 14th Amendment. The repugnancy of the statute to the commerce clause of the Constitution was also averred, on the ground that "the plaintiff, at the time he received the injuries complained of, and engaged as an employee of an interstate railroad engaged in commerce between the states of Missouri, Kansas, and Nebraska," and the statute of Nebraska "attempts to regulate and *control as well as create a cause of[544] action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject."

At the trial the company excepted to the refusal of the court to give instructions embodying its contentions respecting the invalidity of the statute, and also excepted to the giving of certain instructions which were antagonistic to those contentions. From a judgment entered upon a verdict of a jury in favor of the plaintiff, this direct writ of error was sued out.

Defendant in error moves to affirm the judgment under subdivision 5 of rule 6. The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.

This court has repeatedly upheld the power of a state to impose upon a railway company liability to an employee engaged in train service for an injury inflicted through the negligence of another employee in the same service. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; and *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169.

Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow servant also justify a similar departure in regard to the effect of contributory negli-

gence, and the cases above cited in principle are therefore authoritative as to the lawfulness of the modification made by the 2d section of the statute under consideration of the rule of contributory negligence as applied to railway employees. The decision in the Mondou Case, sustaining the validity of the Federal employees' liability act, practically *forecloses all question as to the authority possessed by the state of Nebraska by virtue of its police power to enact the statute in question, and to confine the benefits of such legislation to the employees of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employees, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employees engaged in interstate commerce. See the Mondou Case, supra, and Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

The circumstance that the Nebraska statute covers acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc.,—subjects dealt with by the safety-appliance act of March 2, 1893 [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174],—does not afford any substantial ground for the contention that the statute is invalid, in so far as it imposed liability for an injury to an employee arising from the negligence of a coemployee.

In the argument at bar, a contention is made which was seemingly not presented in the court below nor alluded to in the assignments of error; *viz.*, that although originally incorporated under the laws of the state of Missouri, the railway company had, in law and in fact, become a domestic corporation in Nebraska under the Constitution and laws of that state, and was such domestic corporation when this suit was instituted; and in consequence the diversity of citizenship essential to the jurisdiction if the circuit court was wanting? In support of the contention, an allegation of the petition is quoted to the effect that the railway company owned and operated its road as well in the state of Nebraska as in the other states; and reference is made to a provision of the Constitution of Nebraska—§ 8, art. 1, Comp. Stat. (Neb.) 1905, pp. 74, 75—denying to a railroad corporation organized *under the laws of any other state or of the United States, and doing business in Nebraska, the power to exercise the right of eminent domain, or to acquire the right of way or real estate for depot or other uses until it shall have 56 L. ed.

become a body corporate, pursuant to and in accordance with the law of the state. Two decisions of the supreme court of Nebraska are cited, in one of which (State ex rel. Leese v. Missouri P. R. Co. 25 Neb. 164, 165, 41 N. W. 127), it is said it was decided that because of consolidations with domestic companies, the Missouri Pacific Company had become a domestic corporation in the state of Nebraska, and could therefore "acquire a right of way," etc. As to the other (Trester v. Missouri P. R. Co. 23 Neb. 243-249, 36 N. W. 502), the contention appears to be that the railway company was held to be a domestic corporation by force of the constitutional provision heretofore referred to. In the face, however, of the clear admission made in the answer of the railway company as to the existence of diverse citizenship, we cannot assent to the soundness of the claim now made, based on the contentions referred to. Certainly, in the absence of any issue on the subject, weight cannot be attached to the decision in 25 Neb.; and it is consistent with the constitutional provision to infer that the railway company, if it became a domestic corporation of Nebraska, did so by compulsion of the Nebraska statutes on the subject. Indeed, the contention is adversely disposed of by Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713, cited in Patch v. Wabash R. Co. 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 80, 12 Ann. Cas. 518. In the Allison Case, the court, among other cases, referred approvingly to Walters v. Chicago, B. & Q. R. Co. 104 Fed. 377, where it was held that a corporation originally created by the state of Illinois, although made by the law of Nebraska a domestic corporation of that state, was nevertheless a citizen of Illinois.

Judgment affirmed.

*AMERICAN RAILROAD COMPANY OF PORTO RICO, Plff. in Err.,
v.

ANN ELIZABETH BIRCH and Ernest Victor Birch.

(See S. C. Reporter's ed. 547-558.)

Parties — employers' liability — personal representative.

The widow and son of a deceased railway employee cannot bring in their own names the action for damages given by the employers' liability act of April 22, 1908 (35

NOTE.—On parties in actions for death under foreign statute—see notes to Nelson v. Chesapeake & O. R. Co. 15 L.R.A. 585, and Boston & M. R. Co. v. Hurd, 56 L.R.A. 206.

Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), § 2, "to his or her personal representative, for the benefit of the surviving widow or husband or children of such employee,"—especially in Porto Rico, where the distinction between heirs and personal representatives is recognized, and where there existed a local employers' liability act when the Federal statute was enacted, which gave a cause of action, if the conditions of liability existed, to the widow of the deceased, or to his children or dependent parents.

[For other cases, see Parties, I. a, 5, in Digest Sup. Ct. 1908.]

[No. 224.]

Submitted April 24, 1912. Decided May 13, 1912.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiffs in an action brought by the widow and son of a deceased railway employee, under the employers' liability act. Reversed without prejudice to such rights as the personal representative may have.

The facts are stated in the opinion.

Messrs. N. B. K. Pettingill and F. L. Cornwell submitted the cause for plaintiff in error:

While the purpose of the statute is doubtless remedial, and it is to be given a liberal construction consistent with its terms, to effectuate that purpose, there is no place for "construction" in the technical sense, because of the absence of ambiguity.

Hamilton v. Rathbone, 175 U. S. 414, 419, 44 L. ed. 219, 221, 20 Sup. Ct. Rep. 155; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

It may well be that, in selecting the personal representative instead of the heirs of the deceased or the specified beneficiary as the proper party to bring the suit, Congress intended to mark the logical distinction between providing for the survival of a cause of action existing in the injured party up to the time of death, and for the creation of a new cause of action, arising in the representative from the moment of death. At least, that it does create a new cause of action seems plain.

Fulgham v. Midland Valley R. Co. — L.R.A.(N.S.) —, 104 C. C. A. 151, 181 Fed. 91; Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494.

While we have found no decision of any Federal court construing this very statute since its enactment, decisions upon similar statutes are very pertinent.

Lake Erie & W. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923; Louisville & N. R.

Co. v. Trammell, 93 Ala. 350, 9 So. 870; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Peers v. Nevada Power, Light & Water Co. 119 Fed. 400.

Mr. Willis Sweet submitted the cause for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

Action for damages for the death, through the alleged negligence of plaintiff in error, of the husband and father of defendants in error, who are, respectively, deceased's widow and son.

The action was originally brought by Ann Elizabeth Birch. A demurrer was filed to the complaint, which was sustained in part, and the court directed counsel "to so amend the complaint as to show whether or not the plaintiff is the sole heir of the deceased, or, if she sues for the benefit of certain other heirs, then the complaint must specifically state the name of said other heirs, and state under what law the said action is brought."

An amended complaint was filed, alleging that the deceased, Francisco Abraham Birch, was, when killed, at his post of duty as brakeman on a train of the railroad which was running through the city of Aguadilla at a high rate of speed, and contrary to an ordinance of the city, in consequence of which speed and a defect in one of the wheels of the car the body of the car left the tracks and was thrown to the ground, crushing the deceased beneath it, and thus causing instant death.

It is alleged that a proper inspection of the wheels would have disclosed the defect in it, and, further, that if the train had been running within the limits of the requirements of the law, the train might and would have been stopped before the accident occurred.

At the time of his death, it is alleged, that the deceased was forty-seven years of age, was receiving \$42 per month, was a skilled and efficient railroad employee, and was in vigorous health and strength. And it is alleged that his death was caused without negligence on his part, and while he was in the faithful discharge of his duty.

It is declared that the "action is based upon an act of Congress entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' approved April 22, 1908." [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322.]

It is alleged that Ernest Victor Birch was poor in health and frail in body, and was dependent upon deceased for support.

Damages were prayed at \$10,000.

The railroad company denied the specific allegations against it of speed and failure to inspect the wheels, alleged that they were inspected, and that no defects were visible or could be ascertained. It also put in issue the allegations of the complaint in regard to Ernest Victor Birch.

The answer alleged that no administration proceedings had been had on the estate of deceased, and that neither of the plaintiffs has been declared his heir, as required by law. It is also alleged that Ernest Victor Birch was over the age of twenty-one years, and that deceased was under no legal obligation to support him.

The case was tried to a jury upon evidence conflicting upon certain of the issues. There was no conflict as to the circumstances of the accident, the death of Birch in the line of duty, and that the accident was caused by a broken wheel, and that the train was not equipped with air brakes, but only with the ordinary hand brakes. There was conflict as to the speed of the train and as to whether the engineer in charge of the locomotive could see signals to stop, or whether he disregarded them.

The instructions of the court, so far as material, will be noticed presently in considering the assignments of error.

These assignments are: (1) The court erred in overruling the demurrer; (2) in denying the motion to dismiss the action and direct verdict on the ground that it had not been brought by the personal representative of the deceased, as required by the statute upon which it was based; (3) in holding that the heirs could sue in their own names; (4) in refusing to give the following: "That the court instruct the jury that the Federal act with regard to safety appliances has no application to the question at bar." And (5) in refusing to instruct the jury as follows:

"That they [the plaintiffs in action] are entitled to recover the actual compensation that they would have received if he [the deceased] had not been killed, and that would be limited to the purchase of an annuity for his recognized period of life."

These assignments are reducible to three propositions, to wit: (1) the capacity of plaintiffs to sue, (2) the application of the safety-appliance law, and (3) the measure of damages. Their discussion requires a consideration of the employers' liability law, as the amended complaint is based on that law. Section 2 of the act provides as follows:

"That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in dam-

ages to any person suffering injury while he is employed *by such carrier in any of [554] said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 3 includes the defense of contributory negligence, but requires the damages to be "diminished by the jury in proportion to the amount of negligence attributable to such employee." But provides that contributory negligence is not to be attributable to the employee injured or killed "where the violation by such common carrier of a statute enacted for the safety of employees contributed to the injury or death of such employee." And by § 4, assumption of risk by the employee is also excluded in such case.

Such part of the instructions of the court as are necessary to be considered in connection with the act are, as given by the court, in effect as follows:

(1) The action is brought under the employers' liability act of Congress of April 22, 1908, which is in force in Porto Rico, the provisions of which are explained as set out above.

(2) The damages can only be compensatory, and the measure of them is what the plaintiffs or either of them necessarily lose in or by the death of their husband and father, and in measuring these damages the jury may take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment of his family, and the amount contributed out of his wages to them for their support, and calculate from these facts the amount the jury, as reasonable *and practical men, believe the [555] plaintiffs lose because of the death. If the deceased was guilty of contributory negligence, the damages should be diminished in proportion to such negligence; and if it be established by a preponderance of the evidence that the violation by the defendant of the law of Congress requiring safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then the deceased cannot be held to have been guilty of contributory negligence nor to have as-

sumed the risk, if the jury believe that the absence of safety appliances in and about the train contributed to or was the proximate cause of the injury.

The employers' liability act expressly applies to Porto Rico. It is, however, contended that the safety-appliance act does not. To this contention defendants in error answer that it is made a part of the former act by the provision of § 3 of that act "that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." A similar provision is made in § 4 as to assumption of risk. These opposing contentions present a serious controversy. It is, however, really doubtful if they arise on the record. The charge in the complaint is that the deceased came to his death by being crushed under the body of a car upon which he was acting as brakeman, and that his death was "caused by the negligence of the defendant in failing to cause a proper inspection of the wheels" of the car, which "inspection would have discovered the unsafe condition of the wheel in question." As a further ground of negligence it was charged that the train was running at a high rate of speed, and that if it had been running within the speed "requirements of the law, the same might and would 556] have been stopped *before the accident occurred." To these charges the testimony was directed to sustain or deny. The amount of testimony as to contributory negligence and assumption of risk we should not think was worthy of attention if the court and counsel had not considered an instruction was called for in regard to them, and it may be that the question is presented of the application of the safety-appliance act to Porto Rico. However, we are not called upon to decide it, as we find a fatal defect of parties.

In the original complaint, defendant in error alleged that she was the widow of the deceased. To this a demurrer was filed, alleging as a ground that the complaint did not "state in what capacity" she sued. Thereupon an amendment was directed and made, as we have indicated. In the amended complaint she joined with her Ernest Victor Birch, alleging him to be the son and herself the widow of the deceased. By agreement of the parties the demurrer to the original complaint was considered as a demurrer to the amended complaint, and as such it was overruled.

The record shows that at the trial the plaintiffs presented, against the objection of the company, a certificate from the proper

insular court "in which it was certified that the plaintiffs in the action were the legal heirs of the deceased." Subsequently the court, in passing on and overruling a motion of the company for direction of a verdict for it upon the ground that the suit was not "brought by any person authorized under the national employers' liability act to bring suit," said "that the suit being brought under the act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any recovery could be had, and it is the opinion of the court that the words used in § 2 of the act in question, 'to his or her personal representative,' cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced, in the absence of any estate *belonging to the[557 deceased other than his right to sue, to have an administrator appointed."

But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, "in case of his death, . . . to his or her personal representative." It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit "of the surviving widow or husband and children."

But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purposes of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used.

It is not denied that under the laws of Porto Rico there is a distinction between heirs and personal representatives. Indeed, defendant in error cites § 61 of the Code of Civil Procedure which recognizes the distinction. The section provides: "When the death of a person, not being a minor, is caused by wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." And defendants in error urge that the national act should be construed to give a like alternative right to heirs or personal representatives, although its language is different. The purpose of

the national act, it is argued, as of the Code of Civil Procedure of the island, is to keep 558] the action "alive and beneficently" "to protect those dependent upon the employee as well as the employee himself;" and that therefore "a 'personal representative'" might act in the place of the deceased. But it is further argued that this was not the only purpose of the act. It had the purpose of giving to a defendant company the right to have its liability determined in one action, and that such liability would be secured whether executors or administrators sued or heirs sued. The reasoning is not very satisfactory and puts out of account the absolute words of the statute. And these take a special force in Porto Rico. An employers' liability act existed there at the time of the enactment of the national act, which gave a cause of action, if the conditions of liability existed, to the widow of the deceased or to his children or dependent parents. The national act gives the right of action to personal representatives only.

Judgment reversed without prejudice to such rights as the personal representatives may have.

EDWARD QUIGLEY McCAUGHEY and George Joseph McCaughey, Minors, by Their Guardian, Susan McCaughey, et al., Plffs. in Err.,

v.

ALEXANDER LYALL, H. J. Finger, Mae Morton, et al.

(See S. C. Reporter's ed. 558-563.)

Constitutional law — due process of law — parties — foreclosure suit — heirs of mortgagor.

Construing Cal. Code Civ. Proc. § 1582, to mean that the heirs are not necessary parties to a suit against the administratrix to foreclose a mortgage executed by the decedent, does not deprive such heirs, without due process of law, of the title which Cal. Civ. Code, § 1384, casts upon them upon the death of their ancestor.

[For other cases, see Constitutional, Law, IV, b, 8, in Digest Sup. Ct. 1908.]

[No. 228.]

Submitted April 19, 1912. Decided May 13, 1912.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Santa Barbara County, in that

State, sustaining a title to land derived through a sheriff's sale under a mortgage foreclosure. Affirmed.

See same case below, 152 Cal. 615, 93 Pac. 681.

The facts are stated in the opinion.

Mr. Cyrus F. McNutt submitted the cause for plaintiffs in error. Mr. William G. Griffith was on the brief:

The supreme court of the state of California has repeatedly held that upon the death of the ancestor the title to the real estate vests immediately in the heir.

Bates v. Howard, 105 Cal. 183, 38 Pac. 715; Re Woodworth, 31 Cal. 604; Chapman v. Hollister, 42 Cal. 463.

The general rule, as laid down in the authorities outside of California, is that in actions to foreclose mortgages after the death of the mortgagors, their heirs are necessary parties defendant.

Lane v. Erskine, 13 Ill. 501; Harvey v. Thornton, 14 Ill. 217; Stark v. Brown, 12 Wis. 573, 78 Am. Dec. 762; Zaegel v. Kuster, 51 Wis. 31, 7 N. W. 781; Johnson v. Johnson, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606.

It has been held that even where the mortgagor retains an equitable interest only, and the legal title is vested in the mortgagee, the heirs are necessary parties.

Fraser v. Bean, 96 N. C. 327, 2 S. E. 159.

It has been uniformly held in the state of California that where the mortgagor has parted with his title to the mortgaged premises, his grantee is a necessary party defendant, and that as against him the mortgagee can acquire no right or title by a proceeding in foreclosure and a sale under a decree therein, unless such successor has been made a defendant in the foreclosure proceeding.

Goodenow v. Ewer, 16 Cal. 468, 76 Am. Dec. 540; Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561.

Surely such a proceeding as was here had cannot be regarded as due process of law as respects the heirs of the intestate.

Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; 10 Am. & Eng. Enc. Law, 2d ed. 296, notes 3, 4; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Meyers v. Shields, 61 Fed. 713; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Calhoun v. Fletcher, 63 Ala. 574; Mulligan v. Smith, 59 Cal. 206; Clark v. Lewis, 35 Ill. 417; Garvin v. Daussman, 114 Ind. 429, 5 Am. St.

Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. 56 L. ed.

Rep. 637, 16 N. E. 826; Hyland v. Brazil Block Coal Co. 128 Ind. 335, 26 N. E. 672; Happy v. Mosher, 48 N. Y. 313; Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 18 N. E. 1040; Zeigler v. South & North Ala. R. Co. 58 Ala. 599; Brown v. Denver, 7 Colo. 305, 3 Pac. 455; Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388.

Mr. Alexander Lyall, *in propria persona*, submitted the cause for defendants in error:

In an action to foreclose a mortgage in the state of California, where the mortgagor has died since the execution of the mortgage, and an administrator has been appointed and qualified, it is not necessary to make his heirs or devisees parties.

McCaughy v. Lyall, 152 Cal. 615, 93 Pac. 681; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; Spotts v. Hanley, 85 Cal. 167, 24 Pac. 738; De La Ossa v. Oxarart, 58 Cal. 101; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704.

This doctrine has been so long adhered to as to become and be a rule of law of real property in the state of California, and to hold otherwise would be to unsettle the title to a vast amount of real property in the state of California and other states where a similar law prevails.

2 Foster, Fed. Pr. 3d ed. p. 881; Neves v. Scott, 13 How. 268, 14 L. ed. 140; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Lorman v. Clarke, 2 McLean, 568, Fed. Cas. No. 8,516; McClaskey v. Barr, 42 Fed. 609; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; Ankeny v. Clark, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; Telfair v. Stead, 2 Cranch, 407, 2 L. ed. 320; Carey v. Roosevelt, 81 Fed. 608; Hearfield v. Bridges, 21 C. C. A. 212, 44 U. S. App. 574, 75 Fed. 47.

Due process of law has been defined by this court to be its regular administration

through courts of justice, by timely and regular course of proceedings, to judgment and execution. As a rule it includes parties, regular pleadings, and a trial according to the settled course of procedure.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72, Pearson v. Yewdall, 95 U. S. 294-296, 24 L. ed. 436, 437; Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728.

Where the law, for convenience in its administration, has furnished a representative of the interest in question, those so represented need not be made parties to the litigation.

1 Foster, Fed. Pr. 3d ed. § 45; 2 Jones, Mortg. 3d ed. p. 415, § 1414; Harwood v. Marye, 8 Cal. 580.

The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law simply because its effect is to deny the claim of ownership in such property.

Tracy v. Ginzberg, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461.

Certainly when state courts act upon and according to a statute that has been in force for more than half a century, and upon their construction of such statute thousands of titles to real property repose, this court would certainly be very reluctant to hold such construction erroneous and in conflict with the Constitution of the United States.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is directed to a judgment of the supreme court of the state of California, sustaining the title of defendants in error to certain lands in that state, derived through a sheriff's sale of the same upon suit for foreclosure of a mortgage. The suit was instituted and prosecuted against the administratrix of the estate of the father of plaintiffs in error, they not having been made parties nor given notice of the pendency of the suit.

The facts, as stated in the opinion of the court, are as follows:

"George McCaughy died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime, on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for \$500, which was due and unpaid at the death of the decedent. After his death Susan McCaughy was duly appointed and qualified as administratrix of his estate.

The note and mortgage were duly presented to the administratrix and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered, under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have **562]** *it adjudicated that they are the owners of an undivided one half of the said land; that the claim of the defendants thereto be adjudged null and void; that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained; and plaintiffs declining to amend, judgment was rendered for defendants." [152 Cal. 616, 93 Pac. 681.]

The judgment was affirmed by department 2 of the supreme court, and a petition for rehearing in bank was denied. Thereupon the chief justice of the court granted this writ of error.

The contention of plaintiffs in error is that the law cast upon them the title to the land upon the death of their intestate ancestor, and that such title could not be divested in a suit in which they were not parties.

To sustain the contention, plaintiffs in error make, as we shall see, one part of the law of the state paramount to another part, certain decisions of the courts of the state paramount to other decisions, putting out of view that necessarily the co-ordination of the laws of the state and the accommodation of the decisions of its courts is the function and province of the tribunals of the state, legislative and judicial, respectively.

For their rights of property plaintiffs adduce § 1384 of the Civil Code of the state, which provides that "the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration." And decisions of the supreme court are cited, holding, it is said, "that upon the death of the ancestor, the title to the real estate vests immediately in the heir." From the Code and the decisions it is deduced that the descent being cast at the instant of the death of ancestor, the "right of the heir is **563]** *fixed by such positive law, and he **56 L. ed.**

becomes invested with the measure of title which that law has fixed, and cannot be divested of such title without due process of law."

It is admitted that the heir takes subject to administration, but with that limitation only, it being contended further that "he holds precisely the title held by the ancestor." Section 1582 of the Code of Civil Procedure of the state is cited as defining the limitation. It provides that "actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

The supreme court of the state in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. *Cunningham v. Ashley*, 45 Cal. 485; *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *Finger v. McCaughey*, 119 Cal. 59, 51 Pac. 13; *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704. This is conceded by plaintiffs in error, but they say that because § 1582 of the Code of Civil Procedure "is made the basis of the rule established by the supreme court of the state," they complain of it, and respectfully urge that it "is repugnant to the 14th Amendment of the Constitution of the United States, § 1." This is equivalent to saying that the legislative power of the state, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the supreme court of the state cannot construe the laws of the state and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary.

Judgment affirmed.

*FRANK H. WASKEY, Petitioner, **[564**
v.

J. J. CHAMBERS.

(See S. C. Reporter's ed. 564-567.)

Real property—recording laws—subsequent purchaser—lease of mine.

1. A lessee in possession of a mining claim in Alaska under an agreement to work the

NOTE.—On lease as conveyance within meaning of recording statutes—see note to *Eadie v. Chambers*, 24 L.R.A. (N.S.) 879.

same continuously, and pay over to the lessor a percentage of the minerals extracted, is a purchaser for a valuable consideration, within the meaning of the act of June 6, 1900 (31 Stat. at L. 321, 505, chap. 786), title 3, § 98, providing that every unrecorded conveyance of real property shall be void against any subsequent innocent purchaser, in good faith and for a valuable consideration, of the same real property or any portion thereof, whose conveyance shall be first duly recorded.

[For other cases, see Real Property, 91-103b, in Digest Sup. Ct. 1908.]

Real property — recording laws — what may be recorded.

2. A conveyance of a mining claim in Alaska is not entitled to registration under the act of June 6, 1900, title 1, § 15, title 3, §§ 82, 95, where it has but one witness, and the only acknowledgment was taken before an alteration, made by consent of the parties.

[For other cases, see Real Property, 55-62, in Digest Sup. Ct. 1908.]

[No. 221.]

Argued April 23 and 24, 1912. Decided May 13, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Alaska, in favor of the plaintiff in an action to recover possession of a mining claim. Reversed.

See same case below, 24 L.R.A.(N.S.) 879, 96 C. C. A. 561, 172 Fed. 73, 18 Ann. Cas. 1096.

The facts are stated in the opinion.

Mr. Albert Fink argued the cause, and with Mr. W. H. Metson, filed a brief for petitioner:

When the deed was changed, whether surreptitiously by Chambers, as claimed by Whittren, or by mutual consent, as insisted by Chambers, the original acknowledgment failed, and even as between the parties, the deed became a new instrument, necessitating a new acknowledgment.

1 Devlin, Deeds, § 462; Coit v. Starkweather, 8 Conn. 293; Stiles v. Probst, 69 Ill. 382.

A deed not entitled to record is no record at all, even though in fact placed thereon.

Alaska Exploration Co. v. Northern Min. & Trading Co. 81 C. C. A. 363, 152 Fed. 145.

A lease is a conveyance of real property within the meaning of registry and recording acts.

Jones v. Marks, 47 Cal. 243; Johnson v. Stagg, 2 Johns. 510; Tuohy's Estate, 23 Mont. 305, 58 Pac. 722; Anderson's Law

Dict. "Lease;" Black's Law Dict.; 2 Bl. Com. 317; Greenleaf's Cruise, Real. Prop. 372, chap. 5, § 54; Archbold, Land & T. 2; Watkins, Conveyancing, 425; Webb, Record of Title, § 28, p. 62; 24 Am. & Eng. Enc. Law, 85; Garber v. Gianella, 98 Cal. 527, 33 Pac. 458; Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; State ex rel. Winston v. Morrison, 18 Wash. 664, 52 Pac. 228; Spielmann v. Kliet, 36 N. J. Eq. 199; State, Shimer, Prosecutor, v. Phillipsburg, 58 N. J. L. 506, 33 Atl. 852; Flower v. Pearce, 45 La. Ann. 853, 13 So. 150; Paine v. Mason, 7 Ohio St. 199; St. Vincent's Roman Catholic Congregation v. Kingston Coal Co. 221 Pa. 349, 70 Atl. 839; Crouse v. Michell, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32; Milliken v. Faulk, 111 Ala. 658, 20 So. 594.

An antenuptial contract for conveyance of lands upon the death of the intended husband, to be void in the event of his surviving, was held a conveyance within the recording acts.

Aultman v. Pettys, 59 Mich. 482, 26 N. W. 680. See also Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892; Cogan v. Cook, 22 Minn. 137; Gregg v. Owens, 37 Minn. 61, 33 N. W. 216; Corse v. Leggett, 25 Barb. 389; Bingham v. Frost, Fed. Cas. No. 1, 413; State Trust Co. v. Casino Co. 19 App. Div. 344, 46 N. Y. Supp. 492; Patterson v. Jones, 89 Ala. 388, 8 So. 77; Cawley v. Johnson, 21 Fed. 492.

An assignment for the benefit of creditors has been held a conveyance within the meaning of the insolvent laws.

Prouty v. Clark, 73 Iowa, 55, 34 N. W. 614; Weston v. Loyhed, 30 Minn. 221, 14 N. W. 892.

The term "conveyance," as used in an act authorizing a creditor to attack after judgment, was held to embrace an assignment of a chose in action.

Wilson v. Beadle, 2 Head, 510.

An assignment of a mortgage is a conveyance within the recording acts.

Larned v. Donovan, 84 Hun, 533, 32 N. Y. Supp. 731; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; Burns v. Berry, 42 Mich. 176, 3 N. W. 924; Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Hull v. Diehl, 21 Mont. 71, 52 Pac. 782; Butler v. Bank of Mazeppa, 94 Wis. 351, 68 N. W. 998.

A certificate of an execution sale of lands is a conveyance within the recording acts.

Drake v. McLean, 47 Mich. 102, 10 N. W. 126.

The term "conveyance," as used in the

recording acts, includes a real-estate mortgage.

Pickett v. Buckner, 45 Miss. 226; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; Burns v. Berry, 42 Mich. 176, 3 N. W. 924; Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603; Allison v. Manske, 118 Wis. 11, 94 N. W. 659.

Even the release or partial release or satisfaction of a mortgage has been held a conveyance within the recording acts.

Baker v. Thomas, 61 Hun, 17, 15 N. Y. Supp. 359; Bacon v. Van Schoonhoven, 87 N. Y. 446; Merchant v. Woods, 27 Minn. 396, 7 N. W. 826; Palmer v. Bates, 22 Minn. 532.

A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance.

Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

Two witnesses are necessary.

Hendon v. White, 52 Ala. 597; Lewis v. Herrera, 10 Ariz. 74, 85 Pac. 245; Merwin v. Camp, 3 Conn. 35; Watson v. Wells, 5 Conn. 468; Kenyon v. Segar, 14 R. I. 490; Allston v. Thompson, Cheves, L. 271; Spanier v. DeVoe, 52 La. Ann. 581, 27 So. 174; Summers v. White, 17 C. C. A. 631, 36 U. S. App. 395, 71 Fed. 106; Clark v. Graham, 6 Wheat. 577, 5 L. ed. 334.

Mr. Albert H. Elliot argued the cause, and, with Mr. George W. Rea, filed a brief for respondent:

As between the grantor and grantee of a deed to real property, if the deed is otherwise properly executed, but has only one witness to the signature of the grantor, the deed is valid and passes title.

Moore v. Thomas, 1 Or. 201; Fleschner v. Sempter, 12 Or. 161, 6 Pac. 506; Good-enough v. Warren, 5 Sawy. 494, Fed. Cas. No. 5,534; Dougherty v. Randall, 3 Mich. 586; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Price v. Haynes, 37 Mich. 489; Baker v. Clark, 52 Mich. 22, 17 N. W. 225; Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; Carpenter v. Carpenter, 126 Mich. 217, 85 N. W. 577; Morton v. Leland, 27 Minn. 37, 6 N. W. 378; Conlan v. Grace, 36 Minn. 276, 30 N. W. 883; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Summers v. White, 17 C. C. A. 631, 36 U. S. App. 395, 71 Fed. 106; Adams v. Dennis, 76 Neb. 682, 107 N. W. 867; Robison v. Gray, 29 Ky. L. Rep. 1296, 97 S. W. 347; Leinenkugel v. Kehl, 73 Wis. 238, 40 N. W. 684; Howard v. Russell, 104 Ga. 230, 30 S. E. 802; Meuley v. Zeigler, 23 Tex. 88; McLane v. Canales, — Tex. Civ. App. —, 25 S. W. 30; Stirman v. Cravens, 29 Ark. 548.

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An acknowledgment is a substitute for attesting witnesses.

Belk v. Meagher, 3 Mont. 65, 1 Mor. Min. Rep. 522; Sharpe v. Orme, 61 Ala. 263.

Attestation was no part of the execution of a deed at common law, and, as between the parties or their privies, a deed was sufficient to convey title if (1) signed, (2) sealed, and (3) delivered.

2 Bl. Com. 307; Dole v. Thurlow, 12 Met. 164; Hepburn v. Dubois, 12 Pet. 345, 9 L. ed. 1111.

The owner of a leasehold estate in real property is not within the purview of the statute of frauds because he is not an innocent purchaser in good faith and for a valuable consideration.

9 Cyc. 860; Edwards v. Perkins, 7 Or. 149; Jeffers v. Easton, E. & Co. 113 Cal. 345, 45 Pac. 680; Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Summerville v. Stockton Mill. Co. 142 Cal. 539, 76 Pac. 243; Gear, Land. & T. § 2; Taylor, Land. & T. p. 59, § 51; Vattier v. Hinde, 7 Pet. 270, 8 L. ed. 682; 20 Am. & Eng. Enc. Law, p. 554.

When alterations are made in a deed by consent, the deed takes effect from the subsequent delivery, and no new acknowledgment is necessary.

Webb v. Mullins, 78 Ala. 111; 2 Jones, Real Prop. in Conveyancing, § 1354; Bassett v. Bassett, 55 Me. 127; Sharpe v. Orme, 61 Ala. 263; Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Greenl. Ev. § 568; Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; Bacon v. Hooker, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078.

A deed or other instrument under seal may be altered by consent of the party to be bound thereby.

1 Devlin, Deeds, § 460, and note; Speake v. United States, 9 Cranch, 28, 3 L. ed. 645; King v. Bush, 36 Ill. 142; Humphreys v. Guillo, 13 N. H. 385, 38 Am. Dec. 499; Collins v. Makepeace, 13 Ind. 448; Kennedy v. Lancaster County Bank, 18 Pa. 347; Kilkelly v. Martin, 34 Wis. 531; Stiles v. Probst, 69 Ill. 382; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; Martin v. Buffalo, 121 N. C. 34, 27 S. E. 995; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Swift v. Barber, 28 Mich. 503; Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722; North v. Henneberry, 44 Wis. 306; Woodbury v. Alleghany & K. R. Co. 72 Fed. 375; 1 Greenl. Ev. § 568A.

After title once passes, the grantee cannot be divested of his title by any alteration or even the destruction of his title deed.

Blewett v. Front-Street Cable R. Co. 49

Fed. 126; Jones, Real Prop. in Conveyancing, § 1259.

The law presumes that an alteration appearing upon the face of a deed or other instrument was made prior to the execution of the deed; and the burden of overcoming this presumption is on the party attacking the instrument on account of the alteration.

Jones, Real Property in Conveyancing §§ 1359, 1360, note 4; Little v. Herndon, 10 Wall. 26, 19 L. ed. 878; Hagan v. Merchants' & B. Ins. Co. 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; Franklin v. Baker, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Van Hook v. Simmons, 25 Tex. Sup. 323, 78 Am. Dec. 573; North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the respondent. Chambers, against Waskey and others, to recover possession of a placer mining claim and damages for gold extracted from the same. Waskey defended under two leases from the parties alleged by him to be the owners. The plaintiff had a verdict and a judgment which was affirmed by a majority of the circuit court of appeals (24 L.R.A.(N.S.) 879, 96 C. C. A. 561, 172 Fed. 73, 18 Ann. Cas. 1096). The facts 565] as they are to be taken under the *verdict are these: Whittren was the original locator of the claim. He made a deed of a part interest to Chambers, and acknowledged it on April 21, 1902, the notary being the only witness. In May, 1906, the deed was altered by consent of the parties so as to convey one half, and was filed for recording on June 20 of that year. On September 24, 1905, Whittren conveyed one half to Eadie, and this deed was recorded. On June 11, 1906, Whittren and Eadie, who were the record owners, made a lease of a part to Waskey for two years, recorded on August 22, 1906, and on June 20, 1906, Whittren made a lease of the other part to Eadie and Waskey, which was recorded on August 30, 1906. Waskey denied the validity of the deed to Chambers and also claimed as purchaser for value without notice. The circuit court of appeals held that the deed to Chambers was good as between the parties, and that Waskey was not within the protection of the statute as a purchaser without notice, and also that he gave no valuable consideration for his lease, these questions having been raised below by exclusion of evidence and instructions of the court.

The act of Congress reads: "Every conveyance of real property within the district, hereafter made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." Act of June 6, 1900, chap. 786, title 3, § 98, 31 Stat. at L. 321, 505; Code, pt. 5, § 98. The circuit court of appeals went on the ground that a lease creates only a chattel interest, and is not a conveyance, and therefore is not within the protection of the statute. But it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee, and it would be a great misfortune, especially to mining interests, if a man taking a lease from those whom the record showed and he believed *to be the owners were liable.[566 after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant, on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word "conveyance" is defined, although for other purposes, as embracing every written instrument except a will by which any interest in lands is created. Act of 1900, title 3, § 136, 31 Stat. at L. 510, chap. 786; Code, pt. 5, § 136. See title 2, § 1046, 31 Stat. at L. 493, chap. 786; Code, pt. 4, § 1046. And the statute provides for the recording of leases, as well as of deeds and grants, act of 1900, title 1, § 15, 31 Stat. at L. 327, chap. 786; Code, pt. 3, § 15. Blackstone defines a lease as a conveyance, 2 Com. 317, and in Sheppard's Touchstone, 267. Leases are ranked under the head of grants,—“as in other grants.” The point does not need authority except to exclude the notion that the statute uses the word in a narrower sense.

It is said that Waskey was not a purchaser for value. By the lease of June 11 he agreed to enter at once and work the mine continuously, and to pay 30 per cent of the gold and precious minerals or metals extracted. The other agreement was similar, except that one eighth was to go to Whittren, one eighth to Eadie, and the remainder, after paying mining expenses, to be divided between Waskey and Eadie. His working the mine was a valuable consideration, and none the less so if in the event he was reimbursed for his expenditures and made a profit for his trouble.

Waskey was in possession and at work before the deed to Chambers was filed for recording, but we do not have to consider whether possession under the lease would

have the same effect as getting the later instrument recorded before the earlier one, under § 98, above quoted. For although the deed to Chambers was filed before the leases, it had no effect as against people without actual notice. It never had but one witness, two being necessary to authorize *the recording of a deed, and the only acknowledgment was before the alteration. Therefore it was filed without authority, was not entitled to registration, and, as we have said, had no effect as against the petitioner. Act of 1900, title 1, § 15, title 3, §§ 82, 95, 31 Stat. at L. 327, 503, 505, chap. 786; Code, pt. 3, § 15; pt. 5, §§ 82, 94. *Alaska Exploration Co. v. Northern Min. & Trading Co.* 81 C. C. A. 363, 152 Fed. 145.

Judgment reversed.

MARY C. LEARY, Administratrix of James D. Leary, Deceased, Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 567-576.)

Intervention — petition — sufficiency.

1. Allegations in a petition in intervention filed by the administratrix of the surety on a forfeited bail bond, that the decedent became such surety "upon the understanding and condition" that certain securities held in trust or on deposit by a third person should remain in the latter's hands as security and indemnity for signing the bond, sufficiently show a right to intervene in a suit by the United States to charge the holder of such securities with a trust in favor of the government, as against the objections that the petition does not negative the surety's ignorance of the facts claimed to raise the latter trust, and that, so far as appears, the asserted right of intervention rests upon an implied contract.

[Intervention generally, see *Intervention*, in Digest Sup. Ct. 1908.]

Contracts — public policy — indemnifying surety on bail bond.

2. Public policy does not forbid an agreement under which the surety on a bail bond became such upon condition that certain securities held in trust or on deposit by a third person should remain in the latter's hands as security and indemnity for signing the bond.

[For other cases, see *Contracts*, IV. d, in Digest Sup. Ct. 1908.]

NOTE.—On the right of surety to intervene in action against principal—see note to *Carlton v. Price*, 68 L.R.A. 736.

On the validity of agreement to indemnify bail in criminal case—see notes to *United States v. Simmons*, 14 L.R.A. 78, and *Carr v. Davis*, 20 L.R.A. (N.S.) 58.

On statutes of limitation and lapse of 56 L. ed.

Laches — intervention — trust.

3. The right of the administratrix of the surety on a forfeited bail bond, asserting an express trust in the surety's favor in certain securities held by a third person, to intervene in a suit by the United States to charge the holder of the securities with a trust in favor of the government, is not barred by laches because the petition in intervention was not filed until the evidence in the suit had been taken and it was ready for final hearing, where such petition was filed shortly after judgment had been recovered in a contested suit on the bond.

[For other cases, see *Limitation of Actions*, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 508.]

Argued April 29 and 30, 1912. Decided May 13, 1912.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Virginia, refusing leave to file a petition in intervention in a suit by the United States to charge the holder of certain securities with a trust in favor of the government. Reversed.

See same case below, 107 C. C. A. 27, 184 Fed. 433.

The facts are stated in the opinion.

Mr. J. T. Coleman argued the cause, and, with Messrs. A. E. Strode and David McClure, filed a brief for appellant:

The circuit court of appeals had jurisdiction to allow the amendment.

Kennedy v. Bank of Georgia, 8 How. 586, 610, 611, 12 L. ed. 1209, 1218, 1219; *Jones v. Meehan*, 175 U. S. 32, 44 L. ed. 61, 20 Sup. Ct. Rep. 1.

In passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice.

Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771.

An express contract to indemnify a person on his becoming bail for a prisoner charged with crime is not illegal and in violation of public policy.

Maloney v. Nelson, 144 N. Y. 182, 39 N. E. 82, 158 N. Y. 355, 53 N. E. 31.

The Federal courts are bound in the matter of taking bail in criminal cases,

time as bar to enforcing trust—see notes to *Prevost v. Gratz*, 5 L. ed. U. S. 311; *Thomas v. Brockenbrough*, 6 L. ed. U. S. 287; *Philippi v. Philippe*, 29 L. ed. U. S. 336; *Ducie v. Ford*, 34 L. ed. U. S. 1091; *Gisborn v. Charter Oak L. Ins. Co.* 35 L. ed. U. S. 1029.

by the state laws, by express command of the statutes.

United States v. Rundlett, 2 Curt. C. C. 44, Fed. Cas. No. 16,208; United States v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; United States v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; United States v. Evans, 2 Flipp. 605, 2 Fed. 147; United States v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

The public policy of a state with respect to contracts made within it, and sought to be enforced therein, is obligatory upon the Federal courts, whether acting in equity or at law.

Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179.

Mr. Marion Erwin, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Lehmann, filed a brief for appellee:

The intervention as pleaded sets up as to the alleged understanding or agreement of January 20, 1902, on which petitioner relies for relief, only an implied contract of a principal to indemnify bail in a criminal case, and is void as against public policy.

United States v. Ryder, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196.

The intervention, if it can be construed to set up an express contract, sets up a contract by a principal to indemnify bail in a criminal case, and is unenforceable because against the public policy of the United States.

Ibid.

The facts pleaded do not create a legal or equitable lien on the stock in favor of Leary, or constitute an assignment of the fund, even in equity, and are within the rule laid down in:

Christmas v. Russell, 14 Wall. 70, 20 L. ed. 762; Trist v. Child (Burke v. Child) 21 Wall. 447, 22 L. ed. 624; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Third Nat. Bank v. Buffalo German Ins. Co. 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. Rep. 524; Williams v. Ingersoll, 89 N. Y. 508; Thomas v. New York & G. L. R. Co. 139 N. Y. 163, 34 N. E. 877.

Denial of leave to intervene is not ordinarily appealable.

Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; The Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

The pleadings in the original case as well as the state of the record required that the intervener claiming a right to the securities alleged to have been acquired from Greene in January, 1902, should have either

put in issue the existence of the frauds alleged in the bill, or that the securities had been purchased with the funds of the government, fraudulently diverted, or set up that Leary acquired the alleged right in the securities as a bona fide purchaser for value, without notice of the trust existing in favor of the government.

Coffey v. Greenfield, 62 Cal. 602; Smith v. Gale, 144 U. S. 519, 36 L. ed. 525, 12 Sup. Ct. Rep. 674; 11 Enc. Pl. & Pr. 506; Minot v. Mastin, 37 C. C. A. 238, 95 Fed. 739; Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Davis v. Sullivan, 33 N. J. Eq. 569; Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 703; Buel v. Farmers' Loan & T. Co. 44 C. C. A. 213, 104 Fed. 842.

It is not enough to say that Leary's claim is superior to the government's claim for that is a mere conclusion to be drawn or not drawn from the facts well pleaded.

United States v. Van Auken, 96 U. S. 366, 24 L. ed. 852; Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416.

The failure of an intervener to make proper averments excusing gross laches apparent on the face of an intervention, as in the case at bar, is fatal.

Landsdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; O'Brien v. Wheelock, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; Buel v. Farmers' Loan & T. Co. 44 C. C. A. 213, 104 Fed. 842; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642.

Where the intervener treated her pleadings as final, and appealed from the order denying leave to intervene, even though her petition was without equity, so that if she had not appealed the adjudication would not have been final, yet it was proper for the circuit court of appeals to affirm the order of denial rather than dismiss her case for want of jurisdiction, because she had by election made the adjudication final.

Rothwell v. Dewees, 2 Black, 613, 17 L. ed. 309.

An express contract of a principal to indemnify bail is against public policy and the contract is void.

United States v. Simmons, 14 L.R.A. 78, 47 Fed. 577; Herman v. Jeuchner, L. R. 15 Q. B. Div. 561, 54 L. J. Q. B. N. S. 340, 53 L. T. N. S. 94, 33 Week. Rep. 606, 49 J. P. 502; 16 Am. & Eng. Enc. Law, 172; 3 Am. & Eng. Enc. Law, 684.

Whatever may be the policy of particular states as to the administration of criminal laws, the public policy of the United States, as declared by the Federal courts, must control in the case at bar.

Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548.

The magistrate in Federal cases must follow the state procedure for taking "bail," and not follow the state procedure for taking something else in lieu of bail, not directed to be taken by the Federal statute.

United States v. Burr, Fed. Cas. No. 14,694; United States v. Reid, 12 How. 366, 13 L. ed. 1025; Logan v. United States, 144 U. S. 301, 36 L. ed. 442, 12 Sup. Ct. Rep. 617.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for leave to intervene in a suit brought by the United States to charge the defendant Kellogg with a trust in respect of funds alleged to have been received by him from Greene, and to have been obtained from the plaintiff by Greene through his participation in the well-known Carter frauds. The funds specially referred to were certain shares of railroad stock standing in Kellogg's name, but held in trust for Greene. The nature of the alleged frauds can be gathered from United States v. Carter, 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594. See Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218. The bill of intervention alleges the indictment of Greene, and that the plaintiff's deceased became surety upon Greene's bail bond "upon the understanding and condition that the securities held in trust or on deposit" by Kellogg from Greene, being the above-mentioned railroad stock, should remain in Kellogg's hands as security and indemnity to Leary for signing the bond. It goes on to allege Greene's failure to appear, a forfeiture of the bond, a suit upon it brought September 10, 1903, and a judgment for the United States against the intervener on January 6, 1908. Finally the bill sets forth that the United States not only has got an injunction *pendente lite* forbidding Kellogg to deliver the fund to the intervener to be used in partial liquidation of the judgment against her, but is pressing the collection 574] of the judgment; *and that the United States has no equity unless subject to that which the intervener claims.

This suit was begun on December 19, 1903. The evidence had been taken and it was ready for final hearing when the petition for leave to intervene was filed, April 18, 1908. But the action on the bond seems to have been contested, and no judgment was entered until January 6, 1908, as we have said. The circuit court intimated an 56 L. ed.

opinion that the bill of intervention was defective for want of an allegation that Leary, at the time of his agreement, did not know the facts alleged in the principal bill to raise a trust for the government, and also that, so far as appears, it might be brought upon a supposed implied contract, whereas no such undertaking of indemnity would be implied by the law, citing United States v. Ryder, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196. But observing that the petition might be amended in these respects, it held that amendment would be unavailing, as the contract was against public policy and void. 163 Fed. 442. The circuit court of appeals, without deciding upon this last point, affirmed the decree on the above-mentioned ground that Leary's knowledge was not negatived, and also on that of laches, apparent and unexplained. 107 C. C. A. 27, 184 Fed. 433.

The result is that the petitioner is denied her chance to be heard for want of amendments which the court that might have allowed them told her that it was no use to make, as it was going to decide against her, whatever she did. Even if the court would have allowed them, which is a speculation, it is holding a party to very technical rules to say that while one case was being dealt with below, he ought to have contemplated having to meet a different one above. But we need not consider that matter, as we are of opinion that the bill, without amendment, showed a sufficient right to intervene.

We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of *an obli-575 gation raised by the law, irrespective of any real promise. That would seem to us a perverted interpretation of the words "upon the understanding and condition," even if the contract were only a general one to indemnify; but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words. The point that Leary's knowledge ought to have been denied impresses us hardly more. The plaintiff has not the legal title, and is not claiming against an admitted prior equity as a purchaser without notice. Her position is that she does not know whether the United States has any equity or not, but that whatever rights the United States may have are inferior to hers. She is not called on to allege Leary's ignorance of facts that she does not admit and that are not yet finally established. We are of opinion that anyone reading the bill in the same way that he

would read an untechnical document would have no doubt that the plaintiff meant to put her ease as we have taken it.

The only matters that seem to us to need argument are the questions of public policy and laches. As to the former, the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said that the bail contemplated by the Revised Statutes (§ 1014, U. S. Comp. Stat. 1901, p. 716) is a common-law bail, and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundium*, although a trace of the old relation remains in the right to arrest. Rev. Stat. § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was 576] for \$40,000, that sum was the *measure of the interest on anybody's part, and it did not matter to the government what person ultimately felt the loss, so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls, we are content to say merely that the New York decisions strike us as founded in good sense. *Maloney v. Nelson*, 144 N. Y. 182, 189, 39 N. E. 82, s. c. 158 N. Y. 351, 355, 53 N. E. 31.

As to laches, there is no legal presumption that the petitioner knew of this suit, and still less that she knew the position taken by Kellogg. He set up that the stock was taken as indemnity to himself for his promise to indemnify Leary, etc., and said nothing about the petitioner's claim. If that claim is well founded and she knew of this suit, it was not laches in her to assume that Kellogg would do his duty as her trustee. She might be bound by a decree against him, but before decree, on discovering his conduct, she fairly may ask a chance to protect herself. Moreover, as she disputed liability on the bond, she had an additional reason for not moving until the case against her had gone to judgment. See *Anonymous*, 11 Mod. 2. On the whole matter it seems to us that she was dealt with too technically. She presents a case which, unless read with an adverse mind, is a good one on its face, and whatever misgivings we may entertain, we are of opinion that she ought to be allowed to try to prove it. In the circumstances it seems to us that the leave to intervene may be granted, subject to the condition that the evidence already in shall be taken to be evidence against her, subject to her right to

recall and cross-examine such witnesses for the government as she may be advised.

Decree reversed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

*TEXAS & PACIFIC RAILWAY[577
COMPANY, Plff. in Err.,

v.

W. A. HOWELL.

(See S. C. Reporter's ed. 577-583.)

Appeal — from circuit court — negligence suit — reversible error.

1. Plain error alone will justify the Federal Supreme Court in reversing a judgment of a circuit court of appeals in a personal-injury case which is brought to the Supreme Court solely on the ground that the defendant corporation has a charter from the United States.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Appeal — reversible error — submission to jury — instructions.

2. No reversible error is committed in leaving to the jury an action for personal injuries sustained by an employee from a falling timber, while he was digging a post hole under a coal chute and other employees were tearing up the floor above him, with instructions that if the injury was due to the negligence of the master in sending men to work above the employee, as a contributing cause, the master was liable, but not if the injury was due only to the negligence of fellow servants in their way of performing their work.

[For other cases, see Appeal and Error, 5071-5143, in Digest Sup. Ct. 1908.]

Evidence — proximate cause — disease.

3. A jury is warranted in finding that tuberculosis of the spine is the direct result of an injury from a falling timber, where there was ample evidence that the blow occasioned the development of the disease, though it was not discovered to be such for over a year.

[For other cases, see Evidence, XII. b, in Digest Sup. Ct. 1908.]

[No. 947.]

Submitted April 22, 1912. Decided May 13, 1912.

NOTE.—On appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On servant's assumption of risk from changing condition of the working place during progress of work—see note to *Citron v. O'Rourke Engineering Constr. Co.* 19 L.R.A.(N.S.) 340.

As to master's duty to provide safe place to work—see notes to *Union P. R. Co. v. O'Brien*, 40 L. ed. U. S. 767; and *Union P. R. Co. v. James*, 41 L. ed. U. S. 236.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Texas in favor of plaintiff in an action against a railway company to recover damages for personal injuries received by an employee. Affirmed.

See same case below, 111 C. C. A. 674, 191 Fed. 1006.

The facts are stated in the opinion.

Mr. William L. Hall submitted the cause for plaintiff in error:

The plaintiff failed to make out a case of negligence on the part of the defendant, and the jury should have been so instructed.

Bishop. Non-Contract Law, § 649; Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224, 54 Am. Rep. 5, 21 N. W. 577; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Houston & T. C. R. Co. v. Alexander, 103 Tex. 594, 132 S. W. 119.

The rule requiring a railroad company to furnish a safe place for their employees to work has no application to a case where laborers are sent to repair a defective structure, such as a coal chute.

Labatt, Mast. & S. § 269; Schneider v. Philadelphia Quartz Co. 220 Pa. 548, 69 Atl. 1035; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Fortin v. Manville Co. 128 Fed. 642; Montgomery v. Robertson, 229 Ill. 466, 82 N. E. 396; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Meehan v. St. Louis, M. & S. E. R. Co. 114 Mo. App. 396, 90 S. W. 102; Gulf, C. & S. F. R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; Moore v. Pennsylvania R. Co. 167 Pa. 495, 31 Atl. 734; Richardson v. Anglo-American Provision Co. 72 Ill. App. 77; McNeill v. Bottsford-Dickinson Co. 128 App. Div. 544, 112 N. Y. Supp. 867; Clark v. Liston, 54 Ill. App. 578; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A.(N.S.) 684, 81 C. C. A. 338, 152 Fed. 120; McElwaine-Richards Co. v. Wall, 166 Ind. 267, 76 N. E. 408; Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; Armour & Co. v. Dumas, 43 Tex. Civ. App. 36, 95 S. W. 710; Allen v. Galveston, H. & S. A. R. Co. 14 Tex. Civ. App. 344, 37 S. W. 171; Walton v. Bryn Mawr Hotel Co. 160 Pa. 3, 28 Atl. 438; Clancy v. Guaranty Constr. Co. 25 App. Div. 355, 50 N. Y. Supp. 800; Walaszewski v. Schoknecht, 127 Wis. 376, 106 N. W. 1070; 2 Bailey, Personal Injuries Relating to Mast. 56 L. ed.

& S. §§ 2993, 2996, 3001, 3022; Dresser, Employers' Liability, p. 535; Moon-Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 111 Fed. 303; Finalyson v. Utica Min. & Mill. Co. 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507; Southern R. Co. v. Lyons, 25 L.R.A.(N.S.) 335, 95 C. C. A. 55, 169 Fed. 560; Gulf, C. & S. F. R. Co. v. Mayo, 14 Tex. Civ. App. 253, 37 S. W. 659; Houston & T. C. R. Co. v. O'Hare, 64 Tex. 603; Watson v. Houston & T. C. R. Co. 58 Tex. 438; Florence & C. C. R. Co. v. Whipps, 70 C. C. A. 443, 138 Fed. 13.

The Potts' disease of the spine with which the plaintiff is now suffering is too remote a consequence to be chargeable against the defendant as the result of the injury he received.

Hamilton, Railway & Other Accidents, p. 257.

Mr. S. P. Jones submitted the cause for defendant in error:

The evidence was sufficient to satisfy the jury in finding that the railway company was guilty of negligence which was the proximate and direct cause of the injury.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 386, 37 L. ed. 780, 13 Sup. Ct. Rep. 914; Mather v. Rillston, 156 U. S. 398, 39 L. ed. 470, 15 Sup. Ct. Rep. 464, 18 Mor. Min. Rep. 165; Texas & P. R. Co. v. Archibald, 170 U. S. 672, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; Chicago House Wrecking Co. v. Birney, 54 C. C. A. 458, 117 Fed. 72; National Steel Co. v. Lowe, 62 C. C. A. 229, 127 Fed. 311; 4 Thomp. Neg. §§ 3809-3814; 1 Shearm. & Redf. Neg. §§ 185b, 194.

To charge Howell with assuming the risk, it would be necessary to show that Howell knew that the men were tearing up the decking over him, and that the manner of tearing the same up was dangerous to the extent that an ordinarily prudent man would not have remained in the service.

Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; Mather v. Rillston, 156 U. S. 398, 39 L. ed. 470, 15 Sup. Ct. Rep. 464, 18 Mor. Min. Rep. 165; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24; Shearm. & Redf. Neg. § 185b; Chicago House Wrecking Co. v. Birney, 54 C. C. A. 458, 117 Fed. 72.

The uncontroverted evidence fully justified the jury in finding that "Potts' disease" and the diseased condition of the defendant in error was the direct result of

the injury that he received by reason of the negligence of the plaintiff in error.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Travelers' Ins. Co. v. Melick*, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; 13 Cyc. 30, 31; *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for personal injuries done to the plaintiff, the defendant in error, Howell, while in the employ of the railway company. The plaintiff had a verdict and judgment, subject to exceptions, and the judgment was affirmed without discussion by the circuit court of appeals. The material facts can be stated in a few words. The plaintiff was set to digging a hole for a post under a coal chute. While he was at work the defendant put other men to removing certain timbers and planks from the floor, 12 feet or so above him, without his knowledge, as he contends, and a piece of timber fell and struck the plaintiff on the head. The plaintiff now is suffering from tuberculosis of the spine, in consequence, as he says, of the blow. The defendant asked the court to direct a verdict, and also to instruct the jury that if the plaintiff knew that other servants were tearing up the floor above him, he took the risk; that if no harm would have resulted but for the negligence of those other servants the defendant was not liable; and that the plaintiff's present disease of the spine was too remote from the blow to be 582]attributed to it as a result. *The case was left to the jury with instructions that if the injury was due to negligence of the defendant in sending men to work above the plaintiff, as a contributing cause, the defendant was liable; but not if it was due only to the negligence of fellow servants in their way of performing their work. The question also was left to the jury whether the disease was the direct consequence of the blow.

The case was begun in the state court and was removed to the circuit court, and is brought here, solely on the ground that the plaintiff in error has a charter from the United States. But for that accident, which has no bearing upon the questions raised, the case would stop with the circuit court of appeals. Under such circumstances we go no further than to inquire whether plain error is made out. *Chicago Junction R. Co. v. King*, 222 U. S. 222, ante, 173, 32 Sup. Ct. Rep. 79. We find nothing that requires us to reverse the

judgment. It was open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained. They well might be of opinion that the general nature of the things to be done gave no notice to the plaintiff that he was asked to take a necessary risk. At the same time, they were warranted in saying that if the defendant saw fit to do the work above and below at the same time, it did so with notice of the danger to those underneath, and took chances that could not be attributed wholly to the hand through which the harm happened. Even if Howell knew that repairs were going on overhead, that did not necessarily put him on an equality with his employer, and require a ruling that he took the risk. *Kreight v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619.

The plaintiff was injured on March 3, 1908. There was ample evidence that the blow occasioned the development of his disease, although it was not discovered to be the Potts disease, as it is called, for over a year. *But it is argued that if such[583 a disease is due to the presence of tubercular germs in a man's system before the accident, the defendant ought not to be required to pay more than it would to a normal man. On this point also we are of opinion that the jury were warranted in finding that the disease was the direct result of the injury, as they were required to, by the very conservative instructions to them, before holding the defendant to answer for it. *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 491, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747; *Smith v. London & S. W. R. Co.* L. R. 6 C. P. 14, 21, 40 L. J. C. P. N. S. 21, 23 L. T. N. S. 678, 19 Week. Rep. 230, 18 Eng. Rul. Cas. 726.

Judgment affirmed.

B. ALTMAN & COMPANY, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 583-602.)

Direct appeal from circuit court — revenue cases — Federal question.

1. A direct appeal lies to the Federal Su-

NOTE.—Direct review by Federal Supreme Court of circuit or district court judgments or decrees.

I. In general, 895.

II. Effect of prior appeal to circuit court of appeals, 895.

preme Court from a circuit court in a revenue case in which, in addition to an objection to the classification and the rate of duty, there is involved the construction of a Federal law, or the validity or construction of a treaty, within the meaning of the act of March 3, 1891 (26 Stat. at L. 826, 827, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549), § 5, governing such direct appeals, notwithstanding the provision of § 6 of that act, making the circuit courts of appeals the proper and final tribunals in revenue cases, and the special provision of the act of May 27, 1908 (35 Stat. at L. 403, chap. 205), amendatory of the revenue act

of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1886), for the review by the circuit courts of appeals of decisions as to the construction of the tariff laws and the facts respecting the classification of merchandise, and the rate of duty imposed thereon under such classification.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Direct appeal from circuit court — Federal question — treaty — commercial compact.

2. The commercial reciprocal agreement with France, negotiated under the authority

III. The designated classes of cases.

- a. When jurisdiction is in issue, 896.
- b. Criminal causes, 902.
- c. When construction or application of Federal Constitution is involved, 903.
- d. When constitutionality of Federal law or validity or construction of treaty is drawn in question, 906.
- e. When state law or Constitution is claimed to violate Federal Constitution, 907.

I. In general.

This note is supplemental to that appended to the case of *Gwin v. United States*, 46 L. ed. U. S. 741.

By the adoption of the Federal Judicial Code (act of March 3, 1911, 36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228), the applicable jurisdictional statute was changed by eliminating the provision for review in criminal cases, and by omitting any reference to the circuit courts abolished by that Code, the present statute (Code, § 238) now reading:

"Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court, in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

No pecuniary limit was imposed by the act of March 3, 1891, upon the appellate jurisdiction over the Federal district or circuit courts which was conferred by that act upon the Supreme Court of the United States and the circuit courts of appeals. *Kirby v. American Soda Fountain Co.* 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619.

56 L. ed.

But the limitation with reference to the amount in dispute, prescribed by the act of March 3, 1887 for appeals from or writs of error to a Federal district court sitting as a court of claims, remained in force, notwithstanding the provision of the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 14, that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding §§ 5 and 6 of this act are hereby repealed." *Reid v. United States*, 211 U. S. 529, 53 L. ed. 313, 29 Sup. Ct. Rep. 171.

The appeal required by the act of June 22, 1860, § 11, to be taken to the Supreme Court of the United States if the decree of the district court in certain private land claim cases is against the United States, was "otherwise provided by law," within the meaning of the act of March 3, 1891, § 6, making the circuit court of appeals the proper tribunal for the review of final decisions of the district court in other than certain excepted cases, which include those where it is otherwise provided by law. *United States v. Dalcour*, 203 U. S. 408, 51 L. ed. 248, 27 Sup. Ct. Rep. 58.

A direct appeal to the Federal Supreme Court from a final decree of a circuit court in a proceeding to compel the production of papers and the giving of testimony before the Interstate Commerce Commission was authorized by the provision in the act of February 19, 1903, § 3, making applicable to "any case" brought under the direction of the Attorney General, in the name of the Commission, the provisions of the act of February 11, 1903, the 2d section of which authorizes direct appeals from the Federal circuit courts to the Supreme Court in cases brought under the anti-trust or interstate commerce acts, although this section has reference only to suits in equity, and the paragraphs preceding the proviso in the later statute do not include proceedings of this character. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

II. Effect of prior appeal to circuit court of appeals.

A judgment of a Federal circuit court in favor of plaintiff in an action to recover

contained in the tariff act of 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), § 3, to make reciprocal agreements with reference to certain specified articles, is a treaty within the meaning of the act of March 3, 1891, § 5, giving a direct appeal from a Federal circuit court to the Supreme Court in cases where the validity or construction of any treaty made under the authority of the United States is drawn in question.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Tariff — bronze bust — statuary — reciprocity.

3. A bronze bust cast by artisans from the artist's model is dutiable, upon importation from France, at 45 per cent ad valorem, under the tariff act of 1897, ¶ 193, which covers articles or wares not specially

provided for in the act, composed wholly or in part of metal, and whether partly or wholly manufactured, and is not classifiable as statuary, under the commercial reciprocal agreement with France, negotiated in accordance with, and under the authority contained in, § 3 of that act, to make reciprocal agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary," since the tariff act defines statuary as including only such as is cut, carved, or otherwise wrought by hand from a solid block of marble, stone, or alabaster, or from metal, and such as is the professional production of a statuary or sculptor.

[For other cases, see Duties, 89-96, 213-219, in Digest Sup. Ct. 1908.]

[No. 208.]

damages for the infringement of a copyrighted map, in which a prior judgment sustaining a demurrer to and dismissing the declaration on the ground that the copyright law gave no such action was reversed by the circuit court of appeals, to which the case was carried by the plaintiff, may be reviewed by the Federal Supreme Court on a direct writ of error sued out by the defendant below under the act of March 3, 1891, § 5, as presenting the question of the jurisdiction of the circuit court. *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726.

A defendant which, on an appeal to a circuit court of appeals from a decree of a Federal circuit court sustaining a demurrer to a bill on the ground of want of jurisdiction of the state court from which the case was removed, does not insist upon the jurisdictional objection, but takes its chances on the merits, stands in no better position, so far as its right to appeal to the Supreme Court from a decree of the circuit court, entered pursuant to the direction of the circuit court of appeals, is concerned, than if it had itself taken the appeal to that court. *Kansas City Northwestern R. Co. v. Zimmerman*, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730.

A decision of a circuit court of appeals, affirming, on the revisory proceeding authorized by the bankrupt act of July 1, 1898, § 24b, an interlocutory order of the court of bankruptcy which overruled a motion to dismiss the proceedings, cannot preclude a writ of error from the Federal Supreme Court to the bankruptcy court, to review the final decision, bringing up the question of the jurisdiction of that court to make an adjudication of bankruptcy on a claim for unliquidated damages. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

A direct appeal will not lie to the Federal Supreme Court under the act of March 3, 1891, to review, as presenting a question of jurisdiction, a decree of a circuit court entered pursuant to the mandate of a cir-

cuit court of appeals, which, being of the opinion that the bill was within the ancillary jurisdiction of the circuit court, had reversed a decree of that court dismissing such bill for want of jurisdiction, since there was an opportunity afforded by the statute to obtain a review of the jurisdictional question in the Supreme Court, either upon a certificate of the circuit court of appeals, or on writ of certiorari to that court. *Brown v. Alton Water Co.* 222 U. S. 325, ante, 221, 32 Sup. Ct. Rep. 156.

The Federal Supreme Court cannot review, as presenting a question of jurisdiction, a decree of a Federal circuit court dismissing a bill in aid of an attempt to remove condemnation proceedings from a state court, which decree was necessitated by the mandate of a circuit court of appeals, which court, being of the opinion that the condemnation proceedings did not amount to a "suit" within the meaning of the removal statutes, had reversed an order of the circuit court, granting a temporary injunction restraining the further prosecution of the proceedings, and had remanded the cause with directions to proceed in accordance with its opinion, since there was an opportunity afforded to obtain a review of the jurisdictional question, either upon a certificate of the circuit court of appeals, or on a writ of certiorari to that court. *Metropolitan Water Co. v. Kaw Valley Drainage Dist.* 223 U. S. 519, ante, 533, 32 Sup. Ct. Rep. 246.

See also div. V., in note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 613, as to the appellate jurisdiction of the circuit courts of appeals where the case was also within the appellate jurisdiction of the Federal Supreme Court over circuit and district courts.

III. The designated classes of cases.

a. When jurisdiction is in issue.

Effect of prior appeal to circuit court of appeals, see *supra*, II.

It is the jurisdiction of the court as a

Argued April 25 and 26, 1912. Decided May 13, 1912.

APPPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment which affirmed a decision of the Board of General Appraisers, sustaining an assessment of a duty of 45 per cent ad valorem upon a bronze bust imported from France. Affirmed.

See same case below, 172 Fed. 161.

The facts are stated in the opinion.

Mr. Henry J. Webster argued the cause, and, with Messrs. Howard T. Walden and John K. Maxwell, filed a brief for appellants:

The mere designation of the instrument

Federal court which must be in issue in order to support the appeal or writ of error.

A direct appeal from a Federal district court to the Supreme Court cannot be maintained under the act of March 3, 1891, § 5, because the jurisdiction of the lower court was questioned, unless it was the jurisdiction of that court as a court of the United States that was in issue, and that question is certified to the appellate court. *Schweer v. Brown*, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15.

A writ of error from the Federal Supreme Court to a circuit court, authorized by the act of March 3, 1891, § 5, when the jurisdiction of the lower court is in issue, cannot be maintained because of a question as to the jurisdiction of that court in respect to its general authority as a judicial tribunal, or its power as a court of equity. *Bien v. Robinson*, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379.

The question whether a Federal circuit court, under the principles of equity and comity governing all courts having concurrent jurisdiction over the same subject-matter, has authority to administer a trust estate after a suit with reference thereto has been begun in a state court, does not involve the jurisdiction of the circuit court as a Federal tribunal, which alone, under the act of March 3, 1891, § 5, can furnish ground for a direct appeal to the Federal Supreme Court as a case in which the "jurisdiction of the court is in issue." *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119.

Whether the bill presents a case for equitable relief or not does not involve a question of the jurisdiction of a Federal circuit court as a Federal court, so as to sustain a direct appeal to the Supreme Court. *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

The objection that an attachment suit in aid of an action at law was not cognizable in a Federal circuit court, to which it had been removed from the state court for diversity of citizenship, because the proceeding was inequitable in form, is not open to

by another name, even by Congress and the President, does not prevent its being a treaty if it is such in substance.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Ann. Crim. Rep. 135; *Bartram v. Robertson*, 122 U. S. 116, 118, 30 L. ed. 1118, 1119, 7 Sup. Ct. Rep. 1115.

In the general sense, and without special reference to the Constitution and laws of the United States, the so-called commercial agreement with France is unquestionably a treaty.

Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; *Holmes v. Jennison*, 14 Pet. 540, 571, 10 L. ed. 579, 594; *United States*

consideration by a direct appeal to the Federal Supreme Court, which is sought to be maintained under the act of March 3, 1891, § 5, as a case in which the jurisdiction of the circuit court was in issue. *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

The jurisdiction of a Federal district court of the United States was in issue so as to sustain a direct appeal to the Federal Supreme Court, where the exceptions to a libel and intervening petition claiming salvage for services rendered to a vessel on fire in a dry dock challenged the jurisdiction because, from the situation of the vessel, the place where the services were rendered, and their nature and character, they afforded no basis for the jurisdiction of the court as a court of admiralty of the United States, and this was the conception upon which that court acted in dismissing such libel and intervening petition. *The Jefferson*, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907.

The jurisdiction of the Federal Supreme Court of a direct appeal from a decree of a Federal district court sitting as a court of admiralty, which dismissed a libel for contribution in favor of a joint wrongdoer who had paid a judgment recovered against him in a suit at common law, founded on the wrong, to which the other wrongdoer was not made a party, cannot be defeated on the theory that the dismissal, although expressed to be for want of jurisdiction, is really upon the merits, because payment of a judgment at common law is not a ground for contribution from a wrongdoer not a party to the suit. *The Ira M. Hedges (Lehigh Valley R. Co. v. Cornell S. B. Co.)* 218 U. S. 264, 54 L. ed. 1039, 31 Sup. Ct. Rep. 17, 20 Ann. Cas. 1235.

The question of the jurisdiction of a Federal district court is not involved so as to require the appeal to be taken to the Supreme Court of the United States rather than to the circuit court of appeals, in the determination that a corporation is principally engaged in such a business that it can be adjudged a bankrupt. *Columbia*

v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456.

In the Constitution and laws of the United States the word "treaty" has no special meaning different from the general definition.

Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; Hauenstein v. Lynham, 100 U. S. 483, 489, 25 L. ed. 628, 630.

The reason for vesting the power to make treaties in the President and Senate appears to have been simply to secure secrecy and despatch, which, it was recognized, were often necessary; and except for this consideration the power would doubt-

less have been expressly vested in Congress as a whole.

2 Hunt's, Madison, Journal of Const. Conv. of 1787, p. 327; 5 Pinckney, Elliott's Debates in State Conventions, pp. 253-267.

In some court decisions this particular agreement with France has been called a treaty without discussion as to the exact meaning of the word.

Nicholas v. United States, 122 Fed. 892; Migliavacca Wine Co. v. United States, 148 Fed. 142; Shaw v. United States, 1 Customs App. 426.

The Constitution, in conferring the power to make treaties, does not prescribe the time or method of the Senate's giving its advice and consent.

Green v. Biddle, 8 Wheat. 1, 85, 5 L.

Ironworks v. National Lead Co. 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 99.

A direct appeal to the Supreme Court of the United States from a judgment of a district court dismissing a petition in involuntary bankruptcy, entered after directing the jury to find that the alleged bankrupt was engaged chiefly in farming, and was therefore, by the express terms of the bankruptcy act, not subject to its provisions, cannot be maintained on the theory that the jurisdiction of the district court was drawn in issue, within the meaning of the act of March 3, 1891, § 5,—especially where no question of jurisdiction was certified by the district court, as required by that section. First Nat. Bank v. Klug, 186 U. S. 203, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899.

A judgment of a district court of the United States, imposing imprisonment for contempt, cannot be reviewed in the Supreme Court of the United States on writ of error to that court, on the theory that the case is one in which the jurisdiction of the court is in issue within the meaning of the act of March 3, 1891, § 5, where jurisdiction over the person and subject-matter was not challenged, and the question asserted in the certificate of the lower court was whether it had jurisdiction to try and punish the defendant for contempt upon the facts and for the causes stated. O'Neal v. United States, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776, 14 Am. Crim. Rep. 303.

The dismissal by a Federal circuit court of an action brought by a domestic corporation to recover from nonresident railway companies the excess over a reasonable freight rate exacted by them because the declaration contained no averment that the Interstate Commerce Commission had sustained plaintiff's right to reparation does not present a question of the jurisdiction of that court as a Federal court, so as to sustain a direct appeal to the Supreme Court, since precisely the same question would have arisen for decision had the suit been pending in a state court of general authority, having jurisdiction over the

defendants. Darnell v. Illinois C. R. Co. 225 U. S. 243, post, —, 32 Sup. Ct. Rep. 760.

The question whether a Federal circuit court, in a suit in which the requisite diversity of citizenship exists, may enforce a cause of action based on a state statute alleged to be penal in its nature, does not involve the jurisdiction of the court as a Federal court, which alone can support a direct writ of error from the Federal Supreme Court, under the act of March 3, 1891, § 5, as a case in which the jurisdiction of the circuit court was in issue. Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185.

The question of the validity of the service of a subpoena issued by a Federal circuit court upon the resident treasurer of a foreign corporation involves the jurisdiction of that court as a Federal court, so as to sustain a direct appeal to the Supreme Court of the United States under the act of March 3, 1891, § 5, from an order setting aside the service. Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768.

The question of the validity of the service of process of a Federal circuit court on certain persons as the agents of a foreign corporation involves the jurisdiction of that court so as to sustain a direct appeal to the Supreme Court of the United States, under the act of March 3, 1891, § 5, from a decree dismissing the bill for lack of valid service. Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

A decree of a Federal circuit court sustaining a plea to the jurisdiction may be brought to the Federal Supreme Court, under the act of March 3, 1891, § 5, by direct appeal, where the question presented involves issues of fact as to whether the corporate defendant was doing business in the state, and whether the person attempted to be served as agent was such at that time. Herndon-Carter Co. v. James N. Norris, Son & Co. 224 U. S. 496, ante, 857, 32 Sup. Ct. Rep. 550.

The contention that there was no valid service of process upon a foreign corporate

ed. 547, 568; *Poole v. Flegger*, 11 Pet. 185, 209, 9 L. ed. 680, 690, affirming 1 McLean, 185, Fed. Cas. No. 4,860; *Virginia v. West Virginia*, 11 Wall. 39, 59, 20 L. ed. 67, 72.

It is within the spirit and intent of the act of March 3, 1891, to give this court jurisdiction in this case.

Durousseau v. United States, 6 Cranch, 307, 314, 3 L. ed. 232, 234.

If the agreement of France is a treaty, this court has jurisdiction of the entire case.

Horner v. United States, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522.

A name of an article, used in a stat-

ute without qualification, includes that article in all its forms and species.

Chew Hing Lung v. Wise, 176 U. S. 156, 160, 44 L. ed. 412, 414, 20 Sup. Ct. Rep. 320; *Shoellkopf v. United States*, 18 C. C. A. 301, 38 U. S. App. 17, 71 Fed. 694.

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.

Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. ed. 628, 629.

The honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

defendant in a suit removed by it from a state to a Federal court, because the corporation was not doing business in the state, and the person attempted to be served was not its agent at that time, involves the jurisdiction of the latter court as a Federal court, so as to sustain a direct review of the judgment of that court, under the act of March 3, 1891, § 5, by writ of error from the Federal Supreme Court. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

The jurisdiction of the court below as a Federal court was so involved as to sustain a direct review, in the Supreme Court of the United States, of a Federal circuit court judgment dismissing an action which had been removed from the state court, where the ground of the judgment was lack of a valid service of process on the defendant, and the plaintiff had moved to remand the cause. *Remington v. Central P. R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577.

The jurisdiction of a Federal circuit court as a Federal court is so involved as to sustain a direct writ of error from the Federal Supreme Court under the act of March 3, 1891, § 5, in a judgment dismissing the suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant. *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

The dismissal of a bill filed against nonresident aliens in a Federal circuit court because complainant offered no proof to establish the fact that the property sought to be affected was within the district, as contemplated by the act of March 3, 1875, § 8, which authorizes the exertion of jurisdiction as to the property of absent defendants, the bill's averment in this regard having been traversed by plea, involves a question as to the power of the court as a Federal court, reviewable by direct appeal to the Supreme Court. *Chase v. Wetz-* 56 L. ed.

lar, 225 U. S. 79, post, 990, 32 Sup. Ct. Rep. 659.

A suit in which the jurisdiction of a United States circuit court was only questioned under the established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, does not involve a question of jurisdiction which, under the act of March 3, 1891, § 5, may be certified directly to the Federal Supreme Court. *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547.

The objection that an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to the act of February 24, 1905, amending the act of August 13, 1894, for his failure to pay certain designated subcontractors for labor and materials used in construction, should, under such statutes, when rightly construed, have been brought in the Federal circuit court for the district wherein the contract was to be performed, instead of in the court for the district where the defendants reside, raises a question of the jurisdiction of the circuit court which will sustain a direct writ of error from the Federal Supreme Court. *United States v. Congress Constr. Co.* 222 U. S. 199, ante, 163, 32 Sup. Ct. Rep. 44.

The denial of a motion to remand a cause which has been removed from the state court to a Federal circuit court does not so present the question of that court's jurisdiction as to sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891, § 5, where such motion did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the cause. *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

The contention that a Federal circuit court has no jurisdiction of a suit founded on a decree of that court because the state court from which the suit was removed was without jurisdiction does not present a question of the jurisdiction of the circuit

Chew Heong v. United States, 112 U. S. 536, 539, 28 L. ed. 770, 771, 5 Sup. Ct. Rep. 255; *New York Indians v. United States*, 170 U. S. 1, 23, 42 L. ed. 927, 935, 18 Sup. Ct. Rep. 531.

The treaty must contain the whole contract between the parties.

New York Indians v. United States, 170 U. S. 1, 23, 42 L. ed. 927, 935, 18 Sup. Ct. Rep. 531; *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 183, 46 L. ed. 138, 143, 22 Sup. Ct. Rep. 59; *Meigs v. M'Clung*, 9 Cranch, 11, 3 L. ed. 639.

The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to

cases not intended by the legislature to be brought within its purview.

Minis v. United States, 15 Pet. 423, 445, 10 L. ed. 791, 799; *United States v. Dickson*, 15 Pet. 141, 165, 10 L. ed. 689, 698; *White v. United States*, 191 U. S. 545, 551, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 171.

Messrs. W. Wickham Smith and John K. Maxwell filed a brief for appellants in opposition to the motion to dismiss or affirm.

Assistant Attorney General Wemple argued the cause, and, with Mr. Charles E. McNabb, Assistant Attorney, and Mr. Frank L. Lawrence, Special Attorney, filed a brief for appellee:

A change looking to the ordinary busi-

court as a Federal court, so as to sustain a direct appeal to the Supreme Court, on the ground that the jurisdiction of the circuit court was in issue. *Kansas City Northwestern R. Co. v. Zimmerman*, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730.

The objection that a Federal circuit court to which a suit has been removed from a state court was without jurisdiction because the removal was improper is not open on a direct appeal to the Supreme Court, presenting the question of the jurisdiction of the circuit court, where the record and certificate show that the jurisdiction of that court was denied on the single ground that the state court where the proceedings started was without jurisdiction. *Ibid.*

The dismissal by a Federal circuit court of a suit against a foreign executor for the want of jurisdiction in the state court, from which it had been removed for diversity of citizenship, does not present a question of the jurisdiction of the circuit court as a Federal court, which will authorize a direct appeal under the act of March 3, 1891, § 5, to the Federal Supreme Court. *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

A case cannot be brought up to the Supreme Court of the United States by direct appeal from the Federal circuit court under the act of March 3, 1891, § 5, as one in which the jurisdiction of the court is in issue, where the jurisdiction challenged is not that of the court rendering the decree from which the appeal is taken, but is that of the court which rendered a former decree, which is set up in the bill as the basis of the title in suit. *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476.

The jurisdictional question must not be wholly without merit.

A decree of a Federal circuit court, dismissing, for want of the requisite diversity of citizenship, a bill by which, on the ground of fraud, injunctive relief against the collection of a judgment against a railway company and of a subsequent judgment

against the surety on its appeal bond is sought by such surety and by the person who is, by contract, ultimately liable to pay the original judgment, is so plainly correct as to require the dismissal of an appeal to the Supreme Court, where such decree is based upon the proposition that such railway company, although insolvent, is an indispensable party, which must be aligned with the plaintiffs for the purpose of determining the question of jurisdiction. *Steele v. Culver*, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9.

The contention that under U. S. Rev. Stat. § 1342, art. 62, U. S. Comp. Stat. 1901, p. 957, a court-martial has exclusive jurisdiction over the crimes committed by a military officer which are cognizable by courts-martial under the provisions of that article, is too clearly unfounded to serve as the basis of a writ of error from the Federal Supreme Court, to review a conviction in a circuit court. *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434.

A decision of a court of bankruptcy, upholding its jurisdiction to adjudicate the validity of an alleged equitable lien upon property which it decided to be an asset of the estate in bankruptcy, and not exempt property of the bankrupt, does not create a question of jurisdiction which will sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891, since, by the express terms of the bankruptcy act of July 1, 1898, § 2, subdiv. 11, jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions. *Lucius v. Cawthon-Coleman Co.* 196 U. S. 149, 59 L. ed. 425, 25 Sup. Ct. Rep. 214.

A plaintiff cannot maintain a direct appeal from a Federal circuit court to the Supreme Court, under the act of March 3, 1891, § 5, because the jurisdiction of the lower court was in issue, where that jurisdiction was sustained and a decree rendered in favor of defendants on the merits. *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93.

ness of the courts should not be held to embrace a change in special jurisdiction merely on the strength of words general enough to include it, when it appears that the general policy of the special jurisdiction still is maintained.

Reid v. United States, 211 U. S. 529, 538, 53 L. ed. 313, 315, 29 Sup. Ct. Rep. 171.

Assuming, but not admitting, that § 5 of the judiciary act of March 3, 1891, applies to suits in which the United States is defendant under the act of June 10, 1890, then, in order that this court may have jurisdiction, the record in this case must show that a real and substantial dispute exists over the construction of the Constitution of the United States, or the

validity or construction of a treaty made under its authority.

Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 619, 620, 44 L. ed. 911-913, 20 Sup. Ct. Rep. 822; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 244, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867; *Lampasas v. Bell*, 180 U. S. 276, 282, 283, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 281, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 530, 48 L. ed. 287, 290, 24 Sup. Ct. Rep. 174.

If the treaty when negotiated went beyond the statute, it could not affect the statute, but could only become operative

A bill of exceptions is not essential to a writ of error from the Federal Supreme Court to a district court, presenting the sole question of the jurisdiction of the latter court, where it can add nothing to what is apparent on the face of the record. *Fredrick L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

Certificate.

The lack of a certificate of jurisdiction is not fatal to an appeal to the Federal Supreme Court from a decree of a circuit court which necessarily decided constitutional questions expressly raised in the bill. *Railroad Commission v. Louisville & N. R. Co.* 225 U. S. 272, post, —, 32 Sup. Ct. Rep. 756.

The absence of a certificate of the question of jurisdiction is not fatal to the right to maintain a direct appeal from a Federal district court to the Supreme Court, where, upon the face of the record, aside from the recitals in the order made on the allowance of the appeal, it is apparent that the only question which was decided below was one of jurisdiction, and the decree appealed from on its face shows that the cause was dismissed for want of jurisdiction. *The Jefferson*, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907.

A decree showing dismissal for want of jurisdiction only takes the place of the certificate required by the act of March 3, 1891, § 5, governing a direct review in the Federal Supreme Court of decrees of the circuit courts. *Herndon-Carter Co. v. James N. Norris, Son & Co.* 224 U. S. 496, ante, 857, 32 Sup. Ct. Rep. 550.

A recital in an order allowing an appeal from a decree of a circuit court, that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction," is a sufficient certificate of the circuit court that the jurisdiction of that court was in issue, to warrant a direct appeal to the Supreme Court. *Excelsior Wooden Pipe Co. v. Pacific Bridge* 56 L. ed.

Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

The record does not show an equivalent of the certificate of jurisdiction required to sustain a direct review in the Federal Supreme Court of a judgment of the circuit court, which had dismissed a complaint for want of jurisdiction, where the assignment of errors is directed both to the jurisdiction and the merits, and the petition for the writ of error which was allowed generally, and without any limitation or specification, prays for a review to the end that the rulings and judgment of the court may be reversed. *Filhiol v. Torney*, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698.

Formal defects in the certificate as to jurisdiction filed by a Federal circuit court under the act of March 3, 1891, § 5, for the purpose of sustaining a writ of error from the Federal Supreme Court, are not material, where the record clearly shows that the only matter tried and decided in the circuit was one of jurisdiction. *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

The failure of the certificate of a Federal circuit court to show the exact nature of the jurisdictional question relied upon to sustain a direct appeal to the Supreme Court does not defeat the jurisdiction of the latter court, where an examination of the record, aided by the opinion of the circuit court, contained therein, and made part thereof, distinctly shows the nature of the question of jurisdiction passed upon. *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286.

The question of the jurisdiction of a Federal circuit court is sufficiently certified to sustain a writ of error from the Supreme Court, under the act of March 3, 1891, § 5, irrespective of any irregularity in the bill of exceptions or formal certificate, where the judgment dismissing the action and the prior proceedings clearly exhibit the ground on which the judgment was based, and make apparent on the record the fact that the only matters tried and decided were de-

by means of new legislation. And if such treaty does follow the authority conferred by statute, then a court, in considering the situation, has to find first whether the treaty in fact became operative, and if that be found so, the entire consideration must shift at once to the statute, on an inquiry as to the proper meaning and construction of the act which was made effective by the happening of the condition subsequent.

American Sugar Ref. Co. v. United States, 211 U. S. 155, 161, 162, 53 L. ed. 129, 131, 29 Sup. Ct. Rep. 89; *Shaw v. United States*, 212 U. S. 559, 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 687.

The commercial agreement is a treaty neither in name nor in essence. In a broad

sense, perhaps, all treaties are agreements or contracts, the word "agreement" being sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects.

Virginia v. Tennessee, 148 U. S. 503, 517, 518, 37 L. ed. 537, 542, 543, 13 Sup. Ct. Rep. 728.

But this particular agreement is not a treaty within the meaning of the Constitution and of the judiciary act of 1891, which follows the Constitution. This appears by several considerations.

1. By constitutional limitations upon the states.

Holmes v. Jennison, 14 Pet. 540, 570, 571, 10 L. ed. 579, 594, 595.

murrers to pleas to the jurisdiction, and the petition upon which the writ of error was allowed asked only for a review of the judgment, which decided that the court was without jurisdiction. *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133.

The question of the jurisdiction of the Federal circuit court must be regarded as fairly presented, so as to sustain a writ of error from the Federal Supreme Court, under the act of March 3, 1891, § 5, despite the indefiniteness of the allegations of the plea to the jurisdiction, where the certificate below states that the defendant raised by such plea the objections that it was a foreign corporation not doing business in the state, and that the person attempted to be served was not its agent at the time, and shows that the court did not consider the affidavits which the bill of exceptions states were filed, but overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were conclusive, and also recites that when the case was filed for trial the same objection was made and overruled for the same reason. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

The ground of the action of a Federal circuit court in dismissing a bill, as recited in the certificate presenting a question of jurisdiction, will be accepted by the Supreme Court on appeal, where a different course requires an assumption of inconsistency between the lower court's opinion and order of dismissal and such certificate. *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

The certificate of a Federal circuit court may be considered by the Supreme Court on the direct review authorized by the act of March 3, 1891, for the purpose of supplying the failure of the record to show when and how the question of jurisdiction was raised, if the elements necessary to decide the question are in the record, although it is the better practice to make apparent on the record by a bill of exceptions or other appropriate mode the fact that the question

of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based. *C. H. Nichols Lumber Co. v. Franson*, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102.

In deciding the question of the jurisdiction below which is shown by the certificate of the Federal circuit court to have been raised, the Supreme Court cannot resort to the statements in the certificate for the purpose of supplying elements of decision which it could not properly consider in an action at law without a bill of exceptions. *Ibid.*

The thirty days' limitation for appeals in bankruptcy cases, made by general orders in bankruptcy, rule 36, does not apply to a writ of error from the Federal Supreme Court to a court of bankruptcy, presenting the question of the jurisdiction to make an adjudication of bankruptcy on a claim for unliquidated damages, but such proceeding is governed by the two years' limitation fixed by U. S. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715, and the act of March 3, 1891, §§ 4, 5. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

A direct appeal from a Federal circuit court to the Supreme Court in a case in which the lack of a certificate of jurisdiction is supplied by the decree which shows dismissal for want of jurisdiction only may be perfected after the term, if within two years from the entry of the decree. *Herdon-Carter Co. v. James N. Norris, Son & Co.* 224 U. S. 496, ante, 857, 32 Sup. Ct. Rep. 550.

b. Criminal causes.

A conviction in a Federal district court of murder in the second degree, punishable only by imprisonment, was not reviewable in the Supreme Court under the act of March 3, 1891, § 5, as amended by the act of January 20, 1897, as a case of "conviction of capital crime," although the accused could have been convicted, under the indictment, of a capital offense. *Rakes v. United*

2. By the distinction between a treaty and an act of Congress.

Haver v. Yaker (*Jecker v. Magee*) 9 Wall. 32, 35, 19 L. ed. 571, 573; *Head Money Cases* (*Edy v. Robertson*) 112 U. S. 580, 598, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247; *United States v. Rauscher*, 119 U. S. 407, 419, 30 L. ed. 425, 429, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; *United States v. Wile*, 64 C. C. A. 577, 130 Fed. 332; *Richard v. United States*, 151 Fed. 954, 86 C. C. A. 671, 158 Fed. 1019; *Marshall, Field & Co. v. Clark*, 143 U. S. 649, 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; *The Aurora v. United States*, 7 Cranch, 382, 388, 3 L. ed. 378, 380; *New York Indians v. United States*, 170 U. S. 1, 23, 42 L. ed. 927, 935, 18

Sup. Ct. Rep. 531; *De Lima v. Bidwell*, 182 U. S. 1, 194, 195, 45 L. ed. 1041, 1055, 1056, 21 Sup. Ct. Rep. 743; *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 183, 46 L. ed. 138, 143, 22 Sup. Ct. Rep. 59.

3. By implied legislative declaration in the very act under discussion that agreements of the sort mentioned in § 3 are not treaties.

The commercial agreement could not enlarge or extend the scope of § 3 of the tariff act.

Nicholas v. United States, 122 Fed. 892; *United States v. Wile*, 64 C. C. A. 577, 130 Fed. 332; *Richard v. United States*, 151 Fed. 954, 86 C. C. A. 671, 158 Fed. 1019.

States, 212 U. S. 55, 53 L. ed. 401, 29 Sup. Ct. Rep. 244.

As pointed out in div. I. of this note, the provision relating to criminal causes was omitted when the Judicial Code was enacted. See also note to *United States v. Stevenson*, 54 L. ed. U. S. 153, on Review by government in criminal case under the act of March 2, 1907, by writ of error directed to a circuit or district court.

c. When construction or application of Federal Constitution is involved.

The record, and not a certificate of the trial judge, furnishes the basis for determining whether the suit is one which involves the construction or application of the Constitution of the United States within the meaning of the judiciary act of March 3, 1891, § 5, authorizing the taking of appeals or writs of error in such cases from district or circuit courts of the United States direct to the Supreme Court. *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

The question must be real and substantial, and not frivolous and wholly lacking in merit. *Harris v. Rosenberger*, 13 L.R.A. (N.S.) 762, 76 C. C. A. 225, 145 Fed. 449.

A contention by importers that the Treasury regulations respecting the polariscopic test for sugar assumed to add something to the dutiable standard prescribed by the tariff act of July 24, 1897, par. 209, and that the Secretary of the Treasury thus exercised legislative power confided by the Constitution solely to Congress, does not constitute a real and substantial dispute or controversy concerning the construction or application of the Federal Constitution within the meaning of the act of March 3, 1891, § 5, so as to sustain a direct appeal from a Federal circuit court to the Supreme Court. *American Sugar Ref. Co. v. United States*, 211 U. S. 155, 53 L. ed. 129, 29 Sup. Ct. Rep. 89.

The contention that constitutional rights to trial by jury and to due process of law are infringed by the action of a Federal circuit court, after appointing receivers

of the assets and property of a corporation, and enjoining any interference with such property, in compelling repayment by summary process, after due notice and opportunity for hearing, from one who, with knowledge of the injunction, collects a check drawn in his favor by the corporation to satisfy a debt, and in denying his application to compel the bringing of an action at law for the recovery of the proceeds of the check, is too frivolous to serve as the foundation of a writ of error from the Supreme Court. *Bien v. Robinson*, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379.

The contention that an indictment charging subornation of perjury before a Federal grand jury did not sufficiently set forth "the nature and cause of the accusation," within the meaning of U. S. Const., 6th Amend., because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality," is too frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a circuit court, to review a conviction under such indictment, where the description therein of the proceeding in which the perjury was committed is as follows: ". . . Sitting as a grand jury . . . and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district." *Hendricks v. United States*, 223 U. S. 178, ante, 394, 32 Sup. Ct. Rep. 313.

See also *infra*, *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, and *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417.

A question of the construction or application of the Federal Constitution which has been directly determined by the Supreme Court of the United States will no

The rule that the same words occurring in different parts of a statute are to be taken in the same sense would require the limitation of "statuary" in § 3 as in §§ 454 and 649. This rule is especially applicable to revenue laws.

Swan & F. Co. v. United States, 190 U. S. 143, 145, 146, 47 L. ed. 984, 986, 23 Sup. Ct. Rep. 702; 17 Ops. Atty. Gen. 579; 21 Ops. Atty. Gen. 501; 23 Ops. Atty. Gen. 418; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. ed. 566, 567.

The late Solicitor General Bowers and Assistant Attorney General Lloyd filed a brief in support of a motion to dismiss or affirm.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from an order of the circuit court of the United States for the southern district of New York, affirming a decision of the board of general appraisers, which sustained an assessment of duty by the collector at the port of New York upon a certain bronze bust imported by the appellants, B. Altman & Company.

The bust was imported from France, and was assessed a duty of 45 per cent ad valorem under paragraph 193 of the tariff act of 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), which covers articles or wares not specially provided for in the act, *composed wholly or in part of metal, and whether partly or whol-

longer serve to support the exercise of this jurisdiction. *Harris v. Rosenberger*, supra.

A suit which involves the consideration of questions relating to the power of Congress under the Constitution over the navigable waters of the United States is one which involves the construction or application of the Federal Constitution within the meaning of the act of March 3, 1891, authorizing direct appeals from a circuit court to the Supreme Court of the United States. *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472.

A contention that by the sentence of an army court-martial the accused was twice punished for the same offense is so raised as to authorize a direct appeal to the Supreme Court of the United States from an order of the circuit court, discharging a writ of habeas corpus, as a case involving the construction and application of the Constitution of the United States, where such contention was put forward in the petition and was argued on the return. *Carter v. McClaughry*, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181.

A decision of a Federal circuit court denying a writ of habeas corpus may be reviewed by direct appeal to the Federal Supreme Court, where the petition averred that the imprisonment of the appellant was in violation of the Federal Constitution. *Dimmick v. Tompkins*, 194 U. S. 540, 48 L. ed. 1110, 24 Sup. Ct. Rep. 780.

Habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of U. S. Const. art. 4, § 2, ¶ 2, regulating extradition, involve the construction of the Constitution of the United States, within the meaning of the act of March 3, 1891, § 5, governing direct appeals from the circuit courts to the Supreme Court. *Pierce v. Creecy*, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714.

An order of a Federal district court

denying relief by habeas corpus to a person convicted in a United States court for the Indian territory is not reviewable in the Federal Supreme Court as involving the construction of the Federal Constitution, where the allegation in the petition that the accused was deprived of his liberty without due process of law was based entirely upon the supposed want of jurisdiction in the court where the conviction was had over an offense committed during the interim between the passage of the Oklahoma enabling act of June 16, 1906, and the admission of the state into the Union, which is a question involving the construction, and not the constitutionality, of the enabling act. *Childers v. McClaughry*, 216 U. S. 139, 54 L. ed. 420, 30 Sup. Ct. Rep. 370.

A writ of error will not lie from the Supreme Court of the United States to review an order of a circuit court committing a district attorney for contempt in refusing to obey an order directing him to return to the owner certain books and papers in his possession which the court found had been seized in violation of constitutional rights. *Wise v. Mills*, 220 U. S. 549, 55 L. ed. 579, 31 Sup. Ct. Rep. 597.

A judgment of a Federal circuit court discharging a writ of habeas corpus to inquire into a detention under an order committing a district attorney for contempt in refusing to obey an order directing him to return to the owners certain books and papers in his possession is not reviewable in the Federal Supreme Court, under the act of March 3, 1891, § 5, as involving a Federal question, although the reason assigned for the order for the return of the books and papers was that they had been seized in violation of constitutional rights. *Wise v. Henkel*, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599.

The application of the due process of law clause of U. S. Const., 5th Amend., is involved so as to sustain a direct appeal to the Federal Supreme Court from a circuit court, where the latter court gave effect, as *res judicata*, to the judgment of a state court which is claimed unlawfully

ly manufactured. A protest was filed by the importers, in which they contended that the bust should be classed as statuary under the commercial reciprocal agreement with France (30 Stat. at L. 1774), which was negotiated under the authority contained in § 3 of the tariff act of 1897 to make reciprocal agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary." A considerable amount of testimony was taken before the board of general appraisers, and it held that the bust was cast in a foundry by mechanics from a model furnished by the artist, and that the artist did little or no work upon the casting, and overruled the protest, on the authority of *C. B. Richard & Co. v. United States*, 86

C. C. A. 671, 158 Fed. 1019, and *Tiffany v. United States*, 18 C. C. A. 297, 38 U. S. App. 29, 71 Fed. 691.

The circuit court affirmed the order and decision of the board of general appraisers on the authority of the same cases, and an appeal was prayed to this court, which was allowed, the circuit judge certifying that the questions involved in the case were, in his opinion, of such importance as to require a review of the decision of the court by the Supreme Court of the United States.

Certain errors were assigned, and the following are insisted upon in this court:

"1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D. 19405), was to

to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact which alone could justify such deprivation. *Fayerweather v. Ritch*, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

A case in which the contention is made that the decree which is the basis of suit is void as violating the right under the Federal Constitution to a jury trial and to due process of law does not involve the construction or application of such Constitution, within the meaning of the act of March 3, 1891, § 5, authorizing direct appeals from the circuit or district courts to the Federal Supreme Court, where the real issue as to such prior decree was whether it was *res judicata* between the parties, or, as is contended by the appellants, was rendered without jurisdiction. *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476.

The contention by a foreign corporation that the rendition of certain judgments in the state courts, sought to be introduced in evidence against it, was without due process of law, does not make the suit one involving the construction or application of the Federal Constitution, within the meaning of the provisions of the judiciary act of March 3, 1891, § 5, for a direct review of a Federal circuit court judgment in the Supreme Court, where this claim is based solely upon the theory that, under the circumstances, the service of process in the suits in the state courts upon the corporation's designated agent was unauthorized either by the state Constitution and laws, or the principles of general jurisprudence. *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

A question respecting an alleged privilege of freedom from arrest as a United States senator, under U. S. Const. art. 1, § 6, is one involving the construction and application of the Federal Constitution, which will sustain a writ of error from the Federal Supreme Court to review a conviction in a district court. *Burton v. United* 56 I. ed.

States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

The contention that the constitutional privilege of a congressman from arrest embraces arrest and punishment for a criminal offense while Congress is not in session is not so frivolous as not to sustain a direct writ of error from the Supreme Court of the United States to a circuit court. *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

A writ of error from the Federal Supreme Court to review the conviction of a congressman in a circuit court, presenting a question respecting his alleged constitutional privilege from arrest, will not be dismissed because the Congress of which the accused was a member has ceased to exist, since, even if the question has thus become a mere abstraction, jurisdiction of the writ of error depends upon the existence of a constitutional question when the writ was sued out, and carries with it the duty of reviewing the whole case. *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417.

A case which involves the application of the Constitution of the United States, and is therefore the subject of a direct appeal from a circuit court to the Supreme Court, under the act of March 3, 1891, § 5, is presented by a bill in equity which alleges that a contract right of a waterworks company, with whose predecessors a municipality, with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on a contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

The construction or application of the

be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, § 1, of the tariff act of July 24, 1897, but which definition was not embodied either in the commercial agreement itself or in the President's proclamation thereof.

"2. In not holding that the term 'statuary' as used in § 3 of the tariff act and in 595]said commercial agreement *with France or the President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, § 1, of said tariff act.

"3. In not holding the merchandise dutiable at 15 per cent ad valorem under § 3 of the tariff act and the commercial agree-

ment with France and the President's proclamation thereof.

"7. In holding the merchandise dutiable at 45 per cent under paragraph 193 as manufactured metal.

"8. In affirming the decision of the board of general appraisers.

"9. In not reversing the decision of the board of general appraisers and of the collector of the port, and holding the merchandise dutiable at 15 per cent under § 3 and the commercial agreement with France, as proclaimed by the President."

A motion was made by the Solicitor General to dismiss the appeal. That motion was postponed for hearing with the case upon its merits. To support the motion it is contended on behalf of the United States

Federal Constitution is not involved so as to sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891, § 5, from a decree of a circuit court enjoining state gaugers from proceeding under La. Acts 1904, p. 201, to gauge coal except as to coal sold or intended for sale by boat or barge loads or some aliquot part thereof, unless there is a question as to the relation between some provision of the Federal Constitution and the state statute. *Knop v. Monongahela River Consol. Coal & Coke Co.* 211 U. S. 485, 53 L. ed. 294, 29 Sup. Ct. Rep. 188.

A decision on the merits may be had in the Federal Supreme Court on a direct appeal taken under the act of March 3, 1891, § 5, in a case involving a question under the Federal Constitution, although the circuit court dismissed the case for want of jurisdiction, and has certified the question of jurisdiction alone to the Supreme Court for decision. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276.

See also *infra*, III. e.—*Railroad Commission v. Louisville & N. R. Co.* 225 U. S. 272, post, —, 32 Sup. Ct. Rep. 756; *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

A cross appeal to review only the non-Federal questions decided against the defendant may be taken directly to the Federal supreme court under the act of March 3, 1891, § 5, from a decree of the circuit court in a case in which jurisdiction was invoked both because of diverse citizenship and on constitutional grounds. *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

d. When constitutionality of Federal law or validity or construction of treaty is drawn in question.

Assertions of errors of construction of Federal statutes furnish no basis for jurisdiction on constitutional grounds, under the act of March 3, 1891, § 5, of a writ of error from the Federal Supreme Court

to a district court. *Rakes v. United States*, 212 U. S. 55, 53 L. ed. 401, 29 Sup. Ct. Rep. 244.

The construction of an Indian treaty is not drawn in question in a suit in a Federal circuit court, so as to justify a direct appeal to the Supreme Court under the act of March 3, 1891, § 5, where the contentions with reference to the proper construction of such treaty are only made by way of founding an argument as to the proper construction of the act of August 7, 1882, providing for allotments in an Indian reservation, which is the issue directly in question. *Sloan v. United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570.

The construction of the extradition treaties, on which the determination of the case depended in part, at least, was none the less so drawn in question by habeas corpus proceedings in a Federal circuit court as to permit a direct review of the judgment in the Supreme Court, because it also became necessary or appropriate for the court below to construe the acts of Congress passed to carry into effect the provisions of such treaties. *Pettit v. Walshe*, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657.

The constitutional question must be real and substantial, and not wholly without merit.

The right to a direct appeal to the Supreme Court under the statute distributing appellate jurisdiction between that court and the circuit court of appeals is not established by a claim that a pertinent act of Congress is violative of the Constitution, but the claim must be real and substantial, and not merely colorable, or without reasonable foundation. *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. A. 225, 145 Fed. 449.

The claim that power of legislation is unconstitutionally delegated to the state legislatures by the act of July 7, 1898, § 2, adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such

that no question is involved which, under § 5 of the circuit court of appeals act of March 3, 1891 (26 Stat. at L. 826, 827, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549), entitles the appellant to a direct appeal from the circuit court to this court. By the circuit court of appeals act that court is given jurisdiction to review appeals in revenue cases, and by the 6th section of the act judgments of that court in such cases are made final.

Prior to June 10, 1890, the right to a review of revenue cases was by appeal to this court from the circuit court. Rev. Stat. § 699. By the act of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1886), special provision was made for the review of revenue cases where the

owner, importer, etc., was dissatisfied with the decision of the board of general appraisers. Under § 15 of that act an appeal was given from the decision of the board of general appraisers "as to the construction of the law and the facts respecting the classification *of such merchandise and[596 the rate of duty imposed thereon under such classification . . . to the circuit court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision." And it was provided that the decision of the circuit court should be final, unless the court should be of the opinion that the question involved was of such importance as to require a review of such decision by

places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the United States, is too clearly unfounded to serve as the basis of a writ of error from a Federal Supreme Court to a circuit court. *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434.

The contention that merchandise coming into the United States from the Canal Zone in the Isthmus of Panama could not be subjected, as is attempted by the act of March 2, 1905, to the duties imposed on merchandise imported from foreign countries, is too frivolous to serve as the basis of a direct writ of error from the Federal Supreme Court to a circuit court. *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

A question of the constitutional validity of an act of Congress which has been directly determined by the Supreme Court of the United States no longer constitutes a ground for a direct appeal to that court under the statute distributing the appellate jurisdiction between it and the circuit court of appeals. *Harris v. Rosenberg*, supra.

The constitutionality of the provision of U. S. Rev. Stat. § 5509, U. S. Comp. Stat. 1901, p. 3712, for such punishment of persons committing any other felony or misdemeanor, when conspiring contrary to the preceding section, as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed,—is too well settled to permit the question as to such constitutionality to serve as the basis of a writ of error from the Federal Supreme Court to a district court. *Rakes v. United States*, 212 U. S. 55, 53 L. ed. 401, 29 Sup. Ct. Rep. 244.

e. When state law or Constitution is claimed to violate Federal Constitution.

A writ of error may be maintained from the Supreme Court of the United States to a circuit court, in a case in which
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the validity of a state statute is drawn in question as being in contravention of the Constitution of the United States. *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

Like the other Federal questions considered supra, III. c. and d., the question must not be one wholly devoid of merit.

A claim that ten days' statutory notice of the time appointed for action upon a petition for the settlement of the final account of an executor and for the final distribution of the decedent's estate is so unreasonable as to a nonresident claimant as to be wanting in due process of law is too clearly unsubstantial and devoid of merit to furnish a basis for a direct appeal to the Federal Supreme Court from a decree of a circuit court. *Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914, 29 Sup. Ct. Rep. 580.

Any question respecting the invalidity of the provisions of the West Virginia Constitution for the forfeiture of lands to the state for five years' neglect to pay taxes is too clearly foreclosed by prior decisions of the Federal Supreme Court to serve as the basis of a writ of error to a circuit court. *Fay v. Crozer*, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568.

The contention that due process of law is denied by a tax imposed under the authority of Maryland Code Pub. Gen. Laws 1904, art. 81, §§ 214, 215, upon a custodian of distilled spirits, which rests upon the theory that the taxing power of the state is, by its Constitution, confined exclusively to the levy of taxes *in personam* upon the owners of property, is too devoid of merit to present a substantial Federal question which will sustain a direct writ of error from the Federal Supreme Court to a circuit court, where the highest state court has upheld the statute in controversy as an exercise of the taxing power of the state, and, in so doing, declared that it but reiterated and re-expounded the rulings by it previously made. *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 54 L. ed. 482, 30 Sup. Ct. Rep. 326.

An appeal lies directly to the Supreme

the Supreme Court of the United States, in which case an appeal was allowed to this court. It is to be observed that the cases herein referred to are strictly revenue cases, in which the decision concerns the classification of merchandise and the rate of duty imposed thereon under the classification made. This act remained in force until amended by the act of May 27, 1908 (35 Stat. at L. 403, chap. 205), to which we shall have occasion to refer later. In the meantime, on March 3, 1891, the circuit court of appeals act was passed, giving a direct appeal in certain cases to this court. So much of § 5 as is pertinent to this case provides:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

The circuit court of appeals act did not repeal the revenue act to which we have referred, but broadly provided for direct appeal to this court from the circuit court in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty, etc., was drawn in question.

We think the cases show that this court, so far as it has had occasion to deal with

the question, has permitted direct appeal to this court in all revenue cases where, in *addition to the objection to classification of merchandise and rate of duty imposed, a real question under § 5 has been involved.

In *Anglo-California Bank v. United States*, 175 U. S. 37, 44 L. ed. 64, 20 Sup. Ct. Rep. 19, an attempt was made to take an appeal to this court from a judgment of the circuit court of appeals, affirming the decree of the circuit court, which overruled the decision of the board of general appraisers, and it was held that the appeal would not lie. In the course of the opinion, Mr. Chief Justice Fuller said that, under the act of June 10, 1890, a direct appeal would lie to this court if the circuit court certified that the question involved was of such importance as to require a review of such decision and decree by this court, but the Chief Justice pointed out that the attempted appeal was not an appeal from the circuit court directly to this court, nor did the case fall within any of the classes of cases enumerated in § 5, in which a direct appeal to this court would lie, and, moreover, that the judiciary act of March 3, 1891, prescribed a different rule as to the prosecution of appeals. While the question here made was not directly involved in that case, it is to be fairly inferred that the court would have sustained an appeal had the case been brought from the circuit

Court of the United States from a decree of a circuit court dismissing a bill which is based not only upon diversity of citizenship, but upon the alleged unconstitutionality of certain municipal ordinances as impairing the obligation of a contract with the municipality under prior ordinances. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498.

A suit to enjoin the enforcement of a municipal ordinance regulating telephone rates is not one in which the Constitution or law of a state is "claimed" to violate the Federal Constitution, within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), § 5, governing direct review in the Federal Supreme Court of decrees of circuit or district courts, where the first and only reference to the Federal Constitution is in the opinion of the circuit judge, on final hearing, holding that the rates are confiscatory and destructive of the telephone company's rights under that Constitution, the case as made by the bill being that the ordinance was passed without legislative authority, and its further allegations as to the confiscatory character of the ordinance being referable only, if consistency with its other provisions is to be observed, to the state Con-

stitution, which would be violated if such allegations were true. *Memphis v. Cumberland Teleph. & Teleg. Co.* 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115.

A suit to enjoin a state official from enforcing the provisions of a registration and inspection law is one in which the law of a state is claimed to be in contravention of the Constitution of the United States, within the meaning of the act of March 3, 1891, § 5, so as to permit a direct appeal to the Federal Supreme Court from a decree of a circuit court, sustaining a general demurrer to the bill for want of equity, where such bill, although averring that complainant's product is not comprehended by the statute, properly interpreted, also alleges that the defendant, who was authorized to enforce the statute, had construed it to be applicable to such product, and challenges the constitutionality of the statute as so construed. *Savage v. Jones*, 225 U. S. 501, post, —, 32 Sup. Ct. Rep. 715.

The contention that, properly construed, the provisions of La. Acts 1904, p. 201, for gauging coal, apply to sales by weight and measurement, and, if so construed, violate the Federal Constitution, does not present a Federal question which will sustain a direct appeal to the Federal Supreme Court under the act of March 3,

court within the terms of § 5 and upon one of the grounds there stated.

In the case of *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376, an appeal was allowed from the circuit court of appeals to this court, and, concerning what were revenue cases within the meaning of the circuit court of appeals act, under the 6th section, making that court's judgment final in cases arising under the revenue laws, this court said:

"So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the government on this 598]point cannot be *sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words 'arising . . . under the revenue laws,' in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues, and which does not, by reason of any question in it, belong also to the class mentioned in the 5th section of that act."

While the *Spreckels Case* was commented on and limited in some measure in the subsequent case of *Macfadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490, nothing was said to indicate any disagreement with the definition of this court as to what was a case arising under

the revenue laws, and the court said that the *Spreckels Case* was held not to be final in the circuit court of appeals because the original jurisdiction involved the construction of the Constitution of the United States, as well as a strictly revenue question, and that, thus construed, it was consistent with all the decisions.

From the principles laid down in these cases, we think it is plain that this court will entertain a direct review in a revenue case which involves not only questions of classification and amount of duty thereunder, as specified in the revenue act to which we have referred, but also a question under the 5th section as to the constitutionality of a law of the United States, or the validity or construction of a treaty under its authority.

Nor did the amendment of the revenue act by the act of May 27, 1908, effect any change in this respect, for its provisions with respect to the review of the decision of a circuit court are substantially identical with the act of June 10, 1890, except that the decision of a circuit court is made final, unless the court certifies that it is of the opinion that the question involved is of such importance as to require a review of such decision by the circuit court of appeals, the decree of which may be reviewed in the *Supreme Court in any of the[599 ways provided in cases arising under the revenue laws by the act approved March 3, 1891, being the circuit court of appeals act;

1891, § 5, from a decree of a Federal circuit court enjoining the state gaugers from proceeding under the state statute except as to coal sold or intended for sale by boat or barge load or some aliquot part thereof, where the statute, construed as applying to boat and barge loads, has been declared valid by the Federal Supreme Court, and appellee does not contend that the statute is invalid, but only that it is inapplicable to the facts. *Knop v. Monongahela River Consol. Coal & Coke Co.* 211 U. S. 485, 53 L. ed. 294, 29 Sup. Ct. Rep. 188.

The issue of the jurisdiction of a Federal circuit court, whether certified or not, is open on an appeal to the Federal Supreme Court from a decree which necessarily decided the constitutional questions as to the validity of a state statute under the Federal Constitution raised in the bill. *Railroad Commission v. Louisville & N. R. Co.* 225 U. S. 272, post, —, 32 Sup. Ct. Rep. 756.

The jurisdiction of the Supreme Court of the United States to consider the whole case on a direct appeal from a circuit court, taken under the act of March 3, 1891, § 5, in a case in which a state Constitution is claimed to violate the Constitution of the United States, cannot be narrowed to a review of the question of

the jurisdiction of the circuit court as a court of the United States, by a certificate of the circuit judge which raises that single question. *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

See also *supra*, III. c.—*North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276.

The Federal Supreme Court, on appeal from the decision of a circuit court, may decide local questions only, and omit to decide the Federal questions as to the validity of a state statute under the Federal Constitution, which gave the lower court jurisdiction, or may decide such questions adversely to the party claiming their benefit. *Silver v. Louisville & N. R. Co.* 213, U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451.

The mere fact that the defeated party in a suit in a Federal circuit court set up the repugnancy of a state law to the Federal Constitution does not authorize him to maintain a direct appeal to the Supreme Court under the act of March 3, 1891, § 5, where his contention on that point was sustained. *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93.

but that act (amendment of May 27, 1908), like the act of June 10, 1890, provides only for the review of decisions of the board of general appraisers "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." We do not think that this act changes the effect of the circuit court of appeals act, and operates to prevent an appeal here in cases really involving the Constitution of the United States or the construction of a treaty.

The government relies, in support of its motion to dismiss, on *Shaw v. United States*, 212 U. S. 559, 53 L. ed. 652, 29 Sup. Ct. Rep. 687. In that case, however, the appeal was undertaken to be made directly from the circuit court because of an alleged deprivation of constitutional right, and because of the construction of a reciprocal agreement made with Italy under the tariff act of 1897. The case was dismissed on the authority of *American Sugar Ref. Co. v. United States*, 211 U. S. 155, 53 L. ed. 129, 29 Sup. Ct. Rep. 89, in which it was held that the only real, substantial controversy concerned the construction of the tariff act of 1897. An examination of the record in the *Shaw Case* shows that no real constitutional question was involved, and that the assessment of duty was in accordance with the reciprocal commercial agreement with Italy. *Shaw v. United States*, 158 Fed. 648.

The report of the *American Sugar Ref. Co. Case*, to which the court referred in the *Shaw Case*, and which was decided at the same term (211 U. S. 155, 53 L. ed. 129, 29 Sup. Ct. Rep. 89), shows that it was an attempt to appeal directly from the circuit court, and that this court did not think that the constitutional question made in the case had any real merit, but that the only question was a construction of the tariff act relating to the collection of duty upon 600]sugar, and *therefore this court had no jurisdiction by direct appeal. In this connection this court said:

"The present direct appeal to this court is a mere attempt to obtain a reconsideration of questions arising under the revenue laws and already determined by the circuit court of appeals [upon a former appeal] in due course. Such direct appeals [from a circuit court], under § 5 of the act of 1891, cannot be entertained unless the construction or application of the Constitution of the United States is involved."

An examination of the record in the present case shows that the importer throughout insisted that the statutory was dutiable

at 15 per cent ad valorem under the reciprocal agreement between the United States and France, entered into under the authority of § 3 of the tariff act of 1897. If this contention be correct, then the assessment was wrong, and, if the reciprocal agreement referred to was a treaty within the meaning of § 5 of the circuit court of appeals act, then there was a right of direct appeal to this court.

Generally, a treaty is defined as "a compact made between two or more independent nations, with a view to the public welfare." 2 Bouvier's Law Dict. 1136. True, that under the Constitution of the United States the treaty-making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (art. 2, § 2), and treaties are declared to be the supreme law of the land (art. 6); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the circuit court of appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a circuit court in certain matters of importance, and, among others, *those involving the construc- [601] tion of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the nation. While it may be true that this commercial agreement, made under authority of the tariff act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the circuit court of appeals

act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.

Coming to the merits, the contention of the importer is that the word "statuary" should receive its popular construction, and that the term should include such a piece of cast bronze as is here involved, but we think the definition and authority of the act cannot be ignored in this connection.

The negotiation was entered into between the representatives of the two countries under the authority of § 3 of the tariff act of 1897, as we have seen. In that act the term "statuary" is defined as follows: "The term 'statuary,' as used in this act, shall be understood to include only such statuary as is cut, carved, or otherwise 602] wrought *by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." The reciprocal agreements were authorized with reference to "paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary." We think this must have reference to statuary as already defined in the act, which both parties understood was the source of their authority to negotiate the reciprocal commercial agreement in question, for the agreement provides:

"It is reciprocally agreed on the part of the United States, in accordance with the provisions of section 3 of the United States tariff act of 1897, that during the continuance in force of this agreement, the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

"Paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary, fifteen per centum ad valorem."

Thus in its terms the agreement was made under the authority and in accordance with § 3 of the tariff act of 1897, in which very act the term "statuary," as used therein, was specifically defined, as we have already stated.

We think that it is clear that the board of general appraisers and the circuit court did not err in finding that this bronze statue was not wrought by hand from metal. On the other hand, the testimony is clear that the statue was cast from metal by artisans employed for that purpose, and was very little touched, if at all, in its finishing, by the professional designer.

The result is that the judgment must be affirmed.

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(See S. C. Reporter's ed. 603-616.)

Commerce — Federal regulation — employers' liability — accepting relief fund benefit.

1. Congress had the power to enforce the regulations validly prescribed by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), § 5, by preventing the acceptance of benefits under a contract of membership in a railway relief department from operating as a bar to the recovery of damages for the injury or death of an employee, and by avoiding any agreement to that effect.

[For other cases, see Commerce, III. a; Constitutional Law, 605-607, 891-894, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability act — acceptance of railway relief fund benefit.

2. Stipulations making the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department equivalent to a release of the company's liability must be deemed to fall within the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,"—especially in view of the proviso of that section permitting a set-off of any sum which the company may have contributed toward any benefit paid to the employee or his legal representative.

Master and servant — employers' liability act — existing contracts against liability.

3. Existing as well as future contracts of

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On contracts requiring servant to elect between acceptance of benefits out of a relief fund, and a prosecution of his claim in an action for damages—see note to Frank v. Newport Min. Co. 11 L.R.A.(N.S.) 182.

On validity of provision in contract of railroad relief department for forfeiture of benefits in case of suit against company for damages—see note to Chicago, B. & Q. R. Co. v. Healy, 10 L.R.A.(N.S.) 198.

the proscribed character fall within the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act."

Commerce — Federal regulation — employers' liability — invalidating existing contracts.

4. Construing the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act" as embracing an existing agreement under which the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department was to release the company from liability does not render the section invalid, since such agreement must necessarily be regarded as having been made subject to the possibility that at some future time Congress might so exert its power to regulate commerce as to render the agreement unenforceable, or impair its value.

[For other cases, see Commerce, III. a; Constitutional Law, 605-607, 891-894, in Digest Sup. Ct. 1908.]

[No. 549.]

Argued April 29, 1912. Decided May 13, 1912.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action against a railway company to recover damages for personal injuries sustained by an employee, in which the acceptance of benefits under a contract of membership in the company's relief department was set up as a bar to the action. Affirmed.

See same case below, 36 App. D. C. 565.

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with Messrs. John S. Flannery and William Hitz, filed a brief for plaintiff in error:

At the time the contract in this case was entered into in October, 1905, and when the employers' liability act of 1908 was passed, relief department contracts like the one pleaded in this case, by the uniform trend of decision in the Federal and state courts of this country, had been held (a) not to be against public policy, and (b) not to be contracts exempting the employer from responsibility for his negligence.

Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; *Atlantic Coast Line*

R. Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; *Day v. Atlantic Coast Line R. Co.* 102 C. C. A. 654, 179 Fed. 26.

Courts uniformly refuse to give to a statute a retrospective operation whereby existing contracts or rights previously vested are injuriously affected unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Twenty Per Cent Cases*, 20 Wall. 179, 22 L. ed. 339.

Being a statute in derogation of common-law rights, it cannot be given any broader or different meaning than its meaning naturally implies.

Sutherland, Stat. Constr. § 290.

Mr. **John A. Kratz, Jr.**, argued the cause, and, with Messrs. M. J. Fulton and Joseph W. Cox, filed a brief for defendant in error:

Section 5 of the employers' liability act of 1908, as applicable to the District of Columbia, is constitutional.

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *McNamara v. Washington Terminal Co.* 35 App. D. C. 230; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 572, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169.

Section 5 of the employers' liability act of 1908 is applicable to the relief-benefit contract pleaded in this case.

McNamara v. Washington Terminal Co. 35 App. D. C. 230; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169; *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942.

The employers' liability law was passed to promote the safety of commerce by protecting those engaged in carrying it on. As one means, among others, of accomplishing that end, the right was conferred on the employees to bring civil actions for negligence. In other words. Congress declares the policy of responsibility for negligence as a means of effecting this purpose of the act.

Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169; *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 533, 52 L. ed. 323, 28 Sup. Ct. Rep. 141; *Narramore v. Cleveland, C. C. & St. L. R. Co.*

48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 300; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

The act was also passed for the benefit of the men employed in the hazardous business of railroading, thousands of whom are annually killed or maimed through defects in appliances, or through negligence on the part of others over whom they have no control, and in whose selection they have no voice.

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 950.

Congress also recognized that in the matter of making contracts the railroad companies and their employees were not on an equal footing; that contracts apparently voluntary were not so in reality; and that the railroad companies were in a position largely to defeat both objects of the law by means of contracts made with their employees at the time of employment, under which the employees would accept stated sums agreed upon in advance, in the event of injuries through negligence.

McNamara v. Washington Terminal Co. 35 App. D. C. 230.

Even before the passage of the law, carriers could not by contract exempt themselves from liability for injury to their employees caused by negligence, such contracts being void, as contrary to public policy.

9 Cyc. 544.

But there was a class of contracts in general use by railroad companies at the time of the passage of the law, recognized as valid by many, but not all, courts, which, while not expressly exempting the companies from liability for negligence, had the practical effect of enabling the companies, by contract made in advance of injury, to relieve themselves of the consequences of negligence, and to cause the employee to accept after injury the sum agreed upon in advance, although at the time of accepting it he might not consider it a fair or just judgment.

The contracts through which this result was accomplished are usually referred to as "relief benefit contracts," which generally, and perhaps always, as in the present case, became "part of the conditions of employment." These contracts were not held to bar the employee's right of action, but the acceptance under them of benefits to which the companies had contributed was held to constitute such bar.

9 Cyc. 543; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; Brown v. Baltimore & O. R. Co. 6 App. D. C. 237.

Where words are susceptible of several meanings the courts will always adopt that meaning which best consists with all other

provisions of the statute and its spirit and purpose as a whole.

9 Cyc. 1128, 1129; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Bernier v. Bernier, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244.

Sections 1 and 2 of the act are wholly declaratory of the common law of negligence as it existed at the time of the passage of the act, with the exception that it abolished the fellow-servant rule, which rule itself was a discredited exception to the ancient common-law rule of negligence, having been invented and first applied in the cases of Murray v. South Carolina R. Co. 1 McMull. L. 385, 36 Am. Dec. 268, and Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339.

See Shearm. & Redf. Neg. 5th ed. Introduction; 14 Law Notes, 161; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 949.

Section 5 is constitutional not only as to contracts made since the passage of the act, but also if applied to contracts made prior thereto.

Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169; McNamara v. Washington Terminal Co. 35 App. D. C. 230; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 949.

The courts have unanimously held that contracts for interstate transportation at special rates, though antedating the enactment of the Federal interstate commerce act, became invalid upon the enactment of the statute.

Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Courts will always, when it is possible to do so, construe a statute so as to avoid insensible meaning or absurd results, which are never to be imputed to Congress. The object designed to be reached by the act will often control the literal import of its terms and the phraseology employed; and there is always a presumption against a construction which will render a statute

ineffective or inefficient, or which would cause public injury or inconvenience.

Dourousseau v. United States, 6 Cranch, 307, 314, 3 L. ed. 232, 234; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 460, 36 L. ed. 227, 228, 12 Sup. Ct. Rep. 511; *McKee v. United States*, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; *Hawaii v. Mankichi*, 190 U. S. 197, 213, 47 L. ed. 1016, 1021, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; *Bird v. United States*, 187 U. S. 118, 124, 47 L. ed. 100, 103, 23 Sup. Ct. Rep. 42.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought by Schubert, the defendant in error, against the Philadelphia, Baltimore, & Washington Railroad Company, to recover damages for personal injuries. He received the injuries on May 13, 1908, while in its service as a brakeman within the District, and they were due to the negligence of a fellow servant.

The company pleaded the general issue, and in addition filed a special plea that Schubert was at the time a member of its "relief fund," under a contract of membership made in 1905, in which it was agreed that the company should apply, as a voluntary contribution from his wages, \$2.10 a month for the purpose of securing the benefits described in certain regulations. These contributions continued from October 18, 1905, to May 13, 1908, the date of the accident. Among the regulations, by which he agreed to be bound, was the following:

607] *"58. Should a member or his legal representative make claim, or bring suit, against the company, or against any other corporation which may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company and any and all of the corporations associated therewith in the administration of their relief departments, for damages arising from such injury or death."

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A stipulation that the acceptance of benefits should constitute a release from all claims for damages was also incorporated in the application for membership.

The plea further set forth that the relief fund was formed by voluntary contributions from the employees of the defendant company and other companies in association with it for the purpose, appropriations by the company whenever necessary to make up any deficit, the income or profit derived from investments of the moneys of the fund, and such gifts or legacies as might be made for its use. The companies took general charge of the department, guaranteed the fulfilment of its obligations, became responsible for the safe-keeping of its funds, supplied the necessary facilities for conducting the business of the department, and paid all its operating expenses. On December 31, 1908, the total number of employees of the defendant company was 8,458, of which 6,909 were "members of the "relief fund;" [608 during the year 1908 the company contributed, as the cost of administration, the sum of \$21,557.02, and during the period of the plaintiff's membership its total contribution for this purpose was \$57,610.51. In addition, the company furnished the facilities of its mail, express, and telegraph departments free of charge.

It was also alleged that after his injury Schubert (between June, 1908, and August, 1908) had voluntarily accepted benefits amounting to \$79; that he had subsequently presented his claim for damages, in view of which no further payments were made, and that the acceptance of the benefits above mentioned was a bar to his action.

The court sustained a demurrer to the special plea, and Schubert recovered judgment for \$7,500, which was affirmed by the court of appeals.

The questions presented by the assignments of error relate to the validity of the employers' liability act of April 22, 1908, chap. 149 (35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322), under which the action was maintained; and particularly, both to the applicability, and to the validity, if applicable, of § 5 of that act, upon which the court below based its ruling as to the insufficiency of the special plea.

That Congress did not exceed its power, in imposing the liability defined by the statute, has been decided by this court. *Second Employers' Liability Cases*, 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169. Section 5 provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent

of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity 609] that may have been paid to the *injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

With respect to this section, the court said in the case cited: "Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the 5th Amendment to the Constitution, as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." *Second Employers' Liability Cases*, supra, p. 52.

In *Chicago, B. & Q. R. Co. v. McGuire*, supra, the court had before it the amendment, made in 1898, of § 2071 of the Code of Iowa. This section, in the cases within its purview, abrogated the fellow-servant rule, and the amendment provided:

"Nor shall any contract of insurance, relief benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives, after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate 610] *any settlement for damages between the parties subsequent to the injuries received."

It was held that the amendment was 56 L. ed.

valid, and hence that the defense based upon the acceptance of benefits could not be sustained. The court said (pp. 564, 572): "Neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. . . . Its provision that contracts of insurance, relief benefit, or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance, relief benefit, or indemnity, as well as in other agreements. . . . It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance."

Upon similar grounds, Congress had the power to enforce the regulations validly prescribed by the act of 1908 by preventing the acceptance of benefits under such relief contracts from operating as a bar to the recovery of damages, and by avoiding any agreement to that effect. The question is whether this power has been exercised; that is, whether the stipulation of the contract of membership, asserted in defense, comes within the interdiction of § 5. The former act of June 11, 1906, chap. 3073 (34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316), which was valid as to employees engaged in commerce within the District of Columbia (*Hyde v. Southern R. Co.* 31 App. D. C. 466; [611 *El. Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 97, 98, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21), contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that act was as follows:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, that upon the

trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

But it is urged that the substituted provision—of § 5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act." It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. The statute provides that "every common carrier by railroad in . . . the District of Columbia . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . 612]resulting *in whole or part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute.

If there could be doubt upon this point, it would be resolved by a consideration of the proviso of § 5, which immediately follows the language condemning contracts, rules, regulations, or devices, the purpose of which is to exempt the carrier from liability. It is: "Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has con-

tributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability to employees who accepted benefits, was well known to Congress, as is shown by § 3 of the act of 1906. On specifically providing in that section that neither such contracts, nor their performance, should be a bar to recovery, Congress inserted *a proviso permitting a set-off[613 of any sum the company had contributed toward any benefit paid to the employee. When, in the act of 1908, it enlarged the scope of the clause defining the contracts and arrangements for immunity which should not prevail, Congress retained the proviso in terms substantially the same. This clearly indicates the intent to include within the statute stipulations which made the acceptance of benefits under contracts of membership in relief departments equivalent to a release from liability. Unless the liability survived the acceptance of benefits, there could be no recovery, and hence no occasion for set-off.

It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of § 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts

614] would be to place, *to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

In speaking of the act in question, this court said that "the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees, and to advance the commerce in which they are engaged," there was no doubt that, "in making those changes, Congress acted within the limits of the discretion confided to it by the Constitution." *Second Employers' Liability Cases*, 223 U. S. 51, ante, 346, 32 Sup. Ct. Rep. 175. If Congress may compel the use of safety appliances (*Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158), or fix the hours of service of employees (*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

In that case it appeared that in 1871, 615] in settlement of a *claim for damages for personal injuries, the plaintiffs had entered into an agreement with the railroad company by which the latter promised that during their lives they should have free passes upon the railroad and its branches. It was held that the company rightfully refused, after the passage of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591. U. S. Comp. Stat. Supp. 1911, p. 56 L. ed.

1288), further to comply with the agreement, and that a decree requiring the continued performance of its provisions was erroneous. The ground for this conclusion was thus stated (pp. 482-486): "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist. . . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. . . . If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." See also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 44 L. ed. 136, 142, 20 Sup. Ct. Rep. 96; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

*We find no error in the rulings of [616] which the plaintiff in error complains, and the judgment of the court below is therefore affirmed.

JAMES H. GRAHAM, Plff. in Err.,
v.

STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 616-631.)

Constitutional law — due process of law — punishing habitual criminals.
1. A former convict is not denied due

NOTE.—On enhancing penalty for crimes when committed by habitual criminals or prior offenders—see notes to *Re Miller*, 34 L.R.A. 398; *Com. v. McDermott*, 24 L.R.A. (N.S.) 431; and *McDonald v. Com.* 45 L. ed. U. S. 542.

process of law by bringing him, after conviction, before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions, which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes. [For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — punishing habitual criminals.

2. Bringing a convict after judgment before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes, does not deny him the equal protection of the laws because of the difference in procedure between the case where the fact of former conviction is alleged in the indictment and determined by the jury on the trial of the charge of crime, and the case where it is charged in the information, and determined by a jury in a proceeding thereby instituted.

[For other cases, see Constitutional Law, §§ 397-401, in Digest Sup. Ct. 1908.]

Criminal law — former jeopardy — punishing habitual criminal.

3. A former convict is not placed twice in jeopardy by bringing him after conviction before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes.

[For other cases, see Criminal Law, 84, 85, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — punishing habitual criminal.

4. None of the privileges or immunities of a former convict as a citizen of the United States are abridged by bringing him, after conviction, before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes.

[For other cases, see Constitutional Law, 397-401, in Digest Sup. Ct. 1908.]

Criminal law — cruel and unusual punishment — habitual criminals.

5. Cruel and unusual punishment is not inflicted upon a former convict by bringing him, after conviction, before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes.

[For other cases, see Criminal Law, V. b, in Digest Sup. Ct. 1908.]

[No. 721.]

Argued April 17, 1912. Decided May 13, 1912.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a judgment which affirmed a judgment of the Circuit Court of Marshall County, in that state, sentencing an habitual criminal to imprisonment for life. Affirmed.

See same case below, 68 W. Va. 248, — L.R.A. (N.S.) —, 69 S. E. 1010.

The facts are stated in the opinion.

Mr. D. W. Baker argued the cause, and Messrs. Frank J. Hogan, Everett F. Moore, and D. B. Evans filed a brief for plaintiff in error:

The defendant is a person within the jurisdiction of the state of West Virginia, and is denied by the state the equal protection of the laws.

Hodgson v. Vermont, 168 U. S. 262, 272, 273, 42 L. ed. 461, 464, 18 Sup. Ct. Rep. 80; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22-33, 25 L. ed. 989-993; Re Lowrie, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 556-561, 46 L. ed. 679, 688-690, 22 Sup. Ct. Rep. 431; Caldwell v. Texas, 137 U. S. 692, 697, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; State v. Lewin, 53 Kan. 679, 37 Pac. 168; Budd v. State, 3 Humph. 483, 39 Am. Dec. 189; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 295, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 100-112, 46 L. ed. 92, 106-110, 22 Sup. Ct. Rep. 30; Re Landford, 4 Inters. Com. Rep. 437, 57 Fed. 570.

The defendant is deprived of his liberty and property by the state of West Virginia without due process of the law.

Stoutenburgh v. Frazier, 48 L.R.A. 220, 16 App. D. C. 235; *Curry v. District of Columbia*, 14 App. D. C. 439; *Lappin v. District of Columbia*, 22 App. D. C. 77; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912a, 463; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 81, 82, 55 L. ed. 369, 378, 379, 31 Sup. Ct. Rep. 337; *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; *Holden v. Hardy*, 169 U. S. 366, 383, 42 L. ed. 780, 788, 18 Sup. Ct. Rep. 383.

The defendant's privileges and immunities as a citizen of the United States are abridged by the state of West Virginia in making and enforcing W. Va. Code, chap. 165, as he is thereby denied his immunity from double jeopardy.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; *Re Butler*, 138 Mich. 453, 101 N. W. 630; *Herndon v. Com.* 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989; *Oliver v. Com.* 113 Ky. 228, 67 S. W. 983; *Com. v. Phillips*, 11 Pick. 28; *Satterfield v. Com.* 105 Va. 867, 52 S. E. 979; *Scott v. Chichester*, 107 Va. 933, 16 L.R.A. (N.S.) 304, 60 S. E. 95; *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288; *Paetz v. State*, 129 Wis. 174, 107 N. W. 1090, 9 Ann. Cas. 767; *Davis v. State*, 134 Wis. 632, 115 N. W. 150; *People ex rel. Cosgriff v. Craig*, 195 N. Y. 190, 88 N. E. 38; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.

The statute and sentence inflict cruel and unusual punishment on the defendant.

McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Weems v. United States*, 217 U. S. 349, 362-382, 54 L. ed. 793, 796-805, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; *Stoutenburgh v. Frazier*, 48 L.R.A. 220, 16 App. D. C. 229; *Howard v. North Carolina*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 449; *Re Kemmler*, 136 U. S. 436, 446, 34 L. ed. 519, 523, 10 Sup. Ct. Rep. 930; *McElvaine v. Brush*, 142 U. S. 155, 158, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156.

Mr. William G. Conley, Attorney General of West Virginia, argued the cause and filed a brief for defendant in error:

The constitutionality of laws providing for the imposition of additional penalties upon habitual criminals is no longer an open question.

Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v.* 56 L. ed.

Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

A proceeding under the West Virginia statute was not a "holding to answer" within the meaning of the Constitution of West Virginia.

State v. Graham, 68 W. Va. 248, — L.R.A. (N.S.) —, 69 S. E. 1010. See also *Ross's Case*, 2 Pick. 171.

An indictment was necessary at common law, yet the states may abolish that form of procedure if they wish.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Brown v. New Jersey*, 175 U. S. 173, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 970, 24 Sup. Ct. Rep. 650.

The statute merely provides a means of identification.

Ross's Case, 2 Pick. 165; *King v. Lynn*, 90 Va. 345, 18 S. E. 439.

The defendant is not denied the equal protection of the laws because the legislature prescribed that identification should be made upon an information.

Finley v. California, 222 U. S. 28, ante, 75, 32 Sup. Ct. Rep. 13; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; *Provident Inst. for Savings v. Malone*, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A. (N.S.) 1129, 31 Sup. Ct. Rep. 661; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

There is no constitutional provision requiring an indictment or presentment of a grand jury in this character of proceeding. The legislature is therefore free to provide other fair means of plainly informing the accused of the charge against him. It has provided an information. This is due process of law.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The plaintiff in error was not twice put in jeopardy for the same offense.

Ross's Case, 2 Pick. 171; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

The sentence in this case is not so disproportionate to the offense as to be cruel and unusual.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

Mr. Justice Hughes delivered the opinion of the court:

In April, 1898, the plaintiff in error, James H. Graham, then known as John H. Ratliff, was indicted for grand larceny in Pocahontas county, West Virginia, pleaded guilty, and was sentenced to the penitentiary for two years. In April, 1901, under the name of Ratliff, he was indicted for burglary in Pocahontas county, West Virginia, pleaded guilty, and was sentenced to the penitentiary for ten years. In October, 1906, he was granted a parole by the governor of West Virginia upon condition that he should pursue the course of a law-abiding citizen. In September, 1907, under 621] the name of John H. Graham, *alias J. H. Gray, he was indicted in Wood county, West Virginia, for grand larceny, pleaded guilty, and was sentenced to the penitentiary for five years.

In February, 1908, the prosecuting attorney for Marshall county, in which the penitentiary was located, presented an information to the circuit court of that county, alleging that the convict Graham was the same man who had twice before been convicted as above stated. Graham was brought before the court, and pleaded that he was not the same person. Later he withdrew his plea, moved to quash the information, and on denial of the motion renewed the plea. A jury was called, and after hearing evidence for the prosecutor the defendant offering none, returned a verdict identifying him as the person previously convicted. Thereupon the defendant moved for arrest of judgment upon the ground that the proceeding was in violation of the Constitution of the state, and also contrary to the 5th and 14th Amendments of the Constitution of the United States. The motion was overruled and the court sentenced the prisoner to confinement in the penitentiary for life. The judgment was affirmed by the supreme court of appeals of West Virginia. 68 W. Va. 248, — L.R.A. (N.S.) —, 69 S. E. 1010. And the case comes here on error.

The proceeding was taken under §§ 1 to 5 of chapter 165 of the Code of West Virginia, which are as follows:

"1. All criminal proceedings against con-

victs in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the 23d or 24th section of chapter 152, the superintendent of the penitentiary shall give *information thereof, without de- [622 lay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be empaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter 152, on a second or third conviction, as the case may be."

The provisions of §§ 23 and 24 of chapter 152, to which the above statute refers, are:

"23. When any person in convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."

"24. When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life."

*These statutes were derived from [623 the laws which were in force in Virginia before West Virginia was created, and formed part of the Code of Virginia of 1860, chap. 199, which in turn had been taken from the Code of 1849, chap. 199.

The plaintiff in error challenges the validity of the legislation and the proceedings which it authorized, upon the grounds: (1)

that he has been deprived of his liberty without due process of law; (2) that he has been denied the equal protection of the laws; (3) that his privileges and immunities as a citizen of the United States have been abridged, and that he has been denied his immunity from double jeopardy; and (4) that cruel and unusual punishment has been inflicted.

1. The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts (*Ross's Case*, 2 Pick. 165, 170; *Plumbly v. Com.* 2 Met. 413, 415; *Com. v. Richardson*, 175 Mass. 202, 205, 55 N. E. 988; *Rand v. Com.* 9 Gratt. 740, 741; *King v. Lynn*, 90 Va. 345, 347, 18 S. E. 439; *People v. Stanley*, 47 Cal. 114, 17 Am. Rep. 401; *People v. Coleman*, 145 Cal. 609, 79 Pac. 283; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Maguire v. State*, 47 Md. 485; *State v. Austin*, 113 Mo. 538, 21 S. W. 31, and it has been held by this court not to be repugnant to the Federal Constitution. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

In the *McDonald Case*, the statute (Mass. Stat. 1887, chap. 435, § 1) provided that 624] whenever one had been twice *convicted of crime and committed to prison in Massachusetts, or in any other state, he should, upon conviction of a subsequent felony, be deemed to be an "habitual criminal," and should be punished by imprisonment for twenty-five years. In delivering the opinion of the court, Mr. Justice Gray said (p. 312):

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

"But it does no such thing. . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal. . . . The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only."

56 L. ed.

In the present case, it was not charged in the indictment on which the prisoner was last tried that he had previously been convicted of other offenses, but after judgment he was brought before the court of another county, in a separate proceeding instituted by information, and on the finding of the jury that he was the former convict, he was sentenced to the additional punishment which the statute in such case prescribed.

By this proceeding he was not held to answer for an offense; the information did not allege crime. As was said by the supreme court of appeals of West Virginia: "It [the information] alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened." 68 *W. Va. 248, 251.—[625 L.R.A. (N.S.) —, 69 S. E. 1010. Full opportunity was accorded to the prisoner to meet the allegation of former conviction. Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon. No question as to this can be raised here, for the prisoner in no way sought to contest the validity or unimpaired character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury.

It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue, together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate and subsequent determination of his identity with the former convict has not been regarded as a deprivation of any fundamental right. It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. The act of 6 & 7 Wm. IV. chap. 111, provided that it should "not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction

until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding, as aforesaid." Exception was made in cases where the accused gave evidence **626**] *of good character to meet the charge of crime, whereupon the prosecutor might show the former conviction before the verdict of guilty had been returned. And in *Reg. v. Shuttleworth*, 3 Car. & K. 375, 376, Lord Campbell thus stated the practice under the statute: "It is the opinion of all the judges: The prisoner is to be arraigned on the whole indictment, and the jury are to have the new charge only stated to them, and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being resworn, are then to have the previous conviction stated to them; and the certificate of it is to be put in, and the prisoner's identity proved." See 24 & 25 Vict. chap. 96, § 116.

If a state adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. Otherwise, criminals who change their place of operation and successfully conceal their identity would be punished simply as first offenders, although on entering prison they would immediately be recognized as former convicts. It is to prevent such a frustration of its policy that provision is made for alternative methods; either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. *Plumbly v. Com.* 2 Met. 413, 415, per Shaw, Ch. J.). In the latter proceeding, as well as in the former, the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected.

Nor is there any reason why such a proceeding should not be prosecuted upon an **627**] information presented by a *competent public officer on his oath of office. There is no occasion for an indictment. To repeat, the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction. And it

cannot be contended that in proceeding by information instead of by indictment, there is any violation of the requirement of due process of law. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Maxwell v. Dow*, 176 U. S. 581, 584, 44 L. ed. 597, 598, 20 Sup. Ct. Rep. 448, 494.

The principles governing a proceeding of this sort, to inquire into the fact of prior conviction, were stated in *Ross's Case* (1824) 2 Pick. 165, 169-171. The legislature of Massachusetts (Stat. 1817, chap. 176 approved February 23, 1818) had provided for increased punishment upon second and third convictions. Reciting that the previous conviction might not be known to the grand jury or to the attorney for the commonwealth at the time of the indictment and trial, the statute contained the following provision closely resembling the one now under consideration:

"That whenever it shall appear to the warden of the state prison, . . . that any convict, received into the same, pursuant to the sentence of any court shall have before been sentenced, by competent authority of this or any other state, to confinement to hard labor for term of life or years, it shall be the duty of the said warden . . . to make representation thereof, as soon as may be, to the attorney or solicitor general; and they or either of them shall, by information or other legal process, cause the same to be made known to the justices of the supreme judicial court, . . . and the said justices shall cause the person or persons, so informed against, to be brought before them, in order that, if he deny the fact of a former conviction, it may be tried according to law, whether the charge contained in such *information **628** be true. And if it appear by the confession of the party, by verdict of the jury, or otherwise, according to law, that said information is true, the court shall forthwith proceed to award against such convict the residue of the punishment provided in the foregoing section; otherwise the said convict shall be remanded to prison, there to be held on his former sentence." *Laws of Mass. 1815-1818*, pp. 602, 603. *Ross*, then undergoing sentence for five years, was brought before the court pursuant to such an information, and his term of imprisonment was increased. In sustaining this sentence, the court, by Parker, Ch. J., said:

"In regard to the objection made to the process, this is not an information of an offense for which a trial is to be had, but of a fact; namely, that the prisoner has already been convicted of an offense; and this

fact must appear, either by his own confession, or by verdict of a jury, or otherwise, according to law, before he can be sentenced to the additional punishment. Is he to be sentenced for an offense distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is whether he is such a person as ought to have been sentenced, on his last conviction, to additional punishment, if the fact of a former conviction had then been known to the court. There was no need of a presentment by a grand jury, for no offense was to be inquired into. That had been already done. An indictment is confined to the question whether an offense has been committed. Here the question was simply whether the party had been convicted of an offense.

"It is said that at common law both offenses should be stated in the same count. The question upon this is whether the legislature had not a right to prescribe a different mode; and we think they had."

In the case at bar, the record is silent upon the question whether the fact of the 629]former convictions was known *at the time of the last indictment and trial. This, however, cannot be regarded as important from the constitutional standpoint. The indictment did not allege the prior convictions; the issue was not involved in the trial of the indictment, and the court could not have considered these convictions in imposing sentence. *State v. Davis*, 68 W. Va. 142, 150, 151, 32 L.R.A.(N.S.) 501, 69 S. E. 639, Ann. Cas. 1912a, 996. They were not considered until the subsequent proceeding was had. Doubtless, as has been said, the object in providing the alternative proceeding is to make sure that old offenders should not be immune from the increased punishment because their former conviction was not known when they were last tried. But this does not define the limit of state power. Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt, and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.

2. It is insisted that the plaintiff in error was denied the equal protection of the laws, 56 L. ed.

in that the statute arbitrarily discriminates against the former convict—in a case like the present one—by requiring an information, instead of indictment, for the sole reason that he has been received into the penitentiary; so that, as the plaintiff in error puts it, "if he be out of the penitentiary, the defendant must be prosecuted by indictment in order to inflict the increased penalty; but if he be in the penitentiary, he is denied the right to indictment, and must be prosecuted by information."

*The argument is without merit.[630 The statute in question applies to all those "convicted of an offense, and sentenced to confinement therefor in the penitentiary," who previously have been sentenced to a like punishment. The fact of such sentence, indicating the gravity of the offense, affords a reasonable basis for classification. Those who have been so sentenced once before, and those who have been so sentenced twice before, are subjected, respectively, to the same measure of increased punishment. In all cases, before the increased punishment can be inflicted, there must be conviction on the new charge; the former conviction must be shown, and there must be a finding by a jury, if the fact is contested, of the identity of the defendant with the former convict. The distinction, upon which the contention is based, has regard simply to the difference in procedure between the case where the fact of former conviction is alleged in the indictment, and determined by the jury on the trial of the charge of crime, and the case where it is charged in the information, and determined by a jury in a proceeding thereby instituted. This, in view of the nature of the issue to be determined, cannot be said to give rise to a substantial difference in right, or to any inequality within the meaning of the constitutional provision.

The 14th Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 420, 54 L. ed. 817, 820, 30 Sup. Ct. Rep. 543. A state may make different arrangements for trials under different circumstances of even the same class of offenses (*Brown v. New Jersey*, 175 U. S. 172, 177, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 31, 25 L. ed. 989, 992; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; *Lang v. New Jersey*, 209 U. S. 467, 52 L. ed. 894, 28 Sup. Ct. Rep. 594); and certainly it may suitably adapt to the exigency the method of determining whether a person found guilty of crime has previously been

631] convicted of *other offenses. All who were in like case with the plaintiff in error were subject to the same procedure. He belonged to a class of persons convicted and sentenced to the penitentiary whose identity as former convicts had not been determined at the time of their trial. As to these, it was competent for the state to provide appropriate means for determining such identity.

3. What has been said, and the authorities which have been cited, sufficiently show that there is no basis for the contention that the plaintiff in error has been put in double jeopardy, or that any of his privileges or immunities as a citizen of the United States have been abridged. Nor can it be maintained that cruel and unusual punishment has been inflicted. *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; *Howard v. North Carolina*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; *Coffey v. Harlan County*, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220.

The questions raised under the Constitution of the state are not open here, and in no aspect of the case does it appear that any right of the plaintiff in error under the Constitution of the United States has been infringed.

Judgment affirmed.

632] *CROSS LAKE SHOOTING AND FISHING CLUB, Plff. in Err.,
v.

STATE OF LOUISIANA.

(See S. C. Reporter's ed. 632-640.)

Error to state court — Federal question — impairing contract obligations — judicial decision.

1. Mere errors committed by a state court when passing upon the validity and effect of a contract under the laws in existence when it was made cannot give rise to a question of the impairment of contract obligations, reviewable in the Federal Supreme Court by writ of error, where no effect has been given to any subsequent leg-

islation, even though the rulings are not in accord with prior decisions, on the faith of which the rights in question were acquired. [For other cases, see *Appeal and Error*, 1709-1714, in *Digest Sup. Ct.* 1908.]

Error to state court — Federal question — impairing contract obligations.

2. A decree of a state court avoiding a conveyance by the board of commissioners of the Caddo levee district under the supposed authority of La. Acts 1892, No. 74, § 9, on the ground that under that section, properly construed, the board had no authority to sell until a proper instrument conveying the land to the board had been duly executed by the proper state officers, does not give effect to Acts 1902, No. 171, repealing the earlier act, so as to present a question of the impairment of contract obligations, reviewable in the Federal Supreme Court by writ of error.

[For other cases, see *Appeal and Error*, 1376-1392, in *Digest Sup. Ct.* 1908.]

[No. 46.]

Argued April 18, 1912. Decided May 13, 1912.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing a judgment of the District Court for the Parish of Caddo, in that state, adjudged the state to be the owner of land theretofore conveyed by the board of commissioners of the Caddo levee district. Dismissed for want of jurisdiction.

See same case below, 123 La. 208, 48 So. 891.

The facts are stated in the opinion.

Mr. Edgar H. Farrar argued the cause, and, with Mr. John D. Wilkinson, filed a brief for plaintiff in error:

A state court cannot oust the jurisdiction of this court by dodging a Federal question which inheres in the case, either by neglecting or declining to decide the question, or by attempting to evade it. This court will itself look into the case and decide, irrespective of the views expressed by the state court:

First. What was the contract set up by the party who claims its obligation has been violated?

Second. Has the obligation of the contract, as found by this court, been violated by subsequent state action, either by legislation or by judicial decision equivalent

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts

can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to *Osborne v. Clark*, 51 L. ed. U. S. 619.

to legislation, as was held in *Douglass v. Pike County*, 101 U. S. 687, 25 L. ed. 971, and *Muhlker v. New York & H. R. Co.* 197 U. S. 570, 49 L. ed. 877, 25 Sup. Ct. Rep. 522; *Louisiana ex rel. Hubert v. New Orleans*, 215 U. S. 175, 54 L. ed. 147, 30 Sup. Ct. Rep. 40; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Jefferson Branch Bank v. Skelly*, 1 Black, 443, 17 L. ed. 177; *Bridge Proprs. v. Hoboken Land & Improv. Co.* 1 Wall. 116, 145, 17 L. ed. 571, 576; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Wright v. Nagle*, 101 U. S. 791, 793, 25 L. ed. 921, 922; *McGahey v. Virginia*, 135 U. S. 664, 667, 34 L. ed. 305, 306, 10 Sup. Ct. Rep. 972; *Douglas v. Kentucky*, 168 U. S. 488, 501, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 555, 31 L. ed. 204, 8 Sup. Ct. Rep. 217; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Mr. W. P. Hall argued the cause, and, with Mr. Walter Guion, Attorney General of Louisiana, filed a brief for defendant in error:

The authority conferred by a state on its courts to hear and determine cases is not the kind of authority referred to in § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), which declares that this court has the right to review a judgment of the highest court of a state "where is drawn in question the validity of a statute of, or an authority exercised under, any state."

Bethell v. Demaret, 10 Wall. 537, 19 L. ed. 1007.

A decision on questions of compliance with the Constitution or statutes of a state does not involve a Federal question.

Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Missouri ex rel. Quincy, M. & P. R. Co. v. Harris*, 144 U. S. 210, 36 L. ed. 407, 12 Sup. Ct. Rep. 838; *Sage v. Board of Liquidation*, 144 U. S. 647, 36 L. ed. 577, 12 Sup. Ct. Rep. 755; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156.

Where a state law is admitted to be valid, and the only question is whether it has

been correctly construed, this court has no jurisdiction.

Congdon v. Goodman, 2 Black. 574, 17 L. ed. 257; *Scott v. Jones*, 5 How. 343, 12 L. ed. 181; *Lessieur v. Price*, 12 How. 59, 13 L. ed. 893; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Smith v. Hunter*, 7 How. 738, 12 L. ed. 894.

A decision of the state court resting upon the construction, and not upon the validity, of a statute of the state, does not present a Federal question.

Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; *Ferry v. King County*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 128; *Snell v. Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489.

The jurisdiction of the Supreme Court of the United States cannot be sustained on the ground that the judgment of the state court impairs or fails to give effect to a contract.

Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; *Knox v. Exchange Bank*, 12 Wall. 379, 383, 20 L. ed. 414, 415; *New York v. Central R. Co.* 12 Wall. 455, 20 L. ed. 458; *Hopkins v. McLure*, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 350, 351, 46 L. ed. 936, 943, 944, 22 Sup. Ct. Rep. 691; *St. Paul, M. & M. R. Co. v. Todd County*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281.

A decision of a state supreme court that certain railroad aid bonds were void under the Constitution and statutes of the state, in force at the time the bonds were issued, there being no subsequent legislation on the subject, is not subject to review on the ground that the contract was impaired by the decision of the state court.

Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

This court has no jurisdiction to review a judgment of a state court on writ of error, when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract, or to a particular statute or series of statutes in existence when the contract was entered into.

Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 647, 48 L. ed. 828, 24 Sup. Ct. Rep. 532.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit by the state of Louisiana 633] against the *Cross Lake Shooting and Fishing Club, to recover about 11,000 acres of land, in the parish of Caddo, in that state, of which the fishing club was in possession, and to which it was asserting title, under a sale and deed made to its remote grantors by the board of commissioners of the Caddo levee district. Although defeated in the district court, the state prevailed in the supreme court, and there obtained a final judgment in its favor. 123 La. 208, 48 So. 891. The fishing club has brought the case here, claiming that the judgment gave effect to a state law which impinged upon the contract clause of the Constitution of the United States.

The facts are these: By act No. 74 of 1892, the legislature of the state created the Caddo levee district, defined its boundaries, vested the control and management of its affairs in a board of commissioners, clothed the board with corporate powers, and made to it a grant of state lands in the following terms:

"Sec. 9. Be it further enacted, etc., That in order to provide additional means to carry out the purposes of this act, and to furnish resources to enable the said board to assist in developing, establishing, and completing the levee system in the said district, all lands now belonging or that may hereafter belong to the state of Louisiana, and embraced within the limits of the levee district as herein constituted, shall be and the same are hereby granted, given, bargained, donated, conveyed, and delivered unto the said board of commissioners of the Caddo levee district, whether the said lands or parts of lands were originally granted by the Congress of the United States to the state of Louisiana, or whether the said lands have been or may hereafter be forfeited, or bought in by or for, or sold to the state at tax sale for nonpayment of taxes; where the state has or may hereafter become the owner of lands by or through tax sales, conveyances thereof shall only be made to the said board of levee commis- 634] sioners *after the period of redemption shall have expired; provided, however, any and all former owners of lands which have been forfeited to purchasers by or sold to the state for nonpayment of taxes may at any time within six months next ensuing after the passage of this act redeem the said lands or all of them upon paying to the treasurer of this state all taxes, costs, and penalties due thereon, down to the date of the said redemption; but such redemption shall be deemed and be taken to be sales of lands by the state, and all and every sum

or sums of money so received shall be placed to the credit of the Caddo levee district. After the expiration of the said six months it shall be the duty of the auditor and register of the state land office, on behalf of and in the name of the state, to convey to the said board of levee commissioners by proper instruments of conveyance, all lands hereby granted or intended to be granted and conveyed to the said board whenever, from time to time, the said auditor or register of the state land office or either of them shall be requested to do so by the said board of levee commissioners or by the president thereof, and thereafter the said president of the said board shall cause the said conveyances to be properly recorded in the recorder's office of the respective parishes wherein the said lands are located, and when the said conveyances are so recorded the title to the said lands, with the possession thereof, shall from thenceforth vest absolutely in the said board of commissioners, its successors or grantees. The said lands shall be exempted from taxes after being conveyed to, and while they remain in the possession or under the control of, the said board. The said board of levee commissioners shall have the power and authority to sell, mortgage, and pledge, or otherwise dispose of, the said lands in such quantities, and at such times, and at such prices, as to the board may seem proper. But all proceeds derived therefrom shall be deposited in the state treasury, *to the [635 credit of the Caddo levee district, and shall be drawn only upon the warrants of the president of said board, properly attested, as provided in this act."

The lands in question were within the district so created, and at the date of the act were owned by the state, but whether it had acquired them as swamp lands, under the legislation of Congress (Acts March 2, 1849, 9 Stat. at L. 352, chap. 87; September 28, 1850, 9 Stat. at L. 519, chap. 84), or as the bed of what was a navigable lake when the state was admitted into the Union (see *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565), is left uncertain. For present purposes, however, this uncertainty may be disregarded and the state's title treated as resting on the swamp-land grant by Congress, as was claimed by the fishing club in the state courts. No instrument conveying the lands to the board of the levee district was ever executed by the state auditor or the register of the state land office, or recorded in the recorder's office of the parish. But in 1895 the board sold and deeded the lands to the remote grantors of the fishing club for the agreed price of \$1,100, or 10 cents per acre, which was deposited in a bank under an agreement where-

by it would be payable to the board whenever the latter should perfect the title by obtaining a conveyance from the auditor and register. Such a conveyance was not obtained, and in December, 1901, the grantees in the deed requested the board to complete the title, and in that connection offered to pay \$3,500 more for the lands; whereupon the board adopted a resolution accepting the offer, and authorizing its president to take proper steps to perfect the title. But it does not appear that the additional sum was either paid or tendered or that anything was done under the resolution.

In July, 1902, the legislature of the state passed an act (Laws of 1902, No. 171, p. 324) authorizing the register of the state land office to sell these lands at not less than \$5 per acre, nor in greater quantities 636] than 320 acres to *any one person, directing that the proceeds of such sales be placed to the credit of the board of the levee district, and containing the following repealing provision:

"Section 4. Be it further enacted, etc., that act No. 74 of the Acts of the General Assembly of Louisiana for 1892, and act No. 160 of the Acts of 1900, be and the same are hereby repealed in so far as they may in any way whatever affect any of the lands described herein, the same never having been transferred by the register of the state land office and the state auditor, nor either of them, by any instrument of conveyance from the state, as required by said act to complete the title to same."

This suit was brought in 1906. The petition made no mention of the act of 1902, but proceeded upon the theory, among others, that under § 9 of act No. 74 of 1892, supra, the board of the levee district was wholly without authority to sell or otherwise dispose of the lands until a proper instrument conveying them to the board had been executed by the auditor and register and duly recorded in the recorder's office of the parish, and that, as no such instrument had been executed or recorded, the sale and deed by the board, under which the fishing club was asserting title, were unauthorized and void. The answer, which was also silent respecting the act of 1902, alleged, in substance, that the act of 1892 was a grant *in presenti* of the lands, and operated to transfer them to the board of the levee district without any conveyance from the auditor and register; that the fishing club's grantors purchased on the faith of that act; and that to permit the state to re-take the lands would impair the obligation of its contract embraced in the act.

At the hearing in the district court, counsel for the state placed some reliance 56 L. ed.

upon the act of 1902, but the court ruled that the act of 1892 was a grant *in presenti* of all lands falling within its terms other than those acquired through tax sales; that the provision requiring conveyances *from the auditor and register related[637 only to lands acquired through such sales; that, as the lands in suit had not been acquired in that way, the sale and deed by the board to the fishing club's grantors were authorized and valid, even although there was no conveyance from the auditor and register; and that the rights acquired thereby were not divested or affected by the subsequent act of 1902. The record does not disclose that there was any reliance upon that act in the supreme court, and yet it was practically conceded in argument here that there was. But, whether relied upon or not, the act was mentioned in the statement preceding the court's opinion, and was not otherwise noticed or treated as a factor in the decision. The court held that the act of 1892 was not a grant *in presenti*; that a conveyance from the auditor and register was essential to invest the board with any disposable title; and that, in the absence of such a conveyance, the sale and deed by the board were wholly unauthorized and void. Upon that subject the court said:

"In our opinion, the levee board acquired no title to the lands in dispute under the act of 1892, because no deed of conveyance thereto was ever executed by the auditor and register, or either of them, and, of course, no such deed was ever recorded. . . . This conclusion renders it unnecessary to consider the other issues presented by the pleadings, . . . and it is wholly immaterial whether the board attempted to sell the land or to give it away, or whether it received an amount agreed to be paid, or received nothing. Our reasons for the conclusion that the board acquired no title, and could therefore convey none, predicated on the admitted fact that no deed of conveyance of the lands in question has ever been executed by the auditor or register, are, briefly, as follows:"

Then, after proceeding with an analysis and interpretation of the provisions[638 of § 9 of the act of 1892, it was further said:

"Upon the whole, we are of opinion that the law in question is susceptible of but one interpretation, *i. e.*, that its makers intended that disposable title to all lands granted or intended to be granted by it should vest in the grantee only upon registry, in the parishes where the lands lie, of proper instruments of conveyance executed by the auditor and register of the state land office. So far as the tax lands are concerned, the reason for thus qualifying

the grant is obvious enough. . . . As to the swamp lands, it may well be that in many instances there were pending unsettled claims and controversies of which the land office was advised, with which the register alone was qualified to deal, and which rendered it inadvisable that new titles should issue save to the knowledge of that officer. But whether these views as to the reasons which inspired the law be correct or not, the law itself is plain, and it has (in effect) twice received from this court the interpretation which we are now placing on it; once in a case involving lands formerly constituting the bed of a shallow lake, and again in a case involving lands acquired by the state under its tax laws."

With this statement of the case, we come to consider whether it presents any question under that clause of the Constitution which declares: "No state shall . . . pass any . . . law impairing the obligation of contracts." This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. 639] But when the state court, *either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired. *Knox v. Exchange Bank*, 12 Wall. 379, 383, 20 L. ed. 414, 415; *Central Land Co. v. Laidley*, 159 U. S. 103, 111, 112, 40 L. ed. 91, 94, 95, 16 Sup. Ct. Rep. 80; *Bacon v. Texas*, 163 U. S. 207, 220, 221, 41 L. ed. 132, 137, 138, 16 Sup. Ct. Rep. 1023; *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 635, 647, 48 L. ed. 823, 828, 24 Sup. Ct. Rep. 532;

Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 175, 54 L. ed. 144, 147, 30 Sup. Ct. Rep. 40; *Fisher v. New Orleans*, 218 U. S. 438, 54 L. ed. 1099, 31 Sup. Ct. Rep. 57; *Missouri & K. Interurban R. Co. v. O'Lathe*, 222 U. S. 187, ante, 47, 32 Sup. Ct. Rep. 47.

It is most earnestly insisted that, even conceding that our jurisdiction is as restricted as just stated, it still includes the present case, because the decision of the state court, although not expressly rested upon the act of 1902, by necessary implication gave effect to it; and in support of this position it is said that, but for that act, the state could not have maintained the suit. But we do not understand that the state's right to maintain the suit was dependent upon that act, nor do we perceive any reason for believing that the act was an influential, though unmentioned, factor in the decision. Under the construction given to the act of 1892 the state still held the title, no conveyance having been made to the board of the levee district, and, of course, the right to maintain the suit was appurtenant to the title.

*What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902, and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed.

LEVI B. GRITTS et al., Appts.,

v.

WALTER L. FISHER, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury.

(See S. C. Reporter's ed. 640-648.)

Indian allotments—minor children.

1. Children born to enrolled members of the Cherokee tribe after September 1, 1902, though expressly excluded by the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), from enrolment or participation in the distribution of the tribal property, were, if living on March 4, 1906, embraced by the provision of the act of April 26, 1906 (34 Stat. at L. 137, 148, chap. 1876), § 2, as amended by the act of June 21, 1906 (34 Stat. at L. 325, 341, chap. 3504), for the enrolment of "children who were minors living March 4, 1906."

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

Constitutional law—vested rights—Indian allotments.

2. Vested rights of members of the Cherokee tribe living on September 1, 1902, and enrolled under the act of July 1, 1902, to

participate in the allotment and distribution of the remaining tribal lands and funds, were not destroyed,—their individual allotments not being affected,—by the provision of the act of April 26, 1906, § 2, as amended by the act of June 21, 1906, for admitting newly-born members of the tribe to the allotment and distribution from which they were excluded by the earlier act if born after September 1, 1902.

[For other cases, see Constitutional Law, IV, e, in Digest Sup. Ct. 1908.]

[No. 896.]

Argued January 10 and 11, 1912. Decided May 13, 1912.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, sustaining a demurrer to and dismissing the bill in a suit to enjoin the enrolment of children born to enrolled members of the Cherokee tribe after September 1, 1902. Affirmed.

See same case below, 37 App. D. C. 473. The facts are stated in the opinion.

Messrs. **John J. Hemphill** and **William H. Robeson** argued the cause, and, with Messrs. **C. C. Calhoun** and **Daniel B. Henderson**, filed a brief for appellants:

It cannot be held that the general act of 1906 repeals the special act of 1902, without violating the most fundamental rules of statutory construction.

Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; **Cope v. Cope**, 137 U. S. 682, 686, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; **Ward v. Race Horse**, 163 U. S. 504–511, 41 L. ed. 244–247, 16 Sup. Ct. Rep. 1076; **Red Rock v. Henry**, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434.

Plaintiffs' rights do not depend upon citizenship in the Cherokee Nation as a body politic.

Cherokee Intermarriage Cases, 203 U. S. 76, 86, 51 L. ed. 96, 101, 27 Sup. Ct. Rep. 29.

Inasmuch as the title was originally in the Cherokee people, as a community, and as the United States and the Cherokee people agreed that the community should terminate on a given date, and that the lands and funds of the former community should belong to an identified class of persons, namely, the appellants in this case, and that no person born after September 1, 1902, should share, the appellants became certainly vested as owners in common with all the right, title, and interest in and to all the lands and funds of the Nation.

Drew v. Carroll, 154 Mass. 181, 28 N. E. 148; **Webster v. Reid**, **Morris (Iowa)** 467.

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Solicitor General **Lehmann** argued the cause and filed a brief for appellees:

The title to the surplus lands and the funds is in the Cherokee Nation, and not in the individual members of the tribe.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; **Cherokee Nation v. Hitchcock**, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; **Delaware Indians v. Cherokee Nation**, 193 U. S. 127, 48 L. ed. 646, 24 Sup. Ct. Rep. 342.

Congress had the same power to amend the law that it had to enact it originally. That property expectations would be affected by its action did not impair its power.

Stephens v. Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; **Wallace v. Adams**, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363.

That the Cherokee Nation assented to the act of July 1, 1902, and that it is in the nature of an agreement, does not alter the case. Acts of Congress dealing with Indian tribes, and treaties with those tribes, stand upon the same footing.

Conley v. Ballinger, 216 U. S. 84, 91, 54 L. ed. 393, 396, 30 Sup. Ct. Rep. 224.

Nothing became vested in the individual members of the tribe except as allotment or distribution was actually made to them. As to surplus lands and funds not distributed, and not available for distribution, still resting in tribal ownership, the power to make a change, and the duty to make it, if the welfare of the Indians required it, remained in Congress.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 316, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; **Muskrat v. United States**, 44 Ct. Cl. 137.

Mr. **William W. Hastings** filed a brief for the Cherokee Nation as *amicus curiæ*:

The Cherokee tribal government is still in existence and recognized as such.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; **Ballinger v. United States**, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; **Intermarried Whites of Cherokee Nation**, 40 Ct. Cl. 411, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29; **Delaware Indians v. Cherokee Nation**, 193 U. S. 127, 48 L. ed. 646, 24 Sup. Ct. Rep. 342.

As long as a nation of Indians was recognized in the tribal capacity by the political department of the United States, they were under the supervisory control of Congress.

Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 756, 757, 18 L. ed. 672,

673; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Brown v. United States*, 44 Ct. Cl. 283.

No individual citizen of the Cherokee Nation has any vested interest in the unallotted lands or the undistributed funds of the tribe.

Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Roff v. Burney*, 168 U. S. 218, 42 L. ed. 442, 18 Sup. Ct. Rep. 60; *Conley v. Ballinger*, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224; *Hayes v. Barringer*, 93 C. C. A. 507, 168 Fed. 221; *Ligon v. Johnston*, 90 C. C. A. 486, 164 Fed. 670; *Cherokee Trust Funds*, 117 U. S. 288, 29 L. ed. 880, 6 Sup. Ct. Rep. 718; *Sac & Fox Indians v. Sac & Fox Indians*, 45 Ct. Cl. 287; *Garfield v. United States*, 30 App. D. C. 177, affirmed in 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; *Fleming v. McCurtain*, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16.

The act of July 1, 1902, was entitled to no greater weight than the acts of June 28, 1898, and March 3, 1901.

Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29.

Interest of the individual members of the Nation in the tribal lands was communal.

Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16.

Petitioners have no right to maintain this action, for the reason that the title to the unallotted lands remained in the tribe, and is therefore "a right of the tribe."

Blackfeather v. United States, 190 U. S. 368, 47 L. ed. 1099, 23 Sup. Ct. Rep. 772.

The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons.

United States v. Moore, 95 U. S. 763, 24 L. ed. 589.

The power of Congress to administer upon the affairs of dependent Indian tribes is plenary.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup.

Ct. Rep. 478; *United States v. Rogers*, 4 How. 567, 11 L. ed. 1105; *Starr v. Campbell*, 208 U. S. 527, 52 L. ed. 602, 28 Sup. Ct. Rep. 365; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Ligon v. Johnston*, 90 C. C. A. 486, 164 Fed. 670; *Marchie Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578.

Nor does the difference in the character of title held by the Indian tribes to their lands in any manner or degree change, alter, or diminish the power of Congress over them or their tribal property. This power is the same in all cases,—plenary.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; *Kansas Indians (Blue Jacket v. Johnson County)* 5 Wall. 737, 18 L. ed. 667; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

It is not material that petitioners became citizens of the United States under the act of March 3, 1901. The government of the United States did not thereby lose control over their tribal property. The courts have uniformly held that as long as a nation of Indians was recognized in their tribal capacity by the political department of the United States, they were under the supervisory control of Congress.

Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 756, 757, 18 L. ed. 672, 673; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; *Farrell v. United States*, 49 C. C. A. 183, 110 Fed. 942; *Hitchcock v. United States*, 22 App. D. C. 275; *Beck v. Flournoy Live-Stock & Real-Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30; *Pilgrim v. Beck*, 69 Fed. 895; *United States v. Flournoy Live-Stock & Real Estate Co.* 71 Fed. 576; *United States v. Mullin*, 71 Fed. 682; *Eells v. Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *McKay v. Kalyton*, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; *Dick v. United States*, 208 U. S. 340-359, 52 L. ed. 520-528, 28 Sup. Ct. Rep. 399; *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115.

Even if the act of July 1, 1902, because it was ratified by a vote of the citizens of

the Cherokee Nation, should be held to be an agreement, still the citizens have no vested rights to enrolment or to unallotted lands or tribal moneys, and Congress could have amended or repealed it, whether it be construed as "only an act of Congress," an agreement, or a treaty.

Cherokee Tobacco (*Boudinot v. United States*) 11 Wall. 621, 20 L. ed. 229; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.

Ratification of the act was only necessary because it was one of the conditions imposed by the act. But, as decided in the case of *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216, Congress could have omitted the condition and no ratification would have been necessary, and the act would have been a valid exercise of power.

Mr. Justice **Van Devanter** delivered the opinion of the court:

The question presented for decision in this case is whether children born to enrolled members of the Cherokee tribe of Indians after September 1, 1902, and living on March 4, 1906, are entitled to enrolment as members of the tribe, and to participation in the allotment and distribution of its lands and funds now being made under the legislation of Congress. The Secretary of the Interior and the Secretary of the Treasury, who are respectively charged with important duties in that connection, have taken the position, and are proceeding upon the theory, that under the acts of April 26, 1906, and June 21, 1906, *infra*, the right of the controversy is with the children; and the purpose of this suit is to test the accuracy of that position, and, if it be held untenable, to enjoin those officers from giving effect to it. The suit was begun in the supreme court of the District of Columbia in 1911, and the plaintiffs are three Indian members of the tribe, duly enrolled as such as of September 1, 1902, under the act of July 642]1, 1902, **infra*, who sue on behalf of themselves and all other similarly situated. A demurrer to the bill was sustained and a decree of dismissal entered, which was affirmed by the court of appeals. 37 App. D. C. 473. An appeal brought the case here.

During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members, and to the dissolution of the tribal governments. An
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extended statement of these laws, so far as they concern the Cherokees, as also of the title by which their lands and funds have been held and of the relations of the tribe and its members to the United States, will be found in *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Cherokee Intermarriage Cases*, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29; *United States ex rel. Lowe v. Fisher*, 223 U. S. 95, ante. 364, 32 Sup. Ct. Rep. 196, and *Heckman v. United States*, 224 U. S. 413, ante. 820, 32 Sup. Ct. Rep. 424.

Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members, and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient, and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among *them, and to terminate the tribal[643 government. This Congress undertook to do. The undertaking was a large one and difficulties were encountered. The first legislation was largely preliminary and experimental and need not be specially noticed, because no material change in the situation resulted therefrom.

The act of July 1, 1902, 32 Stat. at L. 716, chap. 1375, which related only to the Cherokees, and is spoken of as the Cherokee agreement, was quite comprehensive and is the one upon which the plaintiffs here rely. It made provision for ascertaining who were members, and permanently enrolling them (§§ 25-30), for reserving certain of the tribal lands for public purposes (§ 24), for appraising the other lands (§§ 9, 10), and for allotting in severalty to each enrolled member land equal in value to 110 acres of the average allottable lands (§ 11). It declared that the enrolment should be made "as of September 1,

1902," and should include "all persons then living" and entitled to enrolment (§ 25); that "no child born thereafter" should be entitled to enrolment or "to participate in the distribution of the tribal property" (§ 26); that during the months of September and October, 1902, applications could be received for the enrolment of infant children born to recognized and enrolled members on or before September 1 of that year, but that the application of no person whomsoever for enrolment should be received after October 31, 1902 (§ 30); that no person not enrolled should be entitled to "participate in the distribution of the common property" of the tribe, and those who were enrolled should "participate in the manner set forth" in the act (§ 31); that the enrolment should be made in partial lists, which, when approved by the Secretary of the Interior, were to constitute parts of the final roll "upon which allotment of land and distribution of other tribal property" should be made, and that when lists embracing all persons lawfully [644] entitled to enrolment were *made and approved, the roll should "be deemed complete" (§ 29). There were provisions that "no allotment of land or other tribal property" should be made on behalf of any enrolled person dying *prior* to September 1, 1902, but that his right in the lands or other tribal property should be deemed extinguished (§ 31); and that if any enrolled person should die *after* September 1, 1902, and before receiving his allotment, the lands to which he would have been entitled if living should be allotted in his name, and should, "with his proportionate share of other tribal property," descend to his heirs (§ 20). The act declared that the tribal government should not continue longer than March 4, 1906 (§ 63), directed the payment in full, out of the tribal funds, of the lawful indebtedness of the tribe incurred up to the time of its dissolution, and authorized a *pro rata* distribution, among the enrolled members, of the tribal funds remaining after the dissolution of the tribal government and the payment of its indebtedness (§§ 66, 67). But it made no specific provision for the distribution or disposal of tribal lands remaining after the prescribed reservations and allotments were made.

But the tribal government was not dissolved on March 4, 1906. By joint resolution of March 2, 1906, Congress provided that the tribal existence and the tribal government should continue until all property of the tribe, or the proceeds thereof, should be distributed among the individual members (34 Stat. at L. 822); and by the act of April 26, 1906, they were fur-

ther continued until otherwise provided by law (34 Stat. at L. 137, 148, chap. 1876). On those dates the work contemplated by the act of July 1, 1902, had not been completed. Some of the applications for enrolment, received within the time prescribed in the act, had not been acted upon; some of the enrolled members had not selected their allotments, and litigation was pending which involved the rights of some who had been enrolled and of others whose applications were awaiting *ac-[645]tion. In addition to this, some who otherwise were entitled to enrolment had filed applications therefor after the time prescribed, and the tribal council of the Cherokees had requested that children born after September 1, 1902, and before March 4, 1906, who, but for the limitation in the act of July 1, 1902, would be entitled to participate in the allotment and distribution of the tribal lands and moneys equally with members born prior thereto, be admitted to such participation, if possible, and if that could not be done, that each child born between those dates be given a sum of money sufficient to place him, as far as possible, on an equal footing with the others.

The act of April 26, 1906, unlike that of July 1, 1902, was not limited to the Cherokees, but it did in express terms include them. By its 28th section it continued the tribal existence and the tribal government, as just indicated; by its 1st section it authorized the enrolment of a class of persons whose applications therefor were made prior to December 1, 1905, and were not allowed solely because not made in time; and by its 2d section, as amended June 21, 1906 (34 Stat. at L. 325, 341, chap. 3504), it provided as follows:

"That for ninety days after approval hereof applications shall be received for enrolment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrolment pending at the approval hereof, and for the purpose of enrolment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. . . . Provided,

*That the rolls of the tribes affected [646] by this act shall be fully completed on or before the fourth day of March, nineteen hun-

dred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrolment of any person after said date: Provided further, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrolment or to be entitled to enrolment in any of said tribes, except for minors, the children of Indians by blood, or of freedmen members of said tribes, . . . as herein otherwise provided."

By its 16th and 17th sections it further provided that after the making of the allotments provided for in that and other acts, the residue of the lands, not reserved or otherwise disposed of, should be sold by the Secretary of the Interior, and the proceeds deposited in the United States Treasury to the credit of the tribe, together with moneys arising from other sources, and that thereafter, and when all the just charges against the tribal funds should be deducted therefrom, the remaining funds should be distributed *per capita* to the members then living and to the heirs of deceased members named in the finally approved rolls.

The controversy here arises out of the provision in § 2 of the act of April 26, 1906, as amended June 21 following, for the enrolment of "children who were minors living March 4, 1906," which the defendants regard as including children born after September 1, 1902, and living on March 4, 1906. The appellants contend, first, that it does not include children born after September 1, 1902, but only such as were born prior to that date, and for whom no application for enrolment was made within the time limited by the act of July 1, 1902; that is, on or before October 31, 1902; and, second, that if it does include children born after September 1, 1902, it arbitrarily takes from the appellants and others similarly situated property *which is theirs and gives it to others, and therefore is violative of due process of law. The last contention rests upon another, *viz.*, that the act of July 1, 1902, vested in the members living on September 1, 1902, who were enrolled under that act, an absolute right to receive all lands of the tribe not reserved or allotted thereunder, and all funds of the tribe not used, in the payment of tribal debts.

We are unable to assent to the first contention. The provision in question says "children who were minors living March 4, 1906," and those words as naturally and aptly embrace children born after as before September 1, 1902. Had it been intended, as is claimed, merely to extend the time for filing applications on behalf of children living on September 1, 1902, and therefore

born on or before that date, it is reasonable to believe that other words more appropriate to the occasion would have been used. Why say "living March 4, 1906," if as to these children the prior requirement expressed in the words "living on September 1, 1902," was not to be affected? Besides, the Cherokee tribal council, as also the Chickasaw legislature (see H. R. Doc. No. 455, 59th Cong., 1st Sess.), had asked that provision be made for the enrolment of children born up to March 4, 1906, and that would shed some light on the provision were its meaning uncertain. But it does not seem to have been regarded as uncertain by those charged with its enforcement, nor by the courts below. On the contrary, they treated it as plainly including children born after September 1, 1902, and we think that is the right view of it.

We come, then, to the second contention. It is not proposed to disturb the individual allotments made to members living September 1, 1902, and enrolled under the act of 1902, and therefore we are only concerned with whether children born after September 1, 1902, and living on March 4, 1906, should be excluded from the allotment and distribution. The act of 1902 required that they be *excluded, and [648 the legislation in 1906, as we have seen, provides for their inclusion. It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress, and can have no greater effect." Cherokee Intermarriage Cases, 203 U. S. 76, 93, 51 L. ed. 96, 103, 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 43 L. ed. 1041,

1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Wallace v. Adams*, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363. It is not to be overlooked that those for whose benefit the change was made in 1906 were not strangers to the tribe, but were children born into it while it was still in existence, and while there was still tribal property whereby they could be put on an equal, or approximately equal, plane with other members. The council of the tribe asked that this be done, and we entertain no doubt that Congress, in acceding to the request, was well within its power.

Decree affirmed.

649] *CITY OF LOUISVILLE, Kentucky,
Appt.,
v.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 649-665.)

Municipal corporations — telephone franchise — revocation.

1. The assent of the municipality, when once given conformably to the charter of a telephone company, empowering the latter, with and by the consent of the city council, to construct and maintain a telephone system in the city, perfects the company's franchise, which, being a legislative grant, cannot thereafter be repealed, nullified, or forfeited by municipal ordinance. [For other cases, see *Municipal Corporations*, II. c, in Digest Sup. Ct. 1908.]

Municipal corporations — telephone franchise — withdrawal — revocation.

2. The right to use the city streets for telephone purposes, acquired by a telephone company conformably to its charter, by which it was empowered, with and by the consent of the city council, to construct and maintain a telephone system in Louisville, Kentucky, was not withdrawn or made subject to municipal revocation by Ky. Const. 1891, §§ 156, 163, 164, 199, or Ky. Stat. §§ 2742, 2783, 2825, conferring upon municipalities the right to grant street franchises, or by Ky. Stat. § 573, enacted under the reserve power, repealing all special corporate privileges, since such repeal relates to exclusive grants, tax exemptions, monopolies, and similar immunities, and the other provisions are in the main prospective, the Constitution, while limiting for the future the power to sell street franchises, distinctly protecting the interests of those pub-

lic-utility companies whose charters had been theretofore granted conferring such rights, where work had in good faith been begun thereunder.

[For other cases, see *Municipal Corporations*, II. c, in Digest Sup. Ct. 1908.]

Corporations — consolidation — effect on telephone franchise.

3. The right to use the city streets for telephone purposes, possessed by a telephone company under its charter, passed to the new corporation formed by consolidation conformably to Ky. Stat. § 556, which declares that the consolidated company shall be vested with all the property, business, assets, and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities.

[For other cases, see *Corporations*, 107-124, in Digest Sup. Ct. 1908.]

Estoppel — of municipality — attacking telephone franchise.

4. The demand by a municipality from a consolidated telephone company of the bond previously required of the original company, and the expenditure of large sums by the consolidated company in extending and improving the telephone system, with the knowledge and acquiescence of the city, and in reliance upon the statutory conveyance of the street rights, estops the city from claiming that its consent to the use of the city streets by the original company for telephone purposes was inoperative, and from denying that the consolidated company had succeeded to the rights and obligations of its predecessor.

[For other cases, see *Estoppel*, III. b, in Digest Sup. Ct. 1908.]

Municipal corporations — telephone franchise — duration — revocation.

5. The right to use the city streets for telephone purposes, acquired under the perpetual charter of a telephone company, empowering it, with and by the consent of the city council, to construct and maintain a telephone system in Louisville, Kentucky, was not revocable by the city at will, and did not expire when, by Ky. Stat. § 2742, Louisville was made a city of the first class, with new and enlarged powers.

[For other cases, see *Municipal Corporations*, II. c, in Digest Sup. Ct. 1908.]

[No. 197.]

Argued March 7 and 8, 1912. Decided May 13, 1912.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining the enforcement of a municipal ordinance attempting to revoke a telephone franchise. Affirmed.

NOTE.—On the privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to *Clarksburg Electric Light Co. v. Clarksburg*, 50 L.R.A. 142.

On the right of telegraph and telephone

companies to use public streets—see notes to *St. Louis v. Western U. Teleg. Co.* 37 L. ed. U. S. 810; *Southern Bell Teleg. & Teleg. Co. v. Richmond*, 44 C. C. A. 155; and *Owensboro v. Cumberland Teleg. & Teleg. Co.* 99 C. C. A. 14.

Statement by Mr. Justice Lamar:

On April 3, 1886, the legislature of Kentucky chartered the Ohio Valley Telephone Company, fixing no limit to its corporate existence. Its principal office was to be at Louisville, but the company was empowered to construct and maintain within the state and elsewhere telephone lines, exchanges, and systems, and authorized "to purchase or to acquire and dispose of real estate, apparatus, patents, licenses, rights, and franchises relating to such business; to borrow money, and to issue and sell bonds, and to secure the payment of the same by a mortgage on all the property of the company, and on any of its . . . franchises, easements, rights of way, and privileges . . ." In § 5 it was enacted that "the said company may construct, equip, and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the city of Louisville, with and by the consent of the general council of said city." On August 17, 1886, the city council passed an ordinance which, after reciting this section of the charter, ordained that the act of the legislature above mentioned, so far as it refers to the use of the streets of Louisville, "is hereby ratified and confirmed, and the right is hereby granted and confirmed 651] to the said Ohio Valley *Telephone Company, its successors and assigns, to maintain a telephone system, and to erect poles and string wires thereon; . . . and to operate its telephone lines over, along, or under any street, avenue, alley, or sidewalk in the city of Louisville." There were also provisions in this ordinance regulating the manner of erecting poles and stringing wires in the street, and requiring the company to carry the fire and police wires of the city free of charge, and to give a bond in the sum of \$50,000, with surety, to save the city harmless against any damage caused by the opening of any street for telephone purposes. This bond was to be renewed from time to time as required by the city. It was declared that nothing in the ordinance should be construed to give the Ohio Valley Telephone Company, its successors or assigns, any exclusive right in the streets.

The ordinance was accepted, the \$50,000 bond was given, and the Ohio Valley Telephone Company erected poles, strung wires, and maintained a telephone exchange in the city of Louisville until January 27, 1900, when it consolidated with the Cumberland Telephone & Telegraph Company. By virtue of the Kentucky statute then of force, a new corporation was created under the name of the Cumberland Telephone & Tele-

graph Company, and the appellee was thereafter vested with all the "property . . . of the constituent companies, without deed or transfer, and bound for their debts and liabilities." The statute, at that time, was silent as to the transfer of "franchises," but in 1902 (Ky. Stat. § 556) it was amended so as to provide that upon the filing of the certificate the consolidated company should be vested "with all the rights, privileges, franchises, exemptions, property, assets, and effects of the constituent companies."

Upon this consolidation, on January 27, 1900, the Cumberland Telephone & Telegraph Company entered into *possession [652] of all the property of the Ohio Valley Telephone Company, and operated the plant, poles, and wires in Louisville until April 7, 1902, when the city council passed an ordinance that the Cumberland Company should execute a bond for \$50,000, as required of the Ohio Valley Telephone Company under the ordinance of August 17, 1886. This was done, and, on June 2, 1902, the council passed a resolution that "the bond of the Cumberland Telephone & Telegraph Company, successor of the Ohio Valley Telephone Company, principal, and the American Bonding Company, of Baltimore city, as surety, be and the same is hereby accepted and approved, and the Ohio Valley Telephone Company, and its sureties, are hereby relieved from all liability under their bond of August 28, 1886."

The Cumberland Company fully complied with the agreement as to carrying the police and fire wires of the city free of charge, greatly enlarged the telephone system in the city, and, at an expense of more than a million dollars, improved the plant and trebled the number of subscribers, although there was in the city another telephone company with a large number of patrons.

In 1908 a difference arose between the city and the company, the city claiming that the company's methods were dictatorial and oppressive, that it rendered poor service at high rates, and was guilty of discrimination among its patrons. This the company denied, claiming that its service was good, its rates were low, and that what was called discrimination consisted in different rates for different classes of service, open on equal terms to all members of the public alike.

No proceedings of any sort were instituted to decide the merits of this controversy, or to secure appropriate relief if, after a hearing, the charges were found to be true. But, apparently with the view of having only one telephone system, an ordinance was submitted to the city council

653]*of Louisville in 1908, providing for the creation of a comprehensive telephone system, repealing all existing rights, and granting a new franchise, which was to be sold to the highest bidder.

The Cumberland Company gave notice that it would rely on its existing contract to use the streets, and would not be a bidder at the proposed sale. Thereupon this ordinance was withdrawn, and another introduced and passed, by which the city, on January 23, 1909, repealed the ordinance of August 17, 1886, under which the Ohio Valley Telephone Company had erected poles, strung wires, and conducted a telephone system.

The Cumberland Company thereupon filed its bill in the United States circuit court for the western district of Kentucky, setting out the facts above outlined, alleging that it was the successor to the Ohio Valley Telephone Company, which, in reliance upon the ordinance of August 17, 1886, had erected a telephone system; that the Cumberland Company, as its successor under the terms of the consolidation act, and in accordance with the contract between the city and the Ohio Valley Telephone Company, carried on the telephone business, and does now carry upon its poles and underground conduits the fire alarm and police wires of the city, free of charge, which wires have been and now are daily used by the city in the conduct of its police and fire departments; that the Cumberland Company has largely extended and improved the plant, appliances, and business, and in doing so has expended \$1,700,000, "all of which was done upon the faith of and in reliance upon the said ordinance." It alleged that the repealing ordinance of 1909 impaired the obligation of its contract and deprived the company of its business and property without due process of law, and that, unless enjoined, the city would remove the poles and wires, and destroy the company's business, to its irreparable damage.

654] *A temporary injunction was granted, and the city's demurrer to the bill for want of equity was overruled. The case was referred to a master to take testimony as to the extent of the discrimination and other matters as to which the city made complaint. On consideration of his report the court said: "We find nothing in the answer of the defendant nor in the large mass of testimony heard on the issues made by the pleadings which should in any way change the views expressed in passing on the demurrer and the motion for a temporary injunction." He thereupon entered a final decree making the injunction permanent. The city appealed, alleging generally that the court erred in overruling the demurrer and in

granting the injunction. It specifically alleges that the court erred in holding (1) that the charter granted to the Ohio Valley Telephone Company the right, with the consent of the city, to operate a telephone system, which could not be repealed by the city council; (2) that the ordinance of August 17, 1886, constituted a valid and binding contract between the city and the company, which could not be repealed by the council; (3) that upon the consolidation of the Ohio Valley Telephone Company with the Cumberland Telephone & Telegraph Company all the rights of the former under its charter and the ordinance passed to and are now owned by and vested in the Cumberland Telephone & Telegraph Company; and (4) that the ordinance of January 23, 1909, repealing that of August 17, 1886, was void and of no effect.

Messrs. Clayton B. Blakey and Huston Quinn argued the cause, and, with Mr. Joseph S. Lawton, filed a brief for appellant:

Power to grant a franchise does not exist in a city unless expressly conferred.

Nellis, Street Railways, § 23; Louisville City R. Co. v. Louisville, 8 Bush, 415; East Tennessee Teleph. Co. v. Russellville, 106 Ky. 669, 51 S. W. 308; Henderson v. Covington, 14 Bush, 312.

A valid franchise authorizing a telephone company to occupy the streets of a city entitles such telephone company to an absolute and exclusive appropriation of that space in the streets which is occupied by its telephone poles.

St. Louis v. Western U. Teleg. Co. 148 U. S. 97, 37 L. ed. 383, 13 Sup. Ct. Rep. 485.

When a telephone company acquires from the state authority to use the streets of a city by and with the consent of the city, its franchise to use such streets is acquired from the state; the grant from the municipality is a mere revocable license.

Booth, Street Railways, § 10; Nellis, Street Railways, § 20; Boise City Artesian Hot & Cold Water Co. v. Boise City, 59 C. C. A. 236, 123 Fed. 232; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, s. c. 110 Mich. 334, 35 L.R.A. 859, 64 Am. St. Rep. 350, 68 N. W. 304; Detroit v. Detroit City R. Co. 56 Fed. 867; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A. (N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Home Teleph. & Telcg. Co. v. Los Angeles, 211 U. S. 273, 53 L. ed. 182, 29 Sup. Ct. Rep. 50; Chicago City

R. Co. v. People, 73 Ill. 547; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Parkhurst v. Capital City R. Co. 23 Or. 471, 32 Pac. 304; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. ed. 629.

A franchise granted by a city, silent as to the length of time during which it may be exercised, is not a perpetual franchise to occupy the streets unless the city had express authority to grant a perpetual franchise.

Boise City Artesian Hot & Cold Water Co. v. Boise City, 59 C. C. A. 236, 123 Fed. 232; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, s. c. 110 Mich. 384, 35 L.R.A. 859, 64 Am. St. Rep. 350, 68 N. W. 304; Detroit v. Detroit City R. Co. 56 Fed. 867; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 273, 53 L. ed. 182, 29 Sup. Ct. Rep. 50; Chicago City R. Co. v. People, 73 Ill. 547; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Parkhurst v. Capital City R. Co. 23 Or. 471, 32 Pac. 304; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. ed. 629; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Fanning v. Gregoire, 16 How. 528, 14 L. ed. 1044; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Buffalo & J. R. Co. v. Falconer, 103 U. S. 821, 26 L. ed. 471; Los Angeles v. Los Angeles City Water Co. 177 U. S. 571, 44 L. ed. 892, 20 Sup. Ct. Rep. 736; Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201.

A grant of a franchise, irrevocable and permanent in its nature, made by a city without express authority from the legislature to make such grant, is void.

Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; West End & A. Street R. Co. v. Atlantic Street R. Co. 49 Ga. 155; Atty. Gen. v. New York, 3 Duer, 119; Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303; Ampt v. Cincinnati, 21 Ohio C. C. 300, 11 Ohio C. D. 805; Birmingham & P. Mines Street R. Co. v. Birmingham Street R. Co. 79 Ala. 473, 58 Am. Rep. 615; Westminster Water Co. v. Westminster, 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.
56 L. ed.

A void act of a municipal body will not be validated by the adoption of a new state Constitution.

East Tennessee Teleph. Co. v. Russellville, 106 Ky. 673, 51 S. W. 303.

When two corporations consolidate, a new corporation comes into existence which is *eo instanti* granted by the state only such portion of the rights and privileges of the constituent corporations as the state at the time had the power to grant.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Clearwater v. Meredith (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Pennsylvania College Cases, 13 Wall. 209, 20 L. ed. 552; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Wright v. Georgia R. & Bkg. Co. 216 U. S. 422, 54 L. ed. 552, 30 Sup. Ct. Rep. 242.

All charters, franchises, and special privileges granted by the Kentucky legislature subsequent to 1856 are subject to revocation.

Louisville Water Co. v. Clark, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383.

The legislature had authority to delegate to the city the right to revoke any franchise which the appellee may have acquired to use the streets of the city of Louisville.

Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

All special privileges or grants made to corporations prior to the adoption of the present Constitution, and inconsistent with the provisions of that Constitution and the laws made pursuant thereto, are now repealed.

Hager v. Kentucky Title Co. 119 Ky. 850, 85 S. W. 183; Pearce v. Mason County, 99 Ky. 357, 35 S. W. 1122; McTigue v. Com. 99 Ky. 72, 35 S. W. 121.

Where a city gives its consent for a telephone company to use its streets without limit as to time, the right of such telephone company to continue to use the streets expires when the charter of the city expires.

Blair v. Chicago, 201 U. S. 485, 50 L. ed. 836, 26 Sup. Ct. Rep. 427; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Parsons v. Breed, 126 Ky. 765, 104 S. W. 766; Louisville v. Vreeland, 140 Ky. 404, 131 S. W. 195.

A city cannot convert a license into a contract by calling it a contract.

St. Louis v. Western U. Teleg. Co. 148 U. S. 97, 37 L. ed. 382, 13 Sup. Ct. Rep. 485; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

A city may revoke a grant or a license without notice to the grantee, and without assigning reasons therefor.

Calder v. Michigan, 218 U. S. 598, 54 L. ed. 1167, 31 Sup. Ct. Rep. 122; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308.

Discrimination among its patrons gives a city ample cause for revoking the franchise of the telephone company.

Wyman, Public Service Corp. chaps. 27, 28; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 317, 15 Ann. Cas. 1210; Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co. 23 Fed. 541; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Louisville & N. R. Co. v. Central Stock Yards Co. 133 Ky. 148, 97 S. W. 778.

Messrs. Alexander Pope Humphrey and William L. Granbery argued the cause, and, with Mr. Alexander Pope Humphrey, Jr., filed a brief for appellee:

The legislature had the right, prior to the adoption of the present Constitution of Kentucky, to grant to the Ohio Valley Telephone Company its charter, including § 5 thereof, and to grant to the city of Louisville the power therein conferred upon it.

Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 120.

A grant of this character is an easement in the streets, and as much property as any other estate, real or personal, which can be acquired by an individual or a corporation.

Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 304; Walla Walla v. Walla Walla Water Co. 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 394, 395, 46 L. ed. 610, 611, 22 Sup. Ct. Rep. 410.

A charter had been granted to the Ohio Valley Telephone Company prior to the adoption of the Constitution of 1891, and work had been begun under the terms and provisions of that charter.

Louisville v. Louisville Water Co. 105 Ky. 754, 49 S. W. 766.

There was a consideration for the grant of this easement to the Ohio Valley Telephone Company.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

This easement is of a character which is entirely independent of corporate life, and would exist as property even if the corporation should cease to exist, and is as much a property in fee as any other real or personal property which the company has acquired or may hereafter acquire.

People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 395, 46 L. ed. 611, 22 Sup. Ct. Rep. 410; Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538; People ex rel. Howell v. Jessup, 160 N. Y. 249, 54 N. E. 682, 15 Am. Crim. Rep. 561; Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676; People ex rel. Pontiac v. Central U. Teleph. Co. 192 Ill. 307, 85 Am. St. Rep. 338, 61 N. E. 428; State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

1. Under the present Constitution of Kentucky, street franchises cannot be granted for longer than twenty years, and then only to the highest bidder, after public advertisement by the city authorities. But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises, but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the general council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept; in which event the franchise granted by the state would have been nugatory. But, when the assent was given, the condition precedent had been performed, the franchise was perfected, and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's *giving a bond and carrying the[659

police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the state of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified, or forfeited by any ordinance of a general council.

2. In 1891 a new Constitution was adopted by the state of Kentucky, conferring upon municipalities the right to grant street franchises, and later, under the reserve power, a statute was passed repealing all special corporate privileges. It is claimed that, in consequence of these laws, the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation. But we find in the cited sections of the Constitution (156, 163, 164, and 199) and the statutes (573, 2742, 2783, and 2825) nothing which sustains this contention, which, if correct, would lead to the conclusion that all structures theretofore lawfully placed in city streets by water, light, telephone, railway, and other public utility companies became nuisances, and as such were removable after September, 1898, to the damage of the community at large and the destruction of property of immense value dedicated to public purposes. The general repeal of all special privileges, referred to in the statute, related to exclusive grants, tax exemptions, monopolies, and similar immunities (Ky. Stat. § 573; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383), and not to those corporate powers and property rights needed 660]* and conferred in order to enable the company to perform the duties for which it had been organized. For, while this charter conferred privileges, it also created obligations in favor of the public, and no attempt was made by the general law to repeal the rights which had vested, nor to relieve the company of the burden which had been imposed.

3. The provisions of the Constitution and statutes relied on as revoking licenses from municipalities, or as conferring power upon cities to repeal grants, are in the main prospective, and do not in any event support the claim that the general council can destroy the rights granted the Ohio Valley Telephone Company, whether they be 56 L. ed.

treated as having been acquired under the charter of April 3, 1886, or under the ordinance of August 17, 1886. On the contrary, the Constitution of 1891, while limiting for the future the power to sell street franchises, distinctly protected the interests of those public-utility companies "whose charters have been heretofore granted, conferring such rights, and work has in good faith been begun thereunder." Inasmuch, therefore, as the charter of the Ohio Valley Telephone Company was granted and as the exchanges were in operation before the adoption of the Constitution, that company's rights are expressly preserved by the organic law of the state.

4. The Ohio Valley Company, thus owning the right to use the streets for telephone purposes, was consolidated on January 27, 1900, into the Cumberland Telephone & Telegraph Company, the appellee, and the latter claims that, as successor, it acquired and now holds these privileges. This is denied by the city on the ground that while the statute, then of force, provided for the transfer of the "property" of the constituent companies, it was not until the amendment of 1902 that provision was made by which their "franchises" could pass to the consolidated company.

It is not necessary to determine whether that amendment *was intended to sup- 661 ply an omission, remove a doubt, or ratify the transfer and use under this and prior mergers. *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 569, 41 L. ed. 1118, 17 Sup. Ct. Rep. 653. For while franchises to be are not transferable without express authority, there are other franchises to have, to hold, and to use, which are contractual and proprietary in their nature, and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right of way,—but, howsoever designated, it is property. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 394, 46 L. ed. 610, 22 Sup. Ct. Rep. 410; *Louisville City R. Co. v. Louisville*, 8 Bush, 415; *West River Bridge Co. v. Dix*, 6 How. 507, 534, 12 L. ed. 535, 546; *Morristown v. East Tennessee Teleph. Co.* 53 C. C. A. 132, 115 Fed. 304, 307. Being property, it was taxable, alienable, and transferable; and, as property, passed to the Cumberland Telephone & Telegraph

Company under the express provisions of the Kentucky statute, which, as of force in 1900, declared that the consolidated company should be "vested with all the property, business, assets, and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities."

That the street rights, however designated, passed to the Cumberland Company, is the natural and obvious construction of the act. The plant and property of a telephone company are useless when dis severed from the streets, and there would, in effect, have been no property out of which to pay the debts or with which to perform the public duties imposed if the street rights of the constituent companies had not been transferred by the *statute to the consolidated company. The Constitution (§§ 199 and 200), in providing for the incorporation and consolidation of telephone companies, evidently contemplated, as did the statute, that on this statutory union there should be a transfer of that franchise, right of way or property, which alone gave value to the plant, thereby preserving the investment which had been made for purposes of private gain and public use. The city itself so construed the general law, and thereupon demanded from the Cumberland Company, as successor of the Ohio Valley Company, the bond for \$50,000 called for in the ordinance of August 17, 1886. The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the consolidation statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits, and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (*Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 322, 11 Sup. Ct. Rep. 687), from claiming that the ordinance was inoperative, and it also prevented the council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company.

5. The appellant makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void *ab initio*, or revocable at the will of the general council, or that it expired in 1893, when (Ky. Stat. § 2742) Louisville was made a city of the first class, with new and

enlarged power. In support of this proposition numerous *decisions are cited, in[663 some of which it appeared that a state had chartered a public-utility corporation, but the city, by ordinance, had given an exclusive or perpetual grant of a street franchise which was held to be void, because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others, it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 54, 43 L. ed. 67, 71, 18 Sup. Ct. Rep. 732; *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63, 24 L. ed. 651; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; 3 *Dill. Mun. Corp.* §§ 1265-1269.

None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the state of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas v. Manila*, 220 U. S. 345, 361, 55 L. ed. 491, 497, 31 Sup. Ct. Rep. 416.

In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires, and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city, and the utility and value of the entire plant *be thereby destroyed.[664 Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event; but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual, and none of which could be exercised without this essential right to use

the streets The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the state of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau v. Sharp* (1863) 27 N. Y. 611, 84 Am. Dec. 314; *State, Hudson Teleph. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Mobile v. Louisville & N. R. Co.* 84 Ala. 122, 5 Am. St. Rep. 342, 4 So. 106; *Seattle v. Columbia & P. S. R. Co.* 6 Wash. 392, 33 Pac. 1048; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787. The earlier cases are reviewed in *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 634, which was cited with approval in *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 395, 46 L. ed. 610, 22 Sup. Ct. Rep. 410, this court there saying that "where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee."

The right to conduct a telephone exchange and to use the streets of the city of Louisville, which had been vested by law in the Cumberland Telephone & Telegraph Company, could not be impaired or forfeited by an ordinance of the general council; nor 665] had it expired by lapse of *time or under any provision of law when the bill was filed. The Circuit Court properly made the injunction permanent, and its decree is affirmed.

GEORGE W. CHOATE et al., Plffs. in Err.,
v.

M. F. TRAPP, Secretary of the State Board
of Equalization, et al.

(See S. C. Reporter's ed. 665-679.)

Taxes — Indian allotments — exemption.

1. A tax exemption, and not merely an additional guard against alienation, which would fall when the restrictions on alienation were removed, was made by the act of June 28, 1898 (30 Stat. at L. 505, chap.

NOTE.—On exemption of Indians from taxation—see note to *Allen County v. Simons*, 13 L.R.A. 512.
56 L. ed.

517), under which the lands allotted in severalty under that act to the members of the Choctaw and Chickasaw tribes were subjected to various restrictions on alienation, and were to be nontaxable while the title remained in the original allottees.

[For other cases, see Taxes, 301-304, 364, in Digest Sup. Ct. 1908.]

Tax exemption — Indian allotments — liberal construction.

2. Any doubt as to whether the tax exemption provision in the act of June 28, 1898, allotting lands in severalty to the members of the Choctaw and Chickasaw tribes, was a personal privilege, and repealable, or an incident attached to the land itself for a limited period, must be resolved in favor of the patentees.

[For other cases, see Taxes, I. c, 8 a, in Digest Sup. Ct. 1908.]

Constitutional law — vested rights — tax exemption — Indian allotments.

3. Choctaw and Chickasaw allottees under the Atoka agreement embodied in the act of June 28, 1898, under which, in part consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by U. S. Const., 5th Amend., from abrogation during that period, as was attempted by the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation.

[For other cases, see Constitutional Law, IV. e, in Digest Sup. Ct. 1908.]

[No. 809.]

Argued February 23, 1912. Decided May 13, 1912.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the Superior Court of Logan County, in that state, sustaining a demurrer to the petition in a suit to enjoin state taxation of Indian allotments. Reversed.

See same case below, 28 Okla. 517, 114 Pac. 709.

The facts are stated in the opinion.

Mr. Joseph W. Bailey argued the cause, and, with Messrs. J. F. McMurray and W. A. Ledbetter filed a brief for plaintiffs in error:

Where the property of a citizen of the United States is exempted from taxation for a consideration, he cannot be deprived of that exemption by subsequent legislation without his consent, and it is immaterial whether the citizen be an Indian or not.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; *Cooley*, Taxn. p. 108; *Wilmington*

ton & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; Armstrong v. Athens County, 16 Pet. 281-289, 10 L. ed. 965-968; Barnes v. Kornegay, 62 Fed. 671.

The removal of restrictions on the right of sale, or the absence of any restrictions on the right of sale, does not render land of Indians subject to taxation, if it was exempt from taxation by treaty provisions.

Allen County v. Simons, 129 Ind. 193, 13 L.R.A. 512, 28 N. E. 420.

The statutes exempting property from taxation are presumed to be based on a sufficient consideration.

Home of the Friendless v. Rouse, 8 Wall. 438, 19 L. ed. 498.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for defendants in error:

Congress may abrogate treaties at its will.

Thomas v. Gay, 169 U. S. 271, 42 L. ed. 743, 18 Sup. Ct. Rep. 340.

A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.

Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; Taylor v. Morton, 2 Curt. C. C. 454, Fed. Cas. No. 13,799.

Treaties with Indians within the United States stand in no better position than treaties with foreign nations.

Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227.

Where the legislature makes a plain provision, without making any exception, the courts can make none.

Yturvide v. United States, 22 How. 290, 16 L. ed. 342; Maxwell v. Moore, 22 How. 185, 16 L. ed. 251; Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

Congress has plenary power over the property of the Indians and of the Indian tribes, and had the right to amend the Atoka agreement and supplemental agreement, not only by the act of May 27, 1908, but by the act of April 26, 1908, as well.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578.

The state of Oklahoma, neither by its Constitution nor by its ordinance irrevocable, made a contract as to tax exemption.

Gleason v. Wood, 28 Okla. 502, — L.R.A. (N.S.) —, 114 Pac. 703.

The state court having decided that the state made no contract, that ground was broad enough to rest the judgment upon without a consideration of whether the contract was broken.

Wailes v. Smith, 157 U. S. 271, 39 L. ed. 698, 15 Sup. Ct. Rep. 624; Moffitt v. Kelly, 218 U. S. 400, 54 L. ed. 1086, 30 L.R.A. (N.S.) 1179, 31 Sup. Ct. Rep. 79; Taylor, Jurisdiction, § 240.

It is very clear that if there was a contract, it was only between the United States and the state. Nothing is pleaded to show any contract between the state and the plaintiffs in error; therefore, if there has been a breach of the alleged contract, the parties to that contract are the only persons who can complain of the breach.

Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393.

Individual Indians cannot complain of a breach.

Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16.

*Mr. Justice Lamar delivered the [667] opinion of the court:

The eight thousand plaintiffs in this case are members of the Choctaw and Chickasaw tribes. Each of them holds a patent to 320 acres of allotted land issued under the terms of the Curtis act (30 Stat. at L. 507, chap. 517), which contained a provision "that the land should be nontaxable" for a limited time. Before the expiration of that period the officers of the state of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands lying within that state. The plaintiffs' application for an injunction was denied.

In order to understand the issues presented by the writ of error it is necessary to refer, as briefly as possible, to certain well-known facts, and to material portions of lengthy statutes, under which the tribal property of the Choctaws and Chickasaws was divided in severalty among their members.

The Five Civilized Tribes owned immense tracts of land in territory that is now embraced within the limits of the state of Oklahoma. The legal title was in the Tribes for the common use of their members. But the fact that so extensive an area was held under a system that did not recognize private property in land presented a serious obstacle to the creation of the state which Congress desired to organize for the government and development of that part of the country. And, with a view of removing these difficulties, it provided (27 Stat. at L. 645, chap. 209) for the appointment of

the Dawes Commission, authorizing it to enter into negotiations with these Tribes for the extinguishment of their title, either by cession to the United States or by allotment, in severalty, among their members. As might have been anticipated, the commission found that many of the Indians were greatly opposed to any change. "Some of them held passionately to their institutions from custom *and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed." (20 H. R. Doc., 1903-04, p. 1.) After several years of negotiations their opposition was so far overcome that provisional agreements were made which contemplated most radical changes in the political and property rights of the Indians.

On April 23, 1897, the Dawes Commission and the Choctaw and Chickasaw representatives made what is known as the Atoka agreement. It was incorporated bodily into the Curtis act of June 28, 1898 (30 Stat. at L. 505, chap. 517), and was modified by the act of July, 1902 (32 Stat. at L. 657, chap. 1362).

These two acts, containing what is known as the Atoka agreement and the supplemental agreement, provided that Indian laws and courts should be at once abolished; that there should be an enrolment of all the members of the tribes; and that the members of the two tribes should become citizens of the United States.

It was also provided, as appears from extracts copied in the margin,† that each member of the tribe should have *allotted to him his share of the land—all of which "shall be nontaxable while the title remains in the original allottee;" that a part of the land could be sold after one year and all of it sold after five years; that the patents issued to the allottee "should be framed in conformity with the provisions of the agreement;" and that the acceptance of such patent should be operative as an assent on his part to the allotment of all

land of the tribes, in accordance with the provisions of the agreement, and as a relinquishment of all his interest in other parts of the common property.

The complainant does not state when the plaintiffs received their patents, but the report of the Dawes Commission *for[670 the year ending June 1, 1904 (20 H. R. Doc. 27-42), shows that the enrolment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued, and that much of the land was alienable, and all of it was nontaxable when, on November 16, 1907, Oklahoma was admitted into the Union. The Constitution of that state provided that all existing rights should continue as if no change in government had taken place, and that property exempt from taxation by virtue of treaties and Federal laws should so remain during the force and effect of such treaties or Federal laws.

No taxes were assessed against the lands of the plaintiffs for the year 1907, but on May 27, 1908 (35 Stat. at L. 312, chap. 199), Congress passed a general act removing restrictions from the sale and encumbrance of land held by Indians of the class to which the plaintiffs belong. Another section provided that lands from which restrictions had been removed should be subject to taxation.

Thereupon proceedings were instituted by the state of Oklahoma with a view of assessing the plaintiffs' lands for taxes. This they sought to enjoin, but their complaint was dismissed on demurrer. The case was carried to the supreme court of the state, which held that Oklahoma was not a party to any contract with the Indians; that the United States, by virtue of its governmental power over the Indians, could have substituted title in severalty for ownership in common without plaintiffs' consent, and that, for want of a consideration, the provision that the land should be nontaxable was not a contract, but a mere gratuity

†[That] all the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of 160 acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. . . . The remainder of the lands allotted to said members shall be alienable for a price to be actually paid . . . one fourth . . . in one year, one fourth in three years, and the balance of said alienable lands in five years from the date of patent. . . . The United States shall put each allottee in possession of his allotment. . . . That, as soon as practicable after the completion of said al-

lotments [the chiefs of the two nations shall] . . . deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement. . . . Said patent shall be framed in accordance with the provisions of this agreement. . . . And the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, excepting the land embraced in

which could be withdrawn at will. The court thereupon overruled plaintiffs' contention that they had a vested right of exemption which prevented the state from taxing the land at this time, and dismissed their suit.

1. There are many cases, some of which are cited in the opinion of the supreme 671] court of Oklahoma (*Thomas v. *Gay*, 169 U. S. 271, 42 L. ed. 743, 18 Sup. Ct. Rep. 340; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216), recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.

This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka agreement is in the form of a contract, it is still an integral part of the Curtis act, and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichart v. Felps*, 6 Wall. 160, 18 L. ed. 849. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the Curtis act which are now protected by the Constitution of the United States.

2. The individual Indian had no title or enforceable right in the tribal property.

said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment. Atoka agreement, 30 Stat. at L. 507, chap. 517.

There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw nations. . . . Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as near as may be, which shall be inalienable during the lifetime of the allottee, not exceeding

But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished. The Curtis act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of nontaxable land only to those who would relinquish their claim in the other property of the Tribe formerly held for their common use. For the Atoka agreement, after declaring that "all land *allotted[672 should be nontaxable," stipulated further that each enrolled member of the Tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.

There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption. *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 386, 48 L. ed. 231, 24 Sup. Ct. Rep. 107; *Home of the Friendless v. Rouse*, 8 Wall. 437, 19 L. ed. 497; *Tomlinson v. Jessup*, 15 Wall. 458, 21 L. ed. 205. Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller v. Ashford*, 133 U. S. 621, 33 L. ed. 672, 10 Sup. Ct. Rep. 494; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855.

As the plaintiffs were offered the allotments on the conditions proposed; as they

twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead. 32 Stat. at L. 642, chap. 1362.

All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead, as herein provided, shall be alienable after issuance of patent as follows:

One fourth in acreage in one year, one fourth in acreage in three years, and the balance in five years; in each case from date of patent; provided that such land shall not be alienable by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value. (643.)

accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.

3. On the part of the state it is argued that there was, in fact, no tax exemption, but that that provision was only intended to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract. In other words, it is said that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act of 1908 (35 Stat. at L. 312, chap. 199), the provision as to nontaxability went as a necessary part thereof.

673] *But the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for sixteen years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary, the privilege of nontaxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. *Kansas Indians (Blue Jacket v. Johnson County)* 5 Wall. 737 (1), 756, 18 L. ed. 667, 672; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

4. The record contains no copy of any of the patents under which the plaintiffs hold. But the act provided that they should be framed in conformity with the Atoka agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed together, and when so construed, they show

that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be nontaxable for a limited period. The patent issued in *pursuance of [674 those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued.

5. It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But it is claimed that he, in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of nontaxability added to the value of the property, it can be withdrawn, because, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed, and are subject to repeal unless the contrary clearly appears. *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112; *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 23 L. ed. 814, are cited in support of this proposition. Some of these cases construe general statutes containing, not a grant, but an offer of exemption to such companies as should do certain work or build certain lines of road before a given date. They hold that a statute making such an offer might be repealed even as against those companies which actually built in reliance on its terms. But these rulings are based on the theory that "the legislature was not making promises, but framing a scheme of public revenue and public improvement" (*Wisconsin & M. R. Co. v. Powers*, 191 U. S. 387, 48 L. ed. 231, 24 Sup. Ct. Rep. 107). The companies gave nothing, and the state received nothing in exchange for the offer. There *was no consideration moving from [675 one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions

are strictly construed, it could be withdrawn at any time the state saw fit.

6. But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

For example, in *Kansas Indians (Blue Jacket v. Johnson County)* 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale of state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice Davis, in speaking for the court, said that "enlarged rules of construction are adopted in reference to Indian treaties." He quoted from Chief Justice Marshall, who said that "the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning." Again, in *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians." In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws.

The provision that "all land shall be non-taxable" naturally indicates that the exemption is attached to the land,—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction,—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee.

The decision in *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303, is directly in point here, and especially as to the quality of the exemption. It appeared there that the Delaware Indians had claims to lands in that state lying south of the river Rariton. An agreement for a release of the

claim was made between the Commissioners and the Indians, under which the latter were to receive a conveyance to a large body of land in fee. The agreement was approved by the state by an act which, among other things, declared that the land "should not hereafter be subject to any tax." The Indians, after many years, sold the land, and the state subsequently passed a statute repealing the exemption. This court, speaking by Chief Justice Marshall, held that "every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians executed their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons." And it was thereupon held that the right was not affected by the later statute repealing the exemption. The case here is much stronger. For the tax exemption, which adds value to the property, is not perpetual, but is attached to the land only so long as the Indian retains the title, and in no event to exceed twenty-one years. It is property, and entitled to protection as such, unless the fact that the owner is an Indian, subject to restrictions as to alienation, made a difference.

7. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *Re Heff*, 197 U. S. 504, 49 L. ed. 855, 25 Sup. Ct. Rep. 506; *Cherokee Nation v. Hitchcock*, 187 U. S. 307, 47 L. ed. 190, 23 Sup. Ct. Rep. 115; *Jackson ex dem. Smith v. Gooddell*, 20 Johns. 188; *Lowry v. Weaver*, 4 McLean, 82, Fed. Cas. No. 8,584; *Whirlwind v. Vonder Ahe*, 67 Mo. App. 628; *Taylor v. Drew*, 21 Ark. 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the

United States as to his political and personal status. This was clearly recognized in the leading case of *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1. There it appeared that an Indian chief owned in fee land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed, Meehan relied on the first contract, made in the exercise of the Indian's right of private ownership. Jones relied on that made 678] *under congressional authority; and although the Indian was a member of the tribe, and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.

Nothing that was said in *Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that "Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation," it was said that "incompetent persons, though citizens, may not have the full right to control their property," and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. 56 L. ed:

Such rights are protected from repeal by the provisions of the 5th Amendment.

The Constitution of the state of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be *abrogated by stat-[679 etc. The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MICHAEL H. GLEASON, Minnie Love, Henry McGee, et al., Pliffs. in Err.,
v.

J. I. WOOD, County Treasurer of Pittsburg County, Oklahoma, et al.

(See S. C. Reporter's ed. 679, 680.)

This case is governed by the decision in *Choate v. Trapp*, ante, 941.

[No. 575.]

Argued February 23, 1912. Decided May 13, 1912.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the Superior Court of Pittsburg County, in that state, sustaining a demurrer to the petition in a suit to enjoin state taxation of Indian allotments. Reversed.

See same case below, 28 Okla. 502, — L.R.A.(N.S.) —, 114 Pac. 703.

The facts are stated in the opinion.

Messrs. **W. L. Sturdevant** and **David C. McCurtain** argued the cause, and, with Mr. Edward P. Hill, filed a brief for plaintiffs in error:

A legislative grant of an exemption from taxation, resting upon a consideration, is a contract, and such an exemption becomes an element of value of the thing exempted, and is therefore a property right.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; *Thompson v. Holton*, 6 McLean, 386, Fed. Cas. No. 13,958; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Cooley, Const. Lim.* 7th ed. p. 395; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Union P. R. Co. v. United States*, 99 U. S. 718, 25 L. ed. 501; *May v. Cass County*, 12 N. D. 137, 96 N. W. 292; *Nivens v. Nivens*, 4 Ind. Terr. 574, 76 S. W. 114.

Congress is as such prohibited from pass-

ing laws impairing the obligation of contracts as are the legislatures of the states.

Union P. R. Co. v. United States, 99 U. S. 718, 719, 25 L. ed. 501; *Calder v. Bull*, 3 Dall. 388, 1 L. ed. 649; *Miller, Const.* 529, 530; 3 *Current Law*, p. 765; 3 *Parsons, Contr.* 9th ed. pp. 503, 510; *Thompson v. Holton*, 6 McLean, 386, Fed. Cas. No. 13,958; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *Evans-Snider-Buel Co. v. McFadden*, 58 L.R.A. 900, 44 C. C. A. 494, 105 Fed. 293, 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. Rep. 758; *Sutherland, Notes on U. S. Const.* pp. 78, 79; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Sutherland, Stat. Constr.* p. 626; 2 *Beach, Modern Law of Contr.* p. 2121, §§ 1634-1637; *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65; *Foster v. Nelson*, 2 Pet. 253-314, 7 L. ed. 415-436; *Hewitt v. New York & O. M. R. Co.* 12 Blatchf. 452, Fed. Cas. No. 6,443.

A treaty or an agreement of the government, made with an Indian tribe, has the legal force of a treaty with a foreign state; and because of the situation of the parties, it stands upon higher moral ground.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; *Kansas Indians (Blue Jacket v. Johnson County)* 5 Wall. 737, 18 L. ed. 667; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216; *Head Money Cases (Edye v. Robertson)* 112 U. S. 598, 28 L. ed. 803, 5 Sup. Ct. Rep. 247; *New York Indians v. United States*, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; *United States v. New York Indians*, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 487; *Shulthis v. McDougal*, 95 C. C. A. 615, 170 Fed. 529; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Chae Chan Ping v. United States*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *New York Indians v. United States*, 40 Ct. Cl. 448; *Garfield v. United States*, 211 U. S. 262, 53 L. ed. 174, 29 Sup. Ct. Rep. 62.

A repeal of the agreements made with the Indians, and embodied in acts of Congress under which this exemption right is claimed, will not be presumed, but if re-

pealed, rights already acquired are not affected.

Cooley, Const. Lim. 7th ed. pp. 216, 217; *Frost v. Wenie*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; *United States v. Lee Yen Tai*, 185 U. S. 220-223, 46 L. ed. 882, 883, 22 Sup. Ct. Rep. 629; *United States v. Healey*, 160 U. S. 145, 146, 40 L. ed. 372, 373, 16 Sup. Ct. Rep. 247; *United States v. Kirby*, 7 Wall. 486, 19 L. ed. 280; *Carlisle v. United States*, 16 Wall. 153, 21 L. ed. 429; *Washington Market Co. v. Hoffman*, 101 U. S. 116, 25 L. ed. 783; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *Ex parte Steele*, 162 Fed. 704.

The principles of law under which we seek to protect the exemption in this case have been invoked by the courts to protect similar rights in an almost endless variety of cases; and the United States government, as much so as the states, is prohibited by the Federal Constitution from depriving persons and corporations of property without due process of law.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *United States v. Arredondo*, 6 Pet. 738, 8 L. ed. 564; *Armstrong v. Athens County*, 16 Pet. 289, 10 L. ed. 968; *Baldwin v. Payne*, 6 How. 332, 12 L. ed. 460; *West River Bridge Co. v. Dix*, 6 How. 542, 12 L. ed. 549; *Piqua State Bank v. Knoop*, 16 How. 385, 401, 14 L. ed. 983, 990; *Von Hoffman v. Quincy*, 4 Wall. 550-554, 18 L. ed. 408-410; *Home of the Friendless v. Rouse*, 8 Wall. 438, 19 L. ed. 498; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 376, 20 L. ed. 613; *Tomlinson v. Jessup*, 15 Wall. 458, 21 L. ed. 205; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Morgan v. Louisiana*, 93 U. S. 223, 23 L. ed. 861; *Antoni v. Greenhow*, 107 U. S. 803, 27 L. ed. 481, 2 Sup. Ct. Rep. 91; *Louisiana v. Jumel*, 107 U. S. 750, 27 L. ed. 461, 2 Sup. Ct. Rep. 128; *Given v. Wright*, 117 U. S. 655, 29 L. ed. 1024, 6 Sup. Ct. Rep. 907; *Pearshall v. Great Northern R. Co.* 161 U. S. 662, 40 L. ed. 843, 16 Sup. Ct. Rep. 705; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Great Northern R. Co. v. Minnesota*, 216 U. S. 206, 233, 54 L. ed. 446, 460, 30 Sup. Ct. Rep. 344; *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352.

At the time of the passage of the act of May 27, 1908, the plaintiffs were citizens of the United States, had received their patents for their allotments, the United States had relinquished its interest and control over their allotted land, and any attempt by Congress to make the same

subject to taxation was an unlawful exercise of governmental authority.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 115.

There is nothing in the status of the Indians of the Five Civilized Tribes, and especially the plaintiffs in this case, that would take them and their property from under the protection of the Constitution of the United States, and Congress possesses no power or authority to legislate respecting Choctaw Indians and their private property that it does not possess respecting other citizens of the United States and their property in the state of Oklahoma.

Kansas Indians (*Blue Jacket v. Johnson County*) 5 Wall. 737, 18 L. ed. 667; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *United States v. Auger*, 153 Fed. 671.

The subject of state taxation is a matter within the exclusive control and jurisdiction of the state, and since statehood the Congress of the United States is without power or authority to pass any legislation relating to the property of citizens of a state except for national purposes.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Cooley*, Const. Lim. 7th ed. p. 11; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

The state of Oklahoma cannot, independently of the act of Congress of May 27, 1908, tax the allotted lands of the Choctaws so long as the title remains in the original allottees, but must link its fortunes with that act, which we maintain is void and of no effect, and with that act must stand or fall, as the case may be, for by the provisions of its own Constitution the state of Oklahoma has exempted such allotted lands from taxation during the force and effect of the treaties and Federal laws theretofore exempting such lands from taxation.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for defendants in error.

For his contentions, see his brief as reported in *Choate v. Trapp*, ante, 941.

Mr. Justice Lamar delivered the opinion of the court:

The complaint alleges that the plaintiffs are Choctaws owning homesteads and surplus granted under the terms of the Atoka agreement. Their applications to enjoin the officers of the state of Oklahoma from as-

sessing their lands for taxation for the year 1909 were denied. All of the *ques-[680 tions involved are disposed of by the decision in *Choate v. Trapp*, just rendered. [224 U. S. 665, ante, 941, 32 Sup. Ct. Rep. 565.] the judgment, therefore, is reversed, and the case remanded, with directions for further proceedings not inconsistent with that opinion. Reversed.

BESSIE BROWN ENGLISH, Plff. in Err.,
v.

H. T. RICHARDSON, County Treasurer of
Tulsa County.

(See S. C. Reporter's ed. 680, 681.)

**Constitutional law — vested rights —
tax exemption — Indian allotments.**

A Creek homestead allottee under an agreement incorporated in Congressional legislation by which, in part consideration of the relinquishment by the Indians of their claim to the tribal property, they were to receive homestead allotments which should be nontaxable and inalienable for a specified period, acquired a vested right to exemption from state taxation, protected by the Federal Constitution against abrogation by Congress during that period.

[For other cases, see Constitutional Law, IV, e, in Digest Sup. Ct. 1908.]

[No. 559.]

Argued February 23, 1912. Decided May
13, 1912.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the Superior Court of Tulsa County, in that state, sustaining a demurrer to the petition in a suit to enjoin state taxation of Indian allotments. Reversed.

See same case below, 28 Okla. 408, 114 Pac. 710.

The facts are stated in the opinion.

Mr. W. L. Sturdevant argued the cause, and, with Messrs. Grant Foreman and M. L. Mott, filed a brief for plaintiff in error:

A legislative grant of an exemption from taxation is presumed to rest upon a consideration and is conclusive against the grantor; and the exemption attaching to the property, right, or franchise becomes an element of its value, and is therefore a property right; and when this right becomes vested, it is inviolate, and cannot be extinguished or disturbed by legislation. Such a grant constitutes a

NOTE.—On exemption of Indians from taxation—see note to *Allen County v. Simons*, 13 L.R.A. 512.

contract which is protected by § 10 of art. 1 of the Constitution of the United States, and likewise by Amendments 5 and 14 of the Constitution. And where an agreement for an exemption is entered into between the state and an individual, and the contract becomes executed, such a contract has all the force of a grant, and the authority of the grantor thereover entirely ceases.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; *Thompson v. Holton*, 6 McLean, 386, Fed. Cas. No. 13,958; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Cooley*, Const. Lim. 7th ed. p. 395; 3 *Parsons*, Contr. 9th ed. p. 353.

Section 10 of art. 1 of the Constitution of the United States, which provides, among other things, that no state shall pass any law impairing the obligation of contracts, does not in terms prohibit Congress from passing such a law; but except in those instances where such a law may be passed in the exercise of an express or a necessarily implied power under the Constitution, the Congress is, on principle, as much prohibited from so doing as the legislatures of the states. The protection of property rights is one of the fundamental purposes of government,—one consideration of the social compact; and the exercise of a power by a legislature which would impair the obligation of contracts or imperil security in private property, whether prohibited or not, would be subversive of the fundamental principles upon which governments rest. Only the exercise of a governmental power regarding matters of the gravest public concern would justify such a course; and in that event the power would have to be exercised so as uniformly to affect the whole people; no special class or individuals could be singled out as victims of its operation.

Sinking Fund Cases, 99 U. S. 718, 719, 25 L. ed. 501; *Calder v. Bull*, 3 Dall. 388, 1 L. ed. 649; *Miller*, Const. 529, 530; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; 22 Ops. Atty. Gen. 194.

A treaty or agreement between the government and an Indian tribe is as binding from every legal standpoint as a treaty between the government and a foreign state; but because of that relation between the government and the Indian by which, through the superior power of the former, the latter is made dependent on its will and subject to its authority, the agreements and treaties made with the Indians involve a higher moral obligation on the part of the government than if made with an independent state.

Where, under such circumstances, an agreement has been made between the strong and the weak, the independent and the dependent sovereignties, and property rights thereunder acquired by the latter in reliance solely upon the good faith of the former, it would be repugnant to every instinct of justice and morality to contend that the rights so acquired may be violated simply because the power exists so to do; and although conceding that power in the abstract to exist, nevertheless no considerations other than those of public policy of the greatest moment would justify its exercise.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; *Kansas Indians (Blue Jacket v. Johnson County)* 5 Wall. 737, 18 L. ed. 667; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

Repeals by implication are not favored. Unless express terms are used or the repugnancy of the statutes is so great as to be irreconcilable, the former statutes will stand, and no intent to repeal will be presumed. And where rights have been acquired under the statute, it can only be repealed by express terms showing an unmistakable intention so to do. But when thus repealed, the rights acquired thereunder cannot be divested or disturbed. It is likewise true that many statutes are and must be construed with certain exceptions from the effect of their general operation. This is necessary in order that other statutes under which rights have become fixed, and which would otherwise be repealed, may still be operated to the extent of preserving such rights.

Cooley, Const. Lim. 7th ed. pp. 216, 217; *Frost v. Wenne*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; *United States v. Lee Yen Tai*, 185 U. S. 220, 223, 46 L. ed. 882, 883, 22 Sup. Ct. Rep. 629; *United States v. Healey*, 160 U. S. 145, 146, 40 L. ed. 372, 373, 16 Sup. Ct. Rep. 247; *United States v. Kirby*, 7 Wall. 486, 19 L. ed. 280; *Carlisle v. United States*, 16 Wall. 153, 21 L. ed. 429; *Washington Market Co. v. Hoffman*, 101 U. S. 116, 25 L. ed. 783; *McKee v. United States*,

164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *Ex parte Steele*, 162 Fed. 705.

The principles of law announced in *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303, have been reiterated and affirmed by the Supreme Court in many subsequent decisions. The property right in an exemption from taxation, the contractual character of such a law, within the constitutional meaning, and the inviolability of such a right, have all been considered in many decisions; and the right, under whatever circumstances it may have arisen, has at all times been held inviolate.

There are instances almost innumerable, and we refer to some of them, in which the courts have held that a grant of a franchise to a corporation, with the exemption of its property from taxation for a limited term, if accepted and acted upon by the corporation, constitutes a contract between the corporation and the state or municipality granting the same, and that the rights of the parties thereto cannot be changed or modified by legislation. The rule has been exactly the same in cases where exemptions have been granted to churches, charities, public or private enterprises, and contracts of this character are of equal efficacy whether between states or municipalities and individuals, or between two states.

Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; *United States v. Arredondo*, 6 Pet. 738, 8 L. ed. 564; *Armstrong v. Athens County*, 16 Pet. 289, 10 L. ed. 968; *Baldwin v. Payne*, 6 How. 332, 12 L. ed. 460; *West River Bridge Co. v. Dix*, 6 How. 542, 12 L. ed. 549; *Piqua State Bank v. Knoop*, 16 How. 385, 401, 14 L. ed. 983, 990; *Von Hoffman v. Quincy*, 4 Wall. 550-554, 18 L. ed. 408-410; *Home of the Friendless v. Rouse*, 8 Wall. 438, 19 L. ed. 498; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 376, 20 L. ed. 613; *Tomlinson v. Jessup*, 15 Wall. 458, 21 L. ed. 205; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Morgan v. Louisiana*, 93 U. S. 223, 22 L. ed. 861; *Antoni v. Greenhow*, 107 U. S. 803, 27 L. ed. 481, 2 Sup. Ct. Rep. 91; *Louisiana v. Jumel*, 107 U. S. 750, 27 L. ed. 461, 2 Sup. Ct. Rep. 128; *Given v. Wright*, 117 U. S. 655, 29 L. ed. 1024, 6 Sup. Ct. Rep. 907; *Pearsall v. Great Northern R. Co.* 161 U. S. 662, 40 L. ed. 843, 16 Sup. Ct. Rep. 705; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Great Northern R. Co. v. Minnesota*, 216 U. S. 206, 233, 54 L. ed. 446, 460, 30 Sup. Ct. Rep. 344.

By accepting the terms of the act of Congress of June 16, 1906, as amended March 4, 1907, known as the enabling act, and adopting a Constitution by a vote of 56 L. ed.

her people in accordance with the authority and conditions thereof, the state of Oklahoma ratified and bound herself to an observance of all rights of the Indians existing by reason of treaties and agreements made by them with the government of the United States, and has by such acts estopped herself to assert an interest in conflict with such right.

United States v. Rickert, 188 U. S. 439, 47 L. ed. 536, 23 Sup. Ct. Rep. 478.

A proceeding to enjoin an illegal tax levy, or a levy upon exempt property, is specifically authorized in the form of the present proceeding by § 242 of the Code of Oklahoma, statutes of 1903; and if the proceeding be against the state, the state, under such statute, has consented thereto.

Atchison, T. & S. F. R. Co. v. Wiggins, 5 Okla. 477, 49 Pac. 1019; *Gray v. Stiles*, 6 Okla. 470, 49 Pac. 1083; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 13 Kan. 277; *Hudson v. Atchison County*, 12 Kan. 140.

Nor would a proceeding of this character be repugnant to the 11th Amendment to the Federal Constitution were it instituted in a circuit court of the United States, on the ground that the suit is against the state. The person attempting the unlawful act can be prohibited, notwithstanding the state is interested in the result.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for defendant in error.

For his contentions, see his brief as reported in *Choate v. Trapp*, ante, 941.

Mr. Justice Lamar delivered the opinion of the court:

The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of the Creek Nation when the tribal lands were divided in pursuance of the same general policy as that discussed in *Choate v. Trapp*, just decided. [224 U. S. 665, ante, 941, 32 Sup. Ct. Rep. 565]. There were, however, a few differences. The tax exemption covered only the homestead of 40 acres, *and there was a restriction on alien-[681] ability for twenty-one years. The patent, instead of being "framed in conformity with the agreement" as in the case of the Choc-taws and Chickasaws, bore on its face a provision that the land should be nontaxable; the language of the agreement incorporated in the act of Congress being that "each citi-

zen shall select from his allotment 40 acres of land . . . as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear." [32 Stat. at L. 503, chap. 1323, § 16.]

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These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the Constitution on principles stated and applied in *Choate v. Trapp*. The judgment dismissing her complaint is therefore reversed, and the case remanded for proceedings not inconsistent with that opinion.

Reversed.

224 U. S.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1911.

Vol. 225.

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THE DECISIONS
OF THE
Supreme Court of the United States
AT
OCTOBER TERM, 1911.

1] *STATE OF MARYLAND, Complain-
ant.
v.

STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 1-31.)

Boundaries — between states — judicial establishment.

The true boundary line between the states of Maryland and West Virginia is established and decreed to be as delineated and set forth in a report and the accompanying map made by the commissioners appointed by the Supreme Court of the United States to run, locate, and permanently mark with suitable monuments the Deakins or old state line as the boundary line between those states from low-water mark on the southern bank of the North Branch of the Potomac river to the Pennsylvania line.

[For other cases, see Boundaries, III. e, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Decree entered May 27, 1912.

ORIGINAL SUIT in equity between the states of Maryland and West Virginia to settle the boundary between those states from the head waters of the Potomac to the Pennsylvania line. The boundary line established and decreed to be as delineated and set forth in the report and accompanying map made by commissioners appointed for that purpose.

See also 217 U. S. 1, 577, 54 L. ed. 645, 888, 30 Sup. Ct. Rep. 268, 630.

Mr. Edgar Allan Poe, Attorney General of Maryland, and Mr. Isaac Lobe Straus for complainant.

56 L. ed.

Mr. William G. Conley, Attorney General of West Virginia, and Mr. George E. Price for defendant.

Per Curiam:

The state of West Virginia having moved the court to take up for consideration the exceptions heretofore filed in this cause by the state of Maryland to the report of Commissioners Julius K. Monroe and Samuel S. Gannett, two of the commissioners who were appointed by the decree entered in this cause on the 31st day of May, 1910, to run, locate, and permanently mark, with suitable monuments, the Deakins or old state line, as the boundary line between the states of Maryland and West Virginia, from low-water mark on *the Southern[2 bank of the North Branch of the Potomac river to the Pennsylvania line, and to overrule said exceptions and confirm said report, which report is in the words and figures following, to wit:

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We, Julius K. Monroe and Samuel S. Gannett, two of the commissioners appointed under the decree of the court rendered May 31, 1910, "to run, locate, and establish and permanently mark with suitable monuments the said Deakins or 'old state line' as the boundary line between the states of Maryland and West Virginia from said point (low-water mark) on the southern bank of the North Branch of the Potomac river to the said Pennsylvania line, etc.," have the honor to submit the following report and map entitled, "Map Showing The Boundary Line Between Maryland and West Virginia, from the Potomac River to the

Pennsylvania State Line, as Surveyed and Marked under the Decree of the Supreme Court of the United States, Rendered May 31, 1910," etc.:

The party was organized and went into camp on July 12, 1910, on Arnold's ridge, about 1 mile north of the North Branch of the Potomac river, and immediately began the survey of the line.

Beginning at the Fairfax stone, a line was first run north $0^{\circ} 56'$ E. along a well-marked line to a planted stone marked

B "1101", at the southwest corner of military lot No. 1101, originally a "bounded maple standing 1 mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Potowmack river." The intersection of this line with the south bank of the North Branch of the Potomac (at low-water mark) was, under the decree of the court, fixed as the corner of Maryland and West Virginia, and monument No. 1 was therefore erected at this place and became the initial point of the boundary line run in 1910 and 1911.

From the corner of lot 1101 B, where monument No. 2 was erected, the line deflects slightly to the west and follows the old marked line on the course N. $0^{\circ} 47' 53''$ 3]E. as *identified by the surveyors in the case in 1897 and shown on the maps filed by the defendants. This line crosses Arnold's ridge, Laurel run, Backbone mountain, Youghiogheny river, and where it intersects the 3d line of a Maryland tract called "Covent Garden" monument No. 4 was erected and an offset was made to the west. The 3d line of Covent Garden was followed for a distance of 402.15 feet on the course N. $71^{\circ} 48'$ W. (true) to a planted stone, acknowledged by residents and owners of adjoining property and pointed out by them as being the limit of their respective claims, at this point. Monument No. 5 was built over this stone and the line was run N. $0^{\circ} 27' 04''$ E. in a manner to follow the property lines, as acknowledged by the citizens of the two states; passing over the center of a planted stone property corner, which marked the beginning of the Maryland tract called Mount Pleasant, surveyed in 1774. Monument No. 6 was built over and around this stone, which was pointed out by witnesses as marking the place of the original corner, a white oak tree. Continuing on the same course, a large anciently marked white oak tree was reached and identified as the beginning of a Virginia tract of land surveyed for John Pettyjohn in 1781, and also a corner of John T. Goff 1,000 acres, survey made in 1782, both of which call for the boundary line. This tree was cut and blocks taken out by your commissioners

which showed surveyors' ax marks in the wood; one one hundred and thirty years old, and one one hundred and seventeen years, and the last seventy-eight years, thus indisputably establishing this course as following the oldest marked line extant. The stump of this tree was removed and monument No. 8 was built in the exact spot occupied by it. Upon trial it was found that from this white oak, northward, the line between property holdings of citizens in the two states verged to the eastward, and a slight angle was therefore made to the east and the boundary line run N. $0^{\circ} 42' 57''$ E. to the stump of a bounded sugar tree, the northwest corner of a Maryland tract called Eelshine; this tree, while standing, was identified by the surveyors in this case in 1897, and also by the owners of the tract. The land, since that time, has been cleared, and the timber destroyed by fire. The stump of this sugar tree was again pointed out to the commissioners, in 1910, by Peter F. Nine, the *present owner of the tract Eelshine.[4 This stump was removed and monument No. 10 erected exactly where it stood.

From this point the boundary line runs S. $89^{\circ} 17' 03''$ E. 482.3 feet along the line common to the tract Eelshine and the Virginia grant to Wm. Ashby for 50 acres, to the southwest corner of the Maryland tract called Buckdale. As the southwest corner of Buckdale and the southeast corner of the Ashby 50-acre tract, which are common, could not be definitely located upon the ground, as all original objects marking them have been destroyed, this point was determined by the intersection of a line produced southward passing through known and accepted points in the "old line," namely, "the stake and stone pile," on Lauer Hill, which is the common corner of the Maryland tract called "Maryland," and the Virginia grant to John Hoyer for 500 acres, and which was identified and located by the surveyors in this case in 1897, and shown at Red "C-6" upon Map No. 1, filed by defendants, and again identified by your commissioners in 1910; and a point north of the B. & O. Railroad near Hutton, Maryland, in the property line between lands of the Connell heirs and George Morris. Monument No. 11 was placed at the intersection of the line above described with the line eastward from monument No. 10. The course of the boundary from monument No. 11, as above determined, is N. $0^{\circ} 41' 02''$ E., following closely the lines of the original Virginia grants, and passing through, or very near, the several points indicated upon map No. 1 filed in this case by defendant, and testified to as standing in the "Deakins, or old state line," to a point on Glover's hill, 1 1/2 miles north of the Baltimore & Ohio Rail-

road, where monument No. 15 was erected. From this point northward it was found that the general course of the property lines verged slightly to the west, and the course of the boundary was here changed to N. $0^{\circ} 22' 27''$ E. to conform thereto, following the well-marked divisional lines between the F. & W. Deakins 6,000-acre Virginia grant, and the Maryland military lots (Nos. 1237 to 1245) and the eastern line of the Hoyer and Martin 3,600-acre Virginia grant, passing over the summits of Snaggy mountain and through the southern end of the Pine swamp 5] to a point where this *line intersects the southern line of the John Crane 776-acre Virginia grant, a short distance north of the Cranesville and Oakland road, as indicated upon the maps filed by the defendant in this case. This point was determined by reproducing upon the ground the southern line of said 776-acre Crane survey. Monument No. 19 was erected at this point.

From monument No. 19 an offset of 971.09 feet was made along the south line of the John Crane 776-acre tract N. $89^{\circ} 27' 27''$ E. to its intersection with the west boundary of Maryland military lot No. 1292, where monument No. 20 was built. The boundary here turns northward, following the west limit of military lots 1292, 1294, 1296, 1298, 1400, and 1402 as laid out by Francis Deakins, on a true course of N. $0^{\circ} 17' 00''$ E. to the northwest corner of military lot 1402. Monument No. 21 was placed at this point and an offset made 53.69 feet S. $89^{\circ} 43' 00''$ E. along the north side of lot 1402 (which is also the division line between lands of E. F. Jenkins and M. H. Frankhouser), where monument No. 22 was erected.

From monument No. 22 the course of the boundary is N. $0^{\circ} 24' 42''$ E., passing through, or near the point where a large marked red oak formerly stood, testified to in this case by Ethbell Falkenstine, as standing in the Deakins or old state line, and shown at the letters "W-K" upon the maps heretofore filed; a planted stone, a short distance north of the red oak in the east line of the Henry Banks survey of 8,000 acres, and following a well-marked line along and with the eastern boundary of the Banks survey and the western boundary of the Maryland tract called "Canrobert" to a point where it intersects the south line of the 328-acre tract granted by Virginia to Henry Deal, and passing through the same, to a point where the east line of the Banks survey intersects the south line of a tract of 367 acres granted by Virginia to Henry Deal, where monument No. 27 was erected.

From monument No. 27 an offset was made 347.3 feet N. $89^{\circ} 25' 12''$ E. along the line between the two Henry Deal tracts

above mentioned, where monument No. 28 was placed.

From monument No. 28 to monument No. 32 the course of the boundary is N. $0^{\circ} 20' 07''$ W. and closely follows *the mutually[6 accepted property lines of citizens of the two states; corners, trees, and fences having been pointed out by various landowners on both sides of the "old line." Monument No. 32 replaces a large marked Spanish oak, which was a common corner of lands owned by John and George W. Vansickle, in West Virginia, and in the west line of land owned by W. M. Fike in Maryland. This tree was cut down and the stump removed by your commissioners in 1911. From this point northward it was found that the old accepted boundary line veered slightly to the east, and the course of the boundary line was therefore changed to N. $0^{\circ} 4' 55''$ E. to conform to it.

Monument No. 34 was set at the intersection of this line with the southern boundary line of the state of Pennsylvania.

In addition to the monuments just mentioned as standing at the angular points in the boundary, others were set between, exactly in line. (See description of monuments.)

The total number of large monuments erected along the Maryland-West Virginia boundary line is 34, in addition to the one restoring the "Fairfax stone." Of small monuments, 26 were erected, making a total of 60 permanent marks. The line is also marked at suitable places by 5 copper bolts securely fastened into natural and planted rocks.

A description of instruments and methods used in the survey, the method of constructing the monuments, location, latitude, longitude, approximate elevation, distance, true and magnetic bearings, will be found in the following pages.

Instruments.

The following instruments were used in making the survey: Theodolite, $7\frac{1}{2}$ inch No. 11, United States & Canada Boundary Survey, temporarily loaned during 1910 to this survey. In 1911, $7\frac{1}{2}$ inch theodolite No. 219 of United States Coast and Geodetic Survey, loaned by the Superintendent of that Bureau in place of No. 11. No. 219 is lighter, works more freely, and is altogether much more satisfactory than No. 11. The circles on both theodolites are graduated to 10' spaces and read by verniers to 10". With these instruments the line was ranged out from hilltop to hilltop and flagpoles set at intervals of 1 to 4 miles.

*2 Gurley transits, circles $5\frac{1}{2}$ inches diameter reading by vernier A to minutes and by vernier B to hundredths of a degree,

loaned by Julius K. Monroe. With these transits the line was run from flagpole to flagpole, previously located with the theodolite, in the usual manner with double backsights and foresights. The length of foresight was limited by the length of tape, 500 feet; the length of backsight was limited only by the visibility of the rear tripod. Instead of the ordinary rods for lining in, brass plumb bobs weighing 2 pounds each, supported by tripods 7 feet high, with movable heads, were used. As sights were taken on the string supporting the plumb bobs, the line was produced with great accuracy. A brass tack was set in a solid hub at each transit station.

Distances.

Distances were measured to the nearest 1/100 of a foot with a 500-foot standardized steel tape, supported at several points along its length so as to have a uniform slope, approximately parallel to the slope of the ground.

The inclination or slope of the tape was measured by the vertical circle on the transit, and the horizontal distance and difference in elevation carefully computed.

Besides the 500-ft. steel tape, which was graduated to single feet, except at each end, where 1 foot was graduated to tenths, a 100-foot steel tape graduated throughout to feet, tenths, and hundredths was used for shorter measurements.

Astronomical observations.

Astronomical observations for azimuth were obtained with the theodolite by observing Polaris near eastern elongation. Ten measurements of the angle between star and mark were made with telescope direct and reversed in 5 positions of the circle. The mark was a bulls-eye lantern placed at one of the transit stations a mile or more distant, northward. Time was obtained from the railroad; a mean time Waltham watch being compared with 75th meridian time as set by telegraph from the United States Naval Observatory at Washington each noon, and proper reduction was made for difference in longitude. Azimuth observations were made at 8 stations along the boundary line, 36.7 miles in length; usually at or near a point of deflection in the final line.

Geodetic positions.

At a point near Cranesville, West Virginia, 24 miles north of the Fairfax stone and 12 miles south of the Pennsylvania line, connection was made with Piney swamp triangulation station located by the United States Geological Survey by a belt of trian-

gulation extending westward from Maryland heights and Sugarloaf, 2 primary triangulation stations of the Coast and Geodetic Survey. The geodetic position of Piney swamp station is on United States Standard datum, and is thus free from station error. A portion of the boundary line, 1.9 miles each of this station, measured during the progress of the survey, was used as a base line, and by measuring all the angles in 2 triangles accurate connection was made with this triangulation station. From these data the geodetic positions of all large monuments were computed.

Elevations.

The approximate elevations of all stations were determined by carrying a line of vertical angle measurements along the boundary. The elevation of Fairfax stone was accepted as 3,162 feet above mean sea level, as derived from railroad levels, and checks on the heights as computed from this were obtained at 5 points from the topographic work of the United States Geological Survey, as follows: Near Gnegy church; at the crossing of the Northwestern pike; at Hutton; near Cranesville; and at the intersection of the Maryland-West Virginia line with the Pennsylvania state line. The apparent errors at these check points were distributed at the various stations in proportion to the distance.

Monuments.

List of monuments from the Fairfax stone to the Pennsylvania line, giving the size, method of construction, and location, together with the latitude and longitude of each of the principal monuments.

The principal monuments are uniform in size and shape, and consist of a molded concrete column, 22 inches square at the base, tapering to 10 inches square at 4 feet in height (top of mold), and finished, in a few instances, with rounded top, but generally in flat, pyramidal shape, extending 4 to 5 inches above the top of mold, or form, making the entire column 4 feet 4 inches in height above base; the corners are beveled 1½ inches in width to prevent defacement.

Inscriptions: Each monument, beginning with the initial one at the North Branch of the Potomac river, is numbered consecutively from 1 to 34 northward to the Pennsylvania state line; the numbers and the names of the commissioners being placed upon the south face of the monument, except where set diagonally; the date, 1910, on the north face; the letters MD. on the east, and W. VA. on the west. The letters MD. and W. VA. are 3¼ inches in height and ¾ inch

deep; the numbers $2\frac{1}{2}$ inches high, and $\frac{5}{8}$ inch deep, and the names of commissioners, 1 inch in height and of proportional depth. The inscriptions were molded in the monuments, when built (except the monument at Fairfax stone, and Nos. 1 and 2), by means of reversed bevel-faced brass and lead pattern letters, which were attached separately to the inside of the "forms;" subsequently the letters MD., W. VA., the names of commissioners, and the date, 1910, were soldered on plates of tin reinforced with heavy sheet iron, which were securely fastened to the forms with screws. These plates were depressed slightly below the surface, which, on the finished monuments, formed corresponding elevations.

Material.

Three bags (300 pounds) best Portland cement, and seven bags (700 pounds) washed, white sand, were used in each of the large monuments. The cement and sand were thoroughly mixed before and after adding water. This material was firmly tamped in the "form," the top being finished with an ordinary mason's trowel. No stone was used in the monument.

Base.

The base of each of the principal monuments was made of concrete, the usual size 10]being $3\frac{1}{2}$ feet square, and $2\frac{1}{2}$ *feet deep, depending upon the character and formation of the ground; in all cases sufficient depth and breadth being obtained to insure stability.

The average amount of material used in each base was $\frac{3}{4}$ barrel of best Portland cement, 1,200 pounds of sand, and 1,500 to 2,000 pounds of broken stone. The cement and sand were thoroughly mixed before and after adding water; cement and stone were placed in the excavations in alternate layers and the whole thoroughly tamped and bonded. The base was finished and cross lines indicating its exact center marked upon it, and when firm enough to sustain the weight of the monument, the "form" was set up and carefully centered by means of the cross lines, and the monument built before the final "set," thus forming the base and column into one solid mass. In the few instances where the bases were built a day or more before the monument, a large stone was set in the center of the base and allowed to project a foot or more above the surface, and the monument built around it, thus securing a firm bond.

Small monuments.

Small monuments are also of concrete, uniform in size, 1 foot square and 2 feet
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high, molded in a wooden form, without taper and contain 1 bag (100 pounds) cement, 2 bags (200 pounds) washed, white sand. The top was finished in a similar manner to the large monuments. The letters MD. cut on the east face, W. VA. on the west, and the date, 1910, on the north. The base, 2 feet square and 2 feet deep, also of concrete, and built as in the larger monuments. One bag of cement and four bags of sand, in addition to the broken stone, were used.

The "Fairfax stone."

The "Fairfax stone" stands at the head of the North Branch of the Potomac river. It derived its name from Thomas, Lord Fairfax, who became the proprietor of what was known as the "Northern Neck of Virginia." The original grant was made in 1663, by Charles II. of England, and subsequently successively confirmed by James II. and George II. The title having rested by *transfers in Lord Fairfax, on the 11th of September, 1736, commissioners were appointed, with the approval of George II., to define the boundaries of the grant, which was to be "all the land lying and situate between and within the heads of the rivers Rappahannock and Potomac, the courses of the said rivers, together with the rivers themselves." The survey of the upper part of the Potomac river was made in 1736, and at the head spring as then determined a number of trees were marked by the surveyors. A dispute arose between Lord Fairfax and the representatives of the Colony of Virginia as to the source of the Potomac, and no further work or agreement reached until 1746, when representatives for each side having been named, the survey was resumed and a line was run from the head of the Rappahannock to the head of the Potomac river. The trees and springs located in the former survey of 1736, as the head of the potomac, having been found, the course of the trial line was corrected and the final line run in the reverse direction from the Potomac to the Rappahannock.

Before leaving the head of the Potomac, additional trees were marked and a stone set up, described as follows, in the notebook (still in existence) of Thomas Lewis, one of the surveyors: "October 23, 1746. Returned to the spring where we made the following marks: '—' on another beach WB WR 1746 Y3—a stone by the corner

pine marked FX, on a beach marked 'AC.' This done we bid adieu to the head spring about $\frac{1}{2}$ hour after nine o'clock, our course directing to the head of Rappahannock bear-

ing S. 46° E. 30 poles the top of the mountain in the spring heads on."

When Lieut. N. Michler made his survey of the meridian line north from the Fairfax stone in 1859, he thus describes the stone in his report: "The initial point of the work—the Fairfax stone—stands on the spot encircled by several small streams flowing from springs about it. It consists of a rough piece of sandstone, indifferent and friable, planted to the depth of a few feet in the ground and rising a foot or more above the surface, shapeless in form, it would scarce attract the attention of the passer-by. The finding of it was without difficulty, and its recognition and identification by the inscription Fx, now almost obliterated by the corroding action of water and air. In order not to disturb this stone the first observatory was built immediately in the rear (south) of it." Here, later, Michler built his monument, which was about 4 feet in height and made of several hewn stones, the upper ones being conical. The original Fairfax stone was in existence until about the year 1883, when it was destroyed by vandals and subsequently carried away, leaving the Michler monument as the only marker.

The stream surveyed in the year 1736 was what has since been designated the North Branch of the Potomac river. The source, designated as the Fairfax stone, is upon the divide between the eastern and western watersheds. It is $\frac{1}{4}$ mile northerly from the summit of the Western Maryland Railroad, which is here the highest point on that line between Cumberland, Maryland, and Elkins, West Virginia.

The stone is easily reached by a trail from Fairfax station, which is $\frac{1}{2}$ mile to the southeast. The large timber all around has been cut by mill men and fire has destroyed the balance, so that the immediate spot is now largely covered by brush and briars. The land near the Fairfax stone is principally owned by the Davis Coal & Coke Company (in 1910).

On August 12, 1910, during the present work, a new concrete monument was built, replacing both the previous marks. The new monument stands 2 feet north of the center of the base of the Michler monument, which point was marked by a brass bolt bedded level with surface of the ground. This rock and mark are still left in place, but are not visible, and the mark is 1 foot north of the point where the original stone stood. The portion of the Michler monument above ground was removed.

"Fairfax stone," restored 1910.

The base is of concrete, $3\frac{1}{2}$ ft. square and 2 ft. deep, set flush with the surface of

ground. On this base the monument was built, utilizing the form which had been designed for, and was afterwards used in the construction of, the monuments along the boundary from the Potomac river to the Pennsylvania line. The monument is 22 inches square at the base and 10 inches square at the top, the latter being built up a few inches and rounded off. The total height being 4 ft. and 4 inches above the base. The monument contains $3\frac{1}{2}$ bags of best Portland cement and $6\frac{1}{2}$ bags of white sand. It is marked as follows: On south face Fx On north face 1910.

1746

The corners are beveled $1\frac{1}{2}$ inches in width.

Latitude 39° 11' 41.92" Longitude 79° 29' 15.50"

Monument No. 1.

This monument marks the initial point of the present boundary survey. It is on the south bank of the North Branch of the Potomac river, 3,983 feet N. 0° 56' E. (true) from the Fairfax stone. The base is $3\frac{1}{2}$ ft. square and 4 ft. deep and tapers to $2\frac{1}{2}$ ft. square at its top. The monument is placed diagonally on this base and is marked as follows:

On the northeast side ¹⁹¹⁰MD On the southeast side W. Va.

On the southwest side ^{No 1}W. Va. On the northwest side W. Va.

It can be reached from the Fairfax station of Western Maryland Railroad by following an old lumber tram road which goes within 100 yards of the river. From the north, on Maryland side, there is a bridle path leading from the county road on Arnold's ridge, to a point almost in sight of this monument, $\frac{1}{2}$ mile distant.

Latitude 39° 12' 21.34" Longitude 79° 29' 14.67"

Monument No. 2.

Is in place of a maple tree marked "1101," which was the beginning of the Maryland military lot 1101. It can be reached from the county road on Arnold's ridge by the same trail that leads to the river. It is less than $\frac{1}{4}$ mile from top of the ridge and about 1 mile west of Eli Mosser's house. The boundary line makes a slight angle to west at this point.

Latitude 39° 12' 33.28" Longitude 79° 29' 14.42"

Arnold's ridge.

A small monument on the highest point of Arnold's ridge. It is one mile west [14

of house of Eli Mosser, and can be reached by the county road along the ridge.

Monument No. 3.

On summit of Backbone or Great Savage mountain. The base of monument rests on the solid ledge which forms the crest of the mountain. It is reached with difficulty by an old road crossing the mountain from Eli Mossers to Sommers Mossers upon the west and is more than $\frac{1}{4}$ mile west of this trail over rough, rocky ground. It can most readily be reached from the west. There is an extended view from this summit as far north as Snaggy mountain.

Latitude $39^{\circ} 14' 12.43''$ Longitude $79^{\circ} 29' 12.65''$

Stahlnaker ridge.

A small monument about 1 mile west of Sommers Mossers, and $\frac{1}{2}$ mile southwest of county road from Gnegy church to Breedlove.

Monument No. 4.

Just north of the Youghiogheny river and south of a county road from Gnegy church to Breedlove. It is in the line of a Maryland land grant called Covent garden, and in property line of Wm. Bittner and Oscar Roth. It is $\frac{3}{4}$ mile south of Gnegy church and is easily reached. The monument stands diagonally as the line here changes its course to the westward.

Latitude $39^{\circ} 15' 53.73''$ Longitude $79^{\circ} 29' 10.84''$

Monument No. 5.

About 100 yards north of county road from Gnegy church to Breedlove and in sight of road. It is in a line of the Covent Garden survey, and is in or near property lines of Wm. Bittner, Chas. Winters, Oscar Roth, and J. Stahlnaker. The monument was built over and around a rough stone marking property corners, and stands diagonally as the course of the boundary line here turns northward.

Latitude $39^{\circ} 15' 54.97''$ Longitude $79^{\circ} 29' 15.69''$

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*Monument No. 6.

On the south side of the county road from Oakland to Horse Shoe run, 100 yards southwest of the cross roads at Gnegy church. On or near the property line of Daniel Gnegy and Elijah Bechtel. The monument was built over and around a stone property corner which marked the beginning of the Maryland land grant called "Mount Pleasant," surveyed in 1774. The original beginning called for was a white

oak tree, now gone. The stone was pointed out as said beginning by Daniel Gnegy.

Latitude $39^{\circ} 16' 31.10''$ Longitude $79^{\circ} 29' 15.32''$

Hamstead hill.

A small monument on the Obed Hamstead hill, $\frac{3}{4}$ of a mile east of the southwest prong of the Youghiogheny river and $\frac{1}{4}$ mile north of Gnegy church. The monument is 45 feet north of an east-west wire fence and 5 feet west of a north-south line fence.

Monument No. 7.

Situated 15 feet south of center of county road from Cash Valley to the Horseshoe run road and $1\frac{1}{2}$ miles east of Eglon, West Virginia. The land on the east of monument is owned by George H. Gauer and that on the west by William Weimer.

Latitude $39^{\circ} 17' 46.83''$ Longitude $79^{\circ} 29' 14.56''$

Monument No. 8.

About $1\frac{1}{2}$ miles northeast of Eglon, West Virginia, and 150 yards east of house of Silas Fike. This monument marks the spot where stood a large white oak tree called for in the Virginia patent to John Pettyjohn, surveyed May 30, 1781, for 400 acres. The call being at "a white oak in the Maryland line and running—and finally to pointers in the Maryland line and with said line N. 226 poles to the beginning." This tree was blocked during the survey of 1910 and the oldest mark counted one hundred and thirty years' growth, the second one hundred and seventeen years, and the third seventy-eight years. The block was saved. The tree was cut down and stump blown up with dynamite and replaced by the monument which now marks property holdings of Silas Fike, Amelius *Fike, and Seymour Hamstead.[16 There is an angle to the east in the boundary line at this point.

Latitude $39^{\circ} 17' 52.63''$ Longitude $79^{\circ} 29' 14.50''$

Silas Fike's ridge.

A copper bolt set in a rock flush with the ground on summit of a flat timbered ridge $\frac{1}{4}$ mile north of house of Silas Fike, who lives $1\frac{1}{2}$ miles northeast of Eglon, West Virginia.

Dawson's hill.

A small monument on wooded hill of Lloyd Dawson, about $\frac{3}{4}$ mile south of the Northwestern pike. It is 26 feet west of north-south fence and 195 feet north of an east-west fence.

Monument No. 9.

Situated 8 miles southwest of Oakland, Maryland, in the angle formed by the North-western turnpike and the county road from Eglon, West Virginia, to Oakland. The monument is 100 yards east of the Youghiogheny river and is on a slight ridge between above-described roads and can be seen from them.

Latitude 39° 19' 07.64" Longitude 79° 29' 13.29"

Offutt's hill.

A small monument on summit of wooded hill belonging to D. E. Offutt, $\frac{1}{2}$ mile north of the Northwestern turnpike, and 10 feet east of a north-south fence.

Stahl's hill.

A small monument on summit of Stahl's hill, 20 feet west of an old split rail fence running north and south, and is on land owned by Peter F. Nine.

Monument No. 10.

In an open field about 300 yards south of a county road running east and west across the Youghiogheny river. The monument stands in place of a sugar tree which formerly stood here and marked a corner 17]of the Maryland *grant called "Eel-shine." The place was pointed out by Peter F. Nine, who owns the property east of it. John Bittner owns the land to the west and his house is 100 yards west of the monument. The boundary line turns to the east and the monument stands diagonally.

Latitude 39° 20' 39.47" Longitude 79° 29' 11.82"

Monument No. 11.

Situated 482 feet east from Monument No. 10, as there is here an offset in the line. It is in the line of Eelshine and Ashby 50-acre survey, and stands diagonally as boundary line here turns to north.

Latitude 39° 20' 39.41" Longitude 79° 29' 05.68"

Monument No. 12.

Is upon the south side of the county road from Brookside, West Virginia, to Oakland, Maryland. It is about 100 feet north of the Youghiogheny river, on land of Dorsey Ashby, and about 100 yards southwest of his house.

Latitude 39° 21' 04.15" Longitude 79° 29' 05.30"

Ashby's hill.

A small monument on summit of a flat ridge owned by Dorsey Ashby, $\frac{1}{2}$ mile north-

west of road from Brookside to Oakland, and $\frac{1}{2}$ mile northwest of Mr. Ashby's house.

Lauer hill (south brow).

A copper bolt set in a rock 6 by 6 by 20 inches, set flush with surface of ground, on south brow of Lauer hill, $\frac{3}{4}$ mile south of house of Charles Fulks. It can be reached from the north by road and trail through the woods.

Monument No. 13.

On the summit of Lauer hill, about 6 miles southwest of Oakland, Maryland. The monument can be reached by a trail running south from a road to a coal mine near Chas. Fulk's house, which is on the north side of Lauer hill, about $\frac{1}{2}$ mile from summit. The land is covered with timber and is owned by Daniel E. Offutt.

Latitude 39° 22' 02.42" Longitude 79° 29' 04.40"

*Miller.

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A small monument on summit of flat ridge $\frac{1}{2}$ mile north of Laurel run, on land owned by J. S. Miller. It can be reached by road from Crellin, Maryland, which is $1\frac{1}{2}$ miles to the east.

Poling.

A small monument on a timbered ridge $1\frac{1}{2}$ miles northwest of Crellin, Maryland, and on land owned by Zach Poling. It is 120 feet south of a second-class road crossing the ridge.

White.

A small monument $\frac{3}{4}$ mile south of Hutton, Maryland, on northwest side of a second-class road, and is on land owned by Charles White.

Monument No. 14.

Is about 200 yards west of Hutton, Maryland, station, B. & O. R. R., and close to south limit of right of way of main line of that railroad. It is north of wagon road from Hutton, Maryland, to Corinth, West Virginia, is conspicuously placed, and can be seen from trains as they pass. It is near lands of John A. Connell, Chas. White, and Grant Felton.

Latitude 39° 25' 08.88" Longitude 79° 29' 01.54"

Morris-Connell.

A small monument on summit of flat ridge cleared on west and timbered on east. It is $\frac{1}{2}$ mile north of Hutton, Maryland, and is on land owned by George Morris on the west and J. A. Connell on the east.

Monument No. 15.

About $1\frac{1}{2}$ miles north of Hutton, Maryland, or Corinth, West Virginia, and can be reached by road from Cornith. The monument is on cleared land owned by Dennis Glover. There is a slight deflection of the boundary line to the westward at this point.

Latitude $39^{\circ} 26' 07.60''$ Longitude $79^{\circ} 29' 00.63''$

19] *Severe.

A small monument on north side of county road 2 miles north of Corinth, West Virginia. On land owned by John M. Browning.

Browning.

A small monument on summit of a flat wooded ridge owned by John M. Browning, $2\frac{1}{2}$ miles north of Corinth, West Virginia.

Camp rocks.

A copper bolt set in a hole drilled in top of and near the northeast corner of a rocky bluff on south slope of Snaggy mountain, 700 feet south of old Burchinal road. Stones are piled around and over the bolt. From this point, Glover's hill, Backbone mountain, and other distant points southward can be seen.

Burchinal.

1st. A small monument on top of a large flat rock 20 feet south of old Burchinal road which crosses Snaggy mountain near this place.

2d. A copper bolt set in solid rock 350 feet north of the small monument described above.

3d. A copper bolt set in solid rock 1,400 feet north of small monument described above.

Monument No. 16.

On one of the main summits of Snaggy mountain about 1,281 feet east of the "Fairfax meridian," and 75 yards from a rough road to fields on top of mountain. It can be reached from the Burchinal road, which comes out at White Oak spring on the road to Terra Alta.

Latitude $39^{\circ} 29' 07.98''$ Longitude $79^{\circ} 28' 59.11''$

Monument No. 17.

Is on the very high north summit or brow of Snaggy mountain, and is one of the highest points along the boundary line, being about 3,070 feet above the mean sea level. It can be reached either from a 20] trail which crosses through *the gap be-

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tween monuments 16 and 17, or from the Cranesville-Oakland road above Brownings lake, or by climbing the steep side of the mountain just south of Pine swamp.

Latitude $39^{\circ} 29' 50.50''$ Longitude $79^{\circ} 28' 58.75''$

Teets.

A small monument on north side of county road which crosses Pine swamp about 3 miles south of Cranesville, West Virginia. The monument is about 1,000 feet south of house of Eugene Teets.

Monument No. 18.

On the north side of the county road from Cranesville, West Virginia, to Oakland, Maryland, and is about 3 miles south of Cranesville, 100 yards east of house of Eugene Teets, and west of Muddy creek, and on the edge of Pine swamp, which has here been drained.

Latitude $39^{\circ} 31' 38.50''$ Longitude $79^{\circ} 28' 57.84''$

Monument No. 19.

Is about $2\frac{1}{2}$ miles southeast of Cranesville, West Virginia, and is on the western edge of the Pine swamp, about 100 yards from solid ground. The foundation of the monument rests on hard sand, 4 feet below the surface. The timber and brush near the monument are mostly dead or burnt. The land is owned by Hiram Ringer. The monument is set diagonally as the line turns abruptly east.

Latitude $39^{\circ} 31' 53.96''$ Longitude $79^{\circ} 28' 57.71''$

Monument No. 20.

Near the middle of Pine swamp, about 3 miles southeast of Cranesville, West Virginia, $\frac{1}{2}$ mile west of house of John H. Sommers, and 50 feet west of Muddy creek. The base of the monument is 4 feet square and 6 feet deep, resting on a sticky clay. The surface of the swamp near this monument is very soft, and all material had to be drawn by men on a sled for a distance of 200 yards. The land is owned by Hiram Ringer, and the adjoining land to the east by John H. Sommers. The monument is set diagonally.

Latitude $39^{\circ} 31' 54.05''$ Longitude $79^{\circ} 28' 45.32''$

*Monument No. 21.

[21

One mile east of Cranesville, West Virginia, in a small ravine, and is on property line between M. H. Frankhouser and E. F. Jenkins at the northwest corner of Maryland military lot 1402, at the end of 2d line. It is 200 yards northwest of M. H.

Frankhouser's house, 50 yards west of county road, and on northeast side of Pine swamp. The monument stands diagonally as the line turns to the east.

Latitude 39° 33' 08.69" Longitude 79° 28' 44.85"

Monument No. 22.

Is 53.69 feet eastward from monument No. 21 in the same ravine, and about 100 feet west of the county road. It stands in the 2d line of lot 1402, and is also on the property line between Frankhouser & Jenkins. The monument stands diagonally as the boundary line turns northward again.

Latitude 39° 33' 08.68" Longitude 79° 28' 44.16"

Monument No. 23.

Is about 1 mile east of Cranesville, West Virginia, 80 feet north of county road from that place to Sang Run, Maryland. It is on a bank above a large spring, and is on cleared land owned by J. G. Elsey, and is 50 yards north of house of E. F. Jenkins.

Latitude 39° 33' 22.93" Longitude 79° 28' 44.03"

Elsey's hill.

A small monument on summit of flat cultivated ridge, 1 mile east of Cranesville, on land owned by J. G. Elsey, and $\frac{1}{2}$ mile north of house of E. F. Jenkins.

Latitude 39° 33' 34.23" Longitude 79° 28' 43.92"

Strawser road.

A small monument on north side of road from Cranesville, West Virginia, to Sang Run, Maryland, about $1\frac{1}{2}$ miles northeast of Cranesville, and on land owned by Samuel A. Strawser.

22] *Fike's mountain (south brow.)

A small monument on south brow of Fike's mountain, 2 miles northeast of Cranesville. It can be reached by a rough road through the woods.

Monument No. 24.

On summit of Fike's mountain, $2\frac{1}{2}$ miles northeast of Cranesville, West Virginia. It can be reached by a rough trail through the woods from a wagon road which crosses the mountain $\frac{1}{2}$ mile west of monument. The summit of the mountain is comparatively flat and no distant large monuments can be seen. The small monument on the south brow is visible, as well as small monument on north brow.

Latitude 39° 34' 49.21" Longitude 79° 28' 43.23"

Fike's mountain (north brow).

A small monument on the north brow of Fike's mountain, 1041.56 feet northward from monument No. 24. It is $2\frac{1}{2}$ miles northeast of Cranesville and $\frac{1}{2}$ mile northeast of county road, which crosses Fike's mountain $\frac{3}{4}$ mile west of this point.

Monument No. 25.

On a timbered flat ridge north of White Rock run, near southeast corner of John A. Reckard's land, and $\frac{1}{2}$ mile south of his house. It is in the woods 100 yards from private road from the Cranesville road to Reckard's house.

Latitude 39° 36' 06.30" Longitude 79° 28' 42.51"

Reckard road.

A small monument 30 feet south of a second-class road through the woods near house of John A. Reckard, about 6 miles west of Friendsville, Maryland.

Herbert Friend's ridge.

A small monument on summit of flat ridge partly covered with timber and brush, owned by Herbert Friend, and is $\frac{1}{2}$ mile southeast of his house. It is 6 miles southwest of Friendsville.

*Monument No. 26. [23

On north side of county road from Keeler Glade to Friendsville, and is 5 miles southwest of latter place. It is on land of Sherman Friend, about 100 yards northeast of his house.

Latitude 39° 37' 47.35" Longitude 79° 28' 41.57"

Sherman Friend's hill.

A small monument on summit of a flat, cleared hill, owned by Sherman Friend, who lives 300 yards to southwest. It is 5 miles southwest of Friendsville, Maryland.

Melville Friend's hill.

A small monument on summit of flat, cleared hill, owned by Melville G. Friend, who lives $5\frac{1}{2}$ miles west of Friendsville, Maryland, and 300 yards west of monument. A road crosses the hill 200 yards west of and another is at foot of hill 300 yards to north of it.

Monument No. 27.

On north side of county road near Mrs. Marshall Friend's house, about 5 miles west of Friendsville, Maryland. It is on south edge of a cleared field bordering the county road, and is on south property line

of Mrs. Marshall Friend. It is in the Henry Deal surveys. The monument stands diagonally as boundary line has offset to east.

Latitude 39° 38' 32.37" Longitude 79° 28' 41.16"

Monument No. 28.

This monument is 347 3 feet eastward from monument No. 27, and the same description applies to it. It also stands diagonally as boundary line here turns northward.

Latitude 39° 38' 32.40" Longitude 79° 28' 36.72"

Monument No. 29.

Is north of a wagon road through land of Jere Teets, and is about $\frac{1}{2}$ mile southeast of his house, and 5 miles west of Friendsville, Maryland.

Latitude 39° 38' 58.92" Longitude 79° 28' 36.92"

24] *Jere Teets' ridge.

A small monument on a flat cultivated ridge sloping to the east, owned by Jere Teets, and is 150 yards east of his house, which is 5 miles west of Friendsville, Maryland. It is a few feet north of an east-west private road.

L. Dedrick's ridge.

A small monument on a flat, cleared ridge, owned by L. Dedrick. It can be reached from county road on the west by leaving that road near Chestnut avenue church, and going eastward past house of Joshua Fike.

Monument No. 30.

On summit of Evans Hill, 1 mile west of Fearer Postoffice, Maryland, and 150 yards south of the county road from Fearer to Chestnut avenue church. The monument is on cultivated land owned by Hosea Thomas, who lives 200 yards to the west.

Latitude 39° 40' 15.92" Longitude 79° 28' 37.50"

Monument No. 31.

On north side of county road from Friendsville, Maryland, to Hazelton, West Virginia, and is 1 mile west of Fearer, Maryland. It is 100 yards west of house of A. J. Thomas and on line dividing his property from that of Hosea Thomas.

Latitude 39° 40' 26.10" Longitude 79° 28' 37.58"

Monument No. 32.

Is $\frac{1}{2}$ mile southeast of house of Geo. W. Vansickle, and is nearly the same distance southwest of W. M. Fisk's house, and about 5 miles west of Selbysport, Maryland. The

monument stands in place of a large Spanish oak tree, which was removed during the survey in 1911. This tree was corner of property of John Van Vansickle, George W. Vansickle, on the west, and in a line of W. Marshall Fike on the east. The land is cleared and the boundary line makes a sight deflection angle to the east. The monument is marked "Span Oak" in addition to other inscriptions.

Latitude 39° 41' 14.28" Longitude 79° 28' 37.94"

*F. T. Fike's ridge. [25

A small monument in a field owned by F. T. Fike, 200 yards east of a road leading from George Vansickle's place to Selbysport, Maryland.

Monument No. 33.

On north side of county road leading towards Selbysport, Maryland, and is about 5 miles west of that place. It is on line between cleared land owned by James McDermott and Isaiah Umble.

Latitude 39° 42' 06.58" Longitude 79° 28' 37.84"

Thomas' ridge.

A small monument on cleared flat ridge owned by M. M. Thomas on the west and by Joseph Thomas on the east. It is 300 yards northwest of house of Joseph Thomas and $\frac{1}{2}$ mile south of Pennsylvania state line.

Monument No. 34.

At the intersection of the Md.-W. Va. boundary line from the south with the Pennsylvania state line. It is 2 miles southwest of Markleysburg, Pennsylvania, $\frac{1}{4}$ mile east of point where the pike to that place crosses the Penna. line, and $\frac{1}{4}$ mile northeast of house of M. M. Thomas. It is 1,051 feet westward from the Mason & Dixon mound in which a stone monument marked, "55.2 M 1885," was set by survey made in 1885 by the states of Pennsylvania and West Virginia.

Monument 34 is 40 feet south of oil pipe line, which runs through Pennsylvania near its southern boundary, and is $\frac{1}{4}$ mile west of a metal gate house of this pipe line. It is in the straight line between monuments of 1885 numbered 55.2 M and 54.2 M; the latter being 4,276 feet to the westward and in center of a Mason & Dixon mound. The land south of monument No. 34 is owned by M. M. Thomas. The monument sets square and is marked the same as others, excepting that on the north face are the letters PA above the date of 1910.

Latitude 39° 43' 15.88" Longitude 79° 28' 37.72"

26]

*Table No. 1.

Horizontal distances from Monument No. 1,—distances between monuments,—true bearings,—magnetic bearings and approximate elevations above mean sea level.

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
	(Feet.)	(Feet.)	" "	" "	
Fairfax.....	3989.13				3162 feet
1.....	0000.00	3989.13	S. 0 56 00 W.		2721 "
2.....	1208.55	1208.55	N. 0 56 00 E.		2894 "
Arnolds ridge.....	1976.49	767.94	N. 0 47 53 E.	N. 4 40 E.	3103 "
3.....	11242.12	9265.63	"	"	3343 "
Stahlnaker ridge.....	17906.38	6664.26	"	"	2778 "
4.....	21494.14	3587.76			2480 "
5.....	21896.29	402.15	N. 71 48 00 W.		2536 "
6.....	25551.94	3655.65	N. 0 27 04 E.	N. 4 19 E.	2523 "
Hamstead's hill.....	29604.88	4052.94	"	"	2575 "
7.....	33215.31	3610.43	"	"	2512 "
8.....	33802.71	587.40	"	"	2535 "
Silas Fike bolt in rock..	35174.15	1371.44	N. 0 42 57 E.	N. 4 38 E.	2568 "
Dawson's hill.....	37824.24	2650.09	"	"	2548 "
9.....	41393.05	3568.81	"	"	2441 "
Offuts hill.....	42784.77	1391.72	"	"	2558 "
Stahl's hill.....	48065.58	5280.81	N. 0 42 57 E.	N. 4 38 E.	2707 "
10.....	50686.81	2621.23	"	"	2464 "
27] *11	51169.11	482.30	S. 89 17 03 E.		2444 "
12.....	53672.78	2503.67	N. 0 41 02 E.	N. 4 42 E.	2420 "
Ashby's hill.....	54860.88	1188.10	"	"	2617 "
Lauer hill bolt in rock..	58182.08	3321.20	"	"	2807 "
13.....	59569.07	1386.99	N. 0 41 02 E.	N. 4 42 E.	2857 "
Miller.....	67074.89	7505.82	"	"	2619 "
Poling.....	70117.80	3042.91	"	"	2634 "
White.....	75391.99	5274.19	"	"	2433 "
14.....	78439.22	3047.23	"	"	2470 "
Morris-Connell.....	80845.03	2405.81	"	"	2548 "
15.....	84381.27	3536.24	"	"	2587 "
Severe.....	89255.10	4873.83	N. 0 22 27 E.	N. 4 34 E.	2530 "
		1713.46	"	"	

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
Browning.....	90968.56				2622 "
		7280.65	"	"	
Burchinal road.....	98249.21				2799 "
		4386.10	"	"	
16.....	102635.31				3020 "
		4302.13	"	"	
17.....	106937.44				3072 "
		9976.18	"	"	
Teet's road.....	116913.62				2572 "
		953.38	"	"	
18.....	117867.00				2572 "
		1563.97	"	"	
19.....	119430.97				2572 "
		971.09	N. 89 27 27 E.		
20.....	120402.06				2572 "
		7553.36	N. 0 17 00 E.	N. 4 29 E.	
28] *21	127955.42				2575 "
		53.69	S. 89 43 00 E.		
22.....	128009.11				2575 "
		1441.82	N. 0 24 42 E.	N. 4 48 E.	
23.....	129450.93				2630 "
		1213.70	"	"	
Elsey's hill.....	130664.63				2788 "
		2696.96	"	"	
Strawser road.....	133361.59				2494 "
		3868.96	"	"	
Fike's hill—southbrow.	137230.55				2862 "
		951.02	N. 0 24 42 E.	N. 4 48 E.	
24.....	138181.57				2867 "
		1041.56	"	"	
Fike's hill—northbrow.	139223.13				2843 "
		6760.07	"	"	
25.....	145983.20				2582 "
		4621.04	"	"	
Near Reckart road.....	150604.24				2344 "
		2534.50	N. 0 24 42 E.	N. 4 48 E.	
H. Friend.....	153138.74				2379 "
		3070.16	"	"	
26.....	156208.90				2260 "
		568.91	"	"	
Friend's hill.....	156777.81				2331 "
		2995.97	"	"	
M. O. Friend.....	159773.78				2299 "
		991.13	"	"	
27.....	160764.91				2229 "
		347.31	N. 89 25 12 E.		
28.....	161112.22				2221 "
		2682.81	N. 0 20 07 W.	N. 4 10 E.	
29.....	163795.03				2193 "
		1493.04	"	"	
Jer. Teets.....	165288.07				2282 "
		2411.66	"	"	
L. Dedrick.....	167699.73				2331 "
		3887.49	"	"	
29] *30	171587.22				2399 "
		1031.22	"	"	
31.....	172618.44				2344 "
		4874.95	"	"	
32.....	177493.39				2337 "
		3070.97	N. 0 04 55 E.	N. 4 38 E.	
F. T. Fike.....	180564.36				2337 "
		2221.59	"	"	
33.....	182785.95				2289 "
		4549.13	"	"	
Thomas.....	187335.08				2301 "
		2463.89	"	"	
34.....	189798.97				2321 "

TABLE No. 2.

Magnetic bearings between monuments on the Maryland-West Virginia boundary line from the Potomac river to the Pennsylvania line, for October, 1910.

Note: The original observations were reduced at the office of the Coast and Geodetic Survey, Washington, District of Columbia, by courtesy of the Superintendent of that

Bureau.

Monuments Nos.	True bearing	Magnetic bearing.	Magnetic declination.	Number of observations.
2-4	N. 0° 47' 53" E.	N. 4° 40' E.	3° 52' W.	20
5-7	N. 0° 27' 04" E.	N. 4° 19' E.	3° 52' W.	7
8-10	N. 0° 42' 57" E.	N. 4° 38' E.	3° 55' W.	8
11-15	N. 0° 41' 02" E.	N. 4° 42' E.	4° 01' W.	6
15-18	N. 0° 22' 27" E.	N. 4° 34' E.	4° 12' W.	13
20-21	N. 0° 17' 00" E.	N. 4° 29' E.	4° 12' W.	2
23-27	N. 0° 24' 42" E.	N. 4° 48' E.	4° 23' W.	5
28-32	N. 0° 24' 07" W.	N. 4° 10' E.	4° 30' W.	5
32-34	N. 0° 04' 55" E.	N. 4° 38' E.	4° 33' W.	3

If values for shorter intervals are desired, it will probably be best to obtain them by 30]interpolating the declination. *The value for the line between Nos. 20 and 21 is probably less reliable than the others, as it depends upon only two results which differ by 10'.

We return herewith a financial statement showing in detail the money actually expended by the commissioners for surveying and marking the boundary line under the decree in this case, including the *per diem* compensation of all the commissioners. We also return herewith the several exceptions made and filed before the commissioners by Mr. W. McCulloh Brown, one of the commissioners, during the progress of the work, together with such explanations, observations, and notes as we have thought proper to make concerning said exceptions, for the information of the court.

We also return herewith a number of photographs taken upon the ground, illustrating the monuments erected by us to mark the line as run by us, showing the character of the work, method of construction, and location of such monuments.

Respectfully submitted,
Julius K. Monroe,
Samuel S. Gannett,
Commissioners.

And this cause coming on this day to be heard upon said motion and upon the said report of Julius K. Monroe and Samuel S. Gannett, and upon the separate report of W. McCulloh Brown, one of the said commissioners, including his protest and exceptions in respect to said report of Commissioners Monroe and Gannett, and also upon the supplemental report filed by said Commissioners Monroe and Gannett, and the

court being now fully advised in the premises:

It is thereupon adjudged, ordered, and decreed that the *said exceptions filed on[31 behalf of the state of Maryland, as aforesaid, to said report of Commissioners Julius K. Monroe and Samuel S. Gannett, be, and they are hereby, overruled, and that said report be, and the same is hereby, in all respects confirmed.

It is further adjudged, ordered, and decreed that the line as delineated and set forth in said report of Commissioners Monroe and Gannett, and upon the map accompanying the same and referred to therein, which line has been marked with permanent monuments, as stated in said report, be, and the same is hereby, established, declared, and decreed to be the true boundary line between the said states of Maryland and West Virginia, and said map is hereby directed to be filed as part of this decree.

And it appearing that the total expenses and compensation of said commissioners, and the expenditures attending upon the discharge of their duties, amount to the sum of \$17,154.60, it is further adjudged, ordered, and decreed that the same be, and they are hereby, approved and allowed as part of the costs of this suit, to be borne equally between the parties to this cause. And it appearing from said report that the state of Maryland has already paid \$5,038.40 of said amount, and that the state of West Virginia has already paid \$12,116.11 of said amount, it is ordered that said amounts be credited to said states respectively in the settlement of the costs of this suit between them in accordance with the provisions of this decree and the former decrees entered herein.

It is further adjudged, ordered, and de-

creed that the clerk of this court do transmit to the chief magistrates of the states of Maryland and West Virginia copies of this decree, duly authenticated under the seal of this court, omitting from said copy, however, the map filed with the report of said Commissioners Monroe and Gannett, above mentioned.

32] *THE JASON.†

(See S. C. Reporter's ed. 32-57.)

Average—saving stranded vessel.

1. Voluntary sacrifices and expenditures in a successful effort to save a negligently stranded vessel and her cargo and freight present a case of general average within the meaning of a clause in the bill of lading under which, if damage results from the negligent navigation of a seaworthy vessel properly manned, equipped, and supplied, the cargo owners are not to be exempt from liability for contribution in general average, but, with the shipowner, are to contribute as if the damage had not resulted from such negligence.

[For other cases, see *Average*, II.b, in Digest Sup. Ct. 1908.]

Average — stranded vessel — Harter act.

2. The exemption of a shipowner who has exercised due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, from liability for the negligence of master and crew, which is declared in the Harter act of Feb. 13, 1893 (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946), § 3, leaves such owner free to make a valid contract with the cargo owners under which contribution in general average may be enforced for sacrifices made subsequent to the negligent stranding of the vessel, in a successful effort to save the vessel, freight, and cargo. [For other cases, see *Average*, I., in Digest Sup. Ct. 1908.]

Shipping — duty of master of stranded vessel.

3. The duty resting upon the master of a negligently stranded vessel, irrespective of whether the negligence falls within the exemption from liability made by the Harter act of February 13, 1893, § 3, or not, demands only the exercise of every reasonable effort to save the imperiled property, and does not extend so far as to call for a sacrifice of part of the owner's property, if necessary to save the cargo.

[For other cases, see *Shipping*, 423-433, in Digest Sup. Ct. 1908.]

†The docket title of the case is *Actieselskabet Jason v. John Arbuckle et al.*

NOTE.—On general average—see notes to *Columbian Ins. Co. v. Ashby*, 10 L. ed. U. S. 186; *Ralli v. Troop*, 39 L. ed. U. S. 743; and *Fowler v. Rathbone*, 20 L. ed. U. S. 281.
56 L. ed.

Average — stranded vessel — contribution.

4. Cargo owners are entitled to contribution from the ship for sacrifices of cargo made subsequent to the negligent stranding of the vessel, in a successful effort to save the vessel, freight, and cargo, where, under the general average clause of the bill of lading, the consignees or owners of the cargo in such cases are not exempted from liability for contribution in general average, but, with the shipowner, are to contribute as if the danger, damage, or disaster had not resulted from negligent navigation.

[For other cases, see *Average*, III., in Digest Sup. Ct. 1908.]

Average — stranded vessel — contribution.

5. Cargo owners cannot enforce contribution from the ship, under a general average clause in the bill of lading, for sacrifices of cargo made subsequent to the negligent stranding of the vessel, in a successful effort to save the vessel, freight, and cargo, without on their part contributing to the general average sacrifices and expenditures of the shipowner, made for the same purpose.

[For other cases, see *Average*, III., in Digest Sup. Ct. 1908.]

[No. 220.]

Argued April 18, 1912. Decided May 13, 1912.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the questions whether a shipowner may enforce contribution from cargo owners for sacrifices and expenditures incurred in a successful effort to save a negligently stranded vessel and her freight and cargo, and whether the cargo owners are entitled to contribution from the ship for sacrifices of cargo, and whether such cargo owners can enforce contribution without contributing to the general average sacrifices of the shipowner. First and second questions answered in the affirmative. Third question answered in the negative.

See same case below, 101 C. C. A. 628, 178 Fed. 414.

Statement by Mr. Justice Pitney:

Cross libels were filed in the United States district court for the southern district of New York between the owner of the steamship *Jason* and the firm of Arbuckle Brothers, owners, and the Insurance Company of North America, insurers[33 of part of that vessel's cargo, to recover general average contributions. The district court dismissed both libels. 162 Fed. 56. Upon appeal, the circuit court of appeals at first filed an opinion for affirm-

ance (101 C. C. A. 628, 178 Fed. 414), but afterwards granted a rehearing, as a result of which the questions of law at issue were certified to this court as follows:

Statement of Facts.

The facts upon which the questions arise are these:

On July 30, 1904, the Norwegian Steamship Jason, while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar, consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped, and supplied.

The vessel was relieved from the strand on August 9 as the result of sacrifices by jettison of 2,042 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures voluntarily made or incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve ship, cargo, and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

The bills of lading for all of the Jason's cargo contained the following provision:

"General average payable according to 34]York-Antwerp *rules, and as to matters not therein provided for, according to usages of port of New York.

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage, or disaster resulting from fault or negligence of the pilot, master, or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred, but, with the shipowner, shall contribute in general average, and shall pay such special charges, as if such danger, damage, or disaster had not resulted from such fault, neg-

ligence, latent or other defect or unseaworthiness."

Both parties pleaded the bills of lading as constituting the contract of carriage.

A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacrifices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the general average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

The adjustment was prepared in accordance with York-Antwerp rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

The adjustment and apportionment of general average, so made, showed a balance due from Arbuckle *Brothers of \$5,-[35 060.24, which the latter refused to pay. The grounds of such refusal were that the stranding resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading, is invalid.

The original libel was filed by the owner of the Jason against Arbuckle Brothers and its guarantor, the Insurance Company of North America, to recover this amount.

Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of \$3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the general average account by reason of the fact that the stranding was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment, and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

The district court made a decree dismissing both libels, from which decree both parties duly appealed to this court.

Questions Certified.

Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

1. Whether the general average agree-

ment above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made 36]and extraordinary expenditures *incurred by it subsequent to the stranding, for the common benefit and safety of ship, cargo, and freight.

2. Whether, in view of the provisions of the 3d section of the Harter act, the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo, and freight?

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner, made for the same purpose.

In accordance with the provisions of § 6 of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), establishing courts of appeals, the foregoing questions of law are by the circuit court of appeals of the United States for the second circuit, hereby certified to the Supreme Court.

Mr. J. Parker Kirlin argued the cause, and, with Mr. Charles C. Burlingham, filed a brief for the Jason:

The facts present a case of general average within the meaning of the clause in the bill of lading.

Birkley v. Presgrave, 1 East, 220, 6 Revised Rep. 256; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, 10 L. ed. 186; *McAndrews v. Thatcher*, 3 Wall. 348, 18 L. ed. 155; *The Star of Hope*, 9 Wall. 203, 19 L. ed. 638; *Lowndes, General Average*, 5th ed. p. 25.

The case was one of general average, whether the shipowner's sacrifices should receive contribution or not. It would have been a case of general average even if there had been but one interest to contribute.

Montgomery v. Indemnity Mut. M. Ins. Co. [1901] 1 Q. B. 147, 70 L. J. Q. B. N. S. 45, 49 Week. Rep. 221, 84 L. T. N. S. 57, 17 Times L. R. 59, 6 Com. Cas. 19, 9 Asp. Mar. L. Cas. 141, [1902] 1 K. B. 734, 71 L. J. Prob. N. S. 457, 50 Week. Rep. 440, 86 L. T. N. S. 462, 18 Times L. R. 479, 7 Com. Cas. 120, 9 Asp. Mar. L. Cas. 289; *Potter v. Ocean Ins. Co.* 3 Sumn. 27, Fed. Cas. No. 11,335; *Risley v. Insurance Co. of N. A.* 189 Fed. 529.

The owners of the cargo in any event 56 L. ed.

would have been entitled to contribution from one another.

Strang v. Scott, L. R. 14 App. Cas. 609, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427; *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.* 69 Fed. 414, 20 C. C. A. 349, 45 U. S. App. 1, 74 Fed. 567.

The owners of cargo would also be entitled, notwithstanding the fault of the shipowner, to demand a contribution from him, subject to the reciprocal right of the shipowner to receive contribution in respect of his losses and sacrifices from them.

The Strathdon, 94 Fed. 206, 41 C. C. A. 515, 101 Fed. 600.

The items of loss, sacrifice, and expense which were included in the adjustment are common subjects of general-average contribution.

Ralli v. Troop, 157 U. S. 386, 393, 39 L. ed. 742, 746, 15 Sup. Ct. Rep. 657; *The Bona* [1895] P. 125, 64 L. J. Prob. N. S. 62, 11 Reports, 707, 71 L. T. N. S. 870, 43 Week. Rep. 290, 7 Asp. Mar. L. Cas. 557, 14 Eng. Rul. Cas. 376; *McAndrews v. Thatcher*, 3 Wall. 348, 366, 18 L. ed. 155, 159; *The Star of Hope*, 9 Wall. 203, 19 L. ed. 638; *Lowndes, General Average*, 5th ed. 1912, § 37, p. 172.

Some force must be attributed to that part of the general-average clause which states that general average is "payable" according to York-Antwerp rules. The true effect of it appears to be to put general average on a contractual instead of an equitable basis, and to provide that contribution shall be payable in accordance with the rules as a legal right, unless the person asked to contribute can show that the claimant is debarred from such right by an actionable wrong on his own part which occasioned the sacrifice.

Stewart v. West India & P. S. S. Co. L. R. 8 Q. B. 95, affirmed in L. R. 8 Q. B. 363, 42 L. J. Q. B. N. S. 191, 28 L. T. N. S. 742, 21 Week. Rep. 953, 1 Asp. Mar. L. Cas. 528; *Harris v. Scaramanga*, L. R. 7 C. P. 488, 41 L. J. C. P. N. S. 170, 26 L. T. N. S. 797, 20 Week. Rep. 777, 1 Asp. Mar. L. Cas. 339; *Greenshields v. Stevens* [1908] 1 K. B. 51, 77 L. J. K. B. N. S. 124, 98 L. T. N. S. 89, 52 Sol. Jo. 727, 13 Com. Cas. 91, 10 Asp. Mar. L. Cas. 597, [1908] A. C. 431, 77 L. J. K. B. N. S. 985, 99 L. T. N. S. 597, 24 Times L. R. 880, 13 Ann. Cas. 245; *De Hart v. Compania Anonima de Seguros*, 8 Com. Cas. 42, [1903] 1 K. B. 109, 72 L. J. K. B. N. S. 64, 51 Week. Rep. 318, 87 L. T. N. S. 716, 19 Times L. R. 16, 9 Asp. Mar. L. Cas. 345, 8 Com. Cas. 314, [1903] 2 K.

B. 503, 72 L. J. K. B. N. S. 818, 52 Week. Rep. 36, 87 L. T. N. S. 154, 19 Times L. R. 642, 9 Asp. Mar. L. Cas. 454; The Santa Ana, 84 C. C. A. 312, 154 Fed. 800; Anglo-Argentine Live Stock & Produce Agency v. Temperley Shipping Co. [1899] 2 Q. B. 408, 68 L. J. Q. B. N. S. 900, 48 Week. Rep. 64, 81 L. T. N. S. 296, 15 Times L. R. 472, 4 Com. Cas. 281, 8 Asp. Mar. L. Cas. 595; The Rossija, 21 Revue Internationale du Droit Maritime, 215, 217.

It is implied in every contract for the carriage of goods from or to a port in the United States that the shipment is to be carried and delivered subject to the terms and provisions of the Harter act. This is the rule, even though the goods are carried under an express contract which makes no mention of the act.

The Silvia, 171 U. S. 462, 463, 465, 43 L. ed. 241-243, 19 Sup. Ct. Rep. 7.

It is also implied in every such contract that the parties will mutually contribute and pay their just share and proportion, in respect of their several interests, of any general-average loss that may arise or happen during the voyage.

Burton v. English, L. R. 12 Q. B. Div. 223, 53 L. J. Q. B. N. S. 133, 49 L. T. N. S. 768, 32 Week. Rep. 655, 5 Asp. Mar. L. Cas. 187, 24 Eng. Rul. Cas. 491; Ralli v. Troop, 157 U. S. 396, 397, 39 L. ed. 747, 748, 15 Sup. Ct. Rep. 657; Anderson v. Ocean S. S. Co. L. R. 10 App. Cas. 112, 54 L. J. Q. B. N. S. 192, 52 L. T. N. S. 441, 33 Week. Rep. 433, 5 Asp. Mar. L. Cas. 401, 14 Eng. Rul. Cas. 409.

The master, in an emergency arising from stranding, due to a sea peril for which the shipowner is not responsible, may jettison goods or the ship's materials.

Ralli v. Troop, 157 U. S. 386, 397, 39 L. ed. 742, 748, 15 Sup. Ct. Rep. 657; The Gratitude, 3 C. Rob. 240, 24 Eng. Rul. Cas. 277; Anglo-Argentine Live Stock & Produce Agency v. Temperley Shipping Co. [1899] 2 Q. B. 409, 68 L. J. Q. B. N. S. 900, 48 Week. Rep. 64, 81 L. T. N. S. 296, 15 Times L. R. 472, 4 Com. Cas. 281, 8 Asp. Mar. L. Cas. 595; Carver, Carriage by Sea, 5th ed. 1909, §§ 294, 295.

He [the master] has authority in an emergency to incur extraordinary expenses to promote the general safety of the associated interests, at the common expense of those interests.

McAndrews v. Thatcher, 3 Wall. 347, 366, 18 L. ed. 155, 159; The Star of Hope, 9 Wall. 203, 228, 19 L. ed. 638, 645.

Damage voluntarily done to the framework or appurtenances of the ship, or by the extraordinary use of the machinery,

is also the subject of contribution as a sacrifice.

Ralli v. Troop, 157 U. S. 393, 39 L. ed. 746, 15 Sup. Ct. Rep. 657; Birkley v. Presgrave, 1 East, 220, 6 Revised Rep. 256; The Bona [1895] P. 129, 64 L. J. Prob. N. S. 62, 11 Reports, 707, 71 L. T. N. S. 870, 43 Week. Rep. 290, 7 Asp. Mar. L. Cas. 557, 14 Eng. Rul. Cas. 376; Robinson v. Price, L. R. 2 Q. B. Div. 91; International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. 312; Watson v. Marine Ins. Co. 7 Johns. 62; Providence & S. S. S. Co. v. Phoenix Ins. Co. 89 N. Y. 559.

Since the shipowner was not legally responsible for the fault which produced the stranding, and was not legally bound to make the sacrifices, nor to incur the extraordinary expenditures, such sacrifices and expenditures were entirely voluntary, and were not made or incurred in pursuance of any duty. Therefore, as the shipowner was not legally responsible for the original disaster, and was not legally bound to make the sacrifices, nor to incur the extraordinary expenditures, it seems just and reasonable that the parties should be permitted to contract that such sacrifices and expenditures shall be the subject of general-average contribution.

Strang v. Scott, L. R. 14 App. Cas. 301, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427; Green-shields v. Stevens, [1908] 1 K. B. 51, 77 L. J. K. B. N. S. 124, 98 L. T. N. S. 89, 52 Sol. Jo. 727, 13 Com. Cas. 91, 10 Asp. Mar. L. Cas. 597; The Enrique, 5 Hughes, 275, 7 Fed. 490; The Bodo, 156 Fed. 980; The Santa Ana, 84 C. C. A. 312, 154 Fed. 801; De Hart v. Compania Anonima de Seguros, 8 Com. Cas. 42, [1903] 1 K. B. 109, 72 L. J. K. B. N. S. 64, 51 Week. Rep. 318, 87 L. T. N. S. 716, 19 Times L. R. 16, 9 Asp. Mar. L. Cas. 345, 8 Com. Cas. 317, [1903] 2 K. B. 503, 72 L. J. K. B. N. S. 818, 52 Week. Rep. 36, 87 L. T. N. S. 154, 19 Times L. R. 642, 9 Asp. Mar. L. Cas. 454; Stewart v. West India & P. S. S. Co. L. R. 8 Q. B. 88, affirmed in L. R. 8 Q. B. 362, 42 L. J. Q. B. N. S. 191, 28 L. T. N. S. 742, 21 Week. Rep. 953, 1 Asp. Mar. L. Cas. 528; Harris v. Scaramanga, L. R. 7 C. P. 481, 41 L. J. C. P. N. S. 170, 26 L. T. N. S. 797, 20 Week. Rep. 777, 1 Asp. Mar. L. Cas. 339.

The Harter act modifies the previously existing public policy.

The Irrawaddy (Flint v. Christall) 171 U. S. 187, 193, 43 L. ed. 130, 132, 18 Sup. Ct. Rep. 831.

The reason why the shipowner was required to bear his own sacrifices prior to the Harter act was that, if he had not

made them, and the property had been lost, he would have been responsible for the whole loss, subject only to his statutory limitation of liability.

Pacific Mail S. S. Co. v. New York, H. & R. Min. Co. 69 Fed. 414, 20 C. C. A. 349, 45 U. S. App. 1, 74 Fed. 564.

Though the Harter act, as construed in the *Irrawaddy*, does not deal with general average, and neither creates nor takes away any rights in that regard, it affects the law of general average indirectly by modifying the relations which previously existed between the shipper and the shipowner. It thus varies the position of the parties with regard to general-average claims.

The Mary Thomas [1894] P. 117, 63 L. J. Prob. N. S. 49, 6 Reports, 792, 71 L. T. N. S. 104, 7 Asp. Mar. L. Cas. 495.

Even if an incidental effect of the general-average clause would be to relieve the shipowner from a portion of a sacrifice that he might be willing, though not bound, to make, to avoid a total loss of all interests, as a consequence of nautical faults, this result would not make the clause equivalent to a stipulation exonerating him from faults for which he would otherwise be responsible to the goods, within the meaning of the rule that formerly declared such clauses void. A clause of which the main intent and purpose is not to relieve the carrier from negligence in the performance of his essential duties may be supported as reasonable and valid, even though its incidental or contingent effect may be to relieve him, in some measure, from the consequences of acts of servants for which, in its absence, he would be responsible.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Hohl v. Norddeutscher Lloyd*, 99 C. C. A. 166, 175 Fed. 544; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 36 C. C. A. 135, 94 Fed. 180, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. Rep. 278; *The Persiana*, 107 C. C. A. 416, 185 Fed. 396; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

Regulation of general average by agreement is permitted by the laws of a great majority of the leading maritime countries.

Simonds v. White, 2 Barn. & C. 805, 4 Dowl. & R. 375, 2 L. J. K. B. 159, 26 Revised Rep. 560, 14 Eng. Rul. Cas. 422; *De Hart v. Compañía Anonima de Seguros*, 8 Com. Cas. 314, [1903] 2 K. B. 503, 72 L. J. K. B. N. S. 818, 52 Week. Rep. 36, 87 L. T. N. S. 154, 19 Times L. R. 642, 9 Asp. Mar. L. Cas. 454; *Strang v. Scott*, 56 L. ed.

L. R. 14 App. Cas. 601, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427; Lowndes, *General Average*, 5th ed. pp. 422, 427, 463, 597, 602; *Crowley v. Saint Freres*, 10 Revue Internationale, 147; 5 Valroger, 10, 11; 4 Desjardins, *Droit Maritime*, pp. 121, 122; 2 Lyon-Caen & Renault, *Droit Maritime*, pp. 92, 93; *The Rossijsa*, Judgment of the Reichs-Gericht, 1905, 21 Revue Internationale, 215; *Navire Llansannor*, 22 Revue Internationale du Droit Maritime, 534; *The Irrawaddy* (Flint v. Christall) 171 U. S. 200, 201, 43 L. ed. 134, 135, 18 Sup. Ct. Rep. 831; *Compagnie v. De Giovanni*, 21 Revue Internationale du Droit Maritime, 689.

Reasons of sound policy and of convenience favor the enforcement of the contract.

Proceedings, International Law Asso. 21 Rep. Antwerp, 1903, p. 231; Carver, *Carriage by Sea*, 5th ed. p. 980; *The Star of Hope*, 9 Wall. 203, 230, 19 L. ed. 638, 645; Marwick v. Rogers, 163 Mass. 50, 47 Am. St. Rep. 436, 39 N. E. 780; *Johnson v. Chapman*, 19 C. B. N. S. 582, 35 L. J. C. P. N. S. 23, 15 L. T. N. S. 70, 14 Week. Rep. 264, 24 Eng. Rul. Cas. 414.

As the master has the right to choose what property shall be sacrificed, what would he be likely to cast overboard if he had reason to believe that sacrifices of the shipowner's property would not receive contribution? It would be only natural that he should jettison the cargo. And since the law imposes the duty on the master of making such choice, and it is presumed his choice was correctly made (*The Star of Hope*, 9 Wall. 203, 220, 231, 19 L. ed. 638, 642, 645; *Lawrence v. Minturn*, 17 How. 100, 109, 110, 15 L. ed. 58, 62), what chance would the cargo owner ordinarily have, as a practical matter, even in an action against the master, of showing that his action was improper?

The cargo owners have a right to contribution from the shipowner for sacrifices of cargo made subsequent to a negligent stranding, in order to save the joint interests from common peril.

Lowndes, *General Average*, 5th ed. p. 734.

The analogy of decisions under the fire statute, holding that contribution must be made by the shipowner to damage suffered by cargo by water taken into the ship to extinguish fire, should lead to this conclusion.

The Roanoke, 46 Fed. 297, 53 Fed. 270, affirmed in 8 C. C. A. 67, 18 U. S. App. 407, 59 Fed. 161; *The Rapid Transit*, 52 Fed. 320; *The Santa Ana*, 84 C. C. A.

312, 154 Fed. 800; *Ralli v. Troop*, 157 U. S. 386, 413, 414, 39 L. ed. 742, 753, 754, 15 Sup. Ct. Rep. 657; *Schmidt v. Royal Mail S. S. Co.* 45 L. J. Q. B. N. S. 646, 4 Asp. Mar. L. Cas. 217, note; *Whitecross Wire Co. v. Savill*, L. R. 8 Q. B. Div. 653, 151 L. J. Q. B. N. S. 426, 46 L. T. N. S. 643, 30 Week. Rep. 588, 4 Asp. Mar. L. Cas. 531; *Greenshields v. Stephens* [1908] 1 K. B. 51, 77 L. J. K. B. N. S. 124, 98 L. T. N. S. 89, 52 Sol. Jo. 727, 13 Com. Cas. 91, 10 Asp. Mar. L. Cas. 597, affirmed in [1908] A. C. 431, 77 L. J. K. B. N. S. 985, 99 L. T. N. S. 597, 24 Times L. R. 880, 13 Ann. Cas. 245.

This court, in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176, specifically allowed an underwriter, suing in the right of the cargo owner by subrogation, to recover from the shipowner a general-average contribution where the general average grew out of a stranding by negligence.

A general average in which the shipowner should be required to contribute to the sacrifices of the cargo, but in which the cargo should not contribute to the sacrifices of the shipowner, would be a contradiction in terms.

Lowndes, General Average, 5th ed. pp. 1, 42; *The Strathdon*, 94 Fed. 206; *Birkley v. Presgrave*, 1 East, 228, 6 Revised Rep. 256; *Svensden v. Wallace*, L. R. 13 Q. B. Div. 73, 24 Eng. Rul. Cas. 445; *Robinson v. Price*, L. R. 2 Q. B. Div. 91; *The Bona* [1895] P. 129, 64 L. J. Prob. N. S. 62, 11 Reports, 707, 71 L. T. N. S. 870, 43 Week. Rep. 290, 7 Asp. Mar. L. Cas. 557, 14 Eng. Rul. Cas. 376; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, 338, 10 L. ed. 186, 190; *McAndrews v. Thatcher*, 3 Wall. 347, 366, 18 L. ed. 155, 159; *The Star of Hope*, 9 Wall. 203, 228, 19 L. ed. 638, 645; *Sturges v. Cary*, 2 Curt. C. C. 59, Fed. Cas. No. 13,572, 2 Curt. C. C. 382, Fed. Cas. No. 13,573; *Potter v. Ocean Ins. Co.* 3 Sumn. 27, Fed. Cas. No. 11,335; *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 312; *Watson v. Marine Ins. Co.* 7 Johns. 62; *Providence & S. S. S. Co. v. Phoenix Ins. Co.* 89 N. Y. 559.

The only important exceptions to the doctrine of reciprocity of contribution that have been admitted in practice, in England, or in this country, relate to passengers' baggage and to deck loads; and these exceptions are not based on equitable principles.

Heye v. North German Lloyd, 33 Fed. 60, 2 L.R.A. 287, 36 Fed. 705; *Lowndes, General Average*, 5th ed. pp. 59, 71, 375, 745; *Arnould, Marine Ins.* 8th ed. p. 936; *Brown v. Cornwell*, 1 Root, 60; *Johnson*

v. Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. N. S. 23, 15 L. T. N. S. 70, 14 Week. Rep. 264, 24 Eng. Rul. Cas. 414; *Strang v. Scott*, L. R. 14 App. Cas. 609, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427; *Wright v. Marwood*, L. R. 8 Q. B. Div. 67, 50 L. J. Q. B. N. S. 643, 45 L. T. N. S. 297, 29 Week. Rep. 673, 4 Asp. Mar. L. Cas. 451.

Mr. Lawrence Kneeland argued the cause and filed a brief for Arbuckle et al.:

Whether this bill of lading clause is valid or invalid depends upon whether it is, in the language of this court in *Florida Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, "such as the law can recognize as reasonable, and not inconsistent with sound public policy."

No one can make a claim for general-average contribution if the danger to avert which the sacrifice was made has arisen from the fault of the claimant or of someone for whose acts the claimant has made himself, or is made by law, responsible to the co-contributors.

Gourlie, General Average, p. 15; *The Ontario*, 37 Fed. 220; *Snow v. Perkins*, 39 Fed. 334; *Schloss v. Heriot*, 14 C. B. N. S. 59, 32 L. J. C. P. N. S. 211, 10 Jur. N. S. 76, 8 L. T. N. S. 246, 11 Week. Rep. 596; *Phipps v. The Nicanor*, 44 Fed. 509; *Strang v. Scott*, L. R. 14 App. Cas. 601, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427.

While such limitation of the right to contribution was well established, the question arose as to the reasons therefor. One view was that the right to contribution was refused to avoid circuitry of action, and that it would be futile to permit the shipowner to recover a sum as contribution which would be immediately reclaimable by the cargo.

Schloss v. Heriot, 14 C. B. N. S. 59, 32 L. J. C. P. N. S. 211, 10 Jur. N. S. 76, 8 L. T. N. S. 246, 11 Week. Rep. 596.

A second view was that the fault or negligence which debars participation in the contribution must be a fault which gives the innocent interest a right of action for damages, either in tort or for breach of the contract to carry safely.

The Carron Park, L. R. 15 Prob. Div. 403, 59 L. J. Prob. N. S. 74, 63 L. T. N. S. 356, 29 Week. Rep. 191, 6 Asp. Mar. L. Cas. 543; *Milburn v. Jamaica Fruit Importing & Trading Co.* [1900] 2 Q. B. 540, 69 L. J. Q. B. N. S. 860, 83 L. T. N. S. 321, 16 Times L. R. 515, 5 Com. Cas. 346, 9 Asp. Mar. L. Cas. 122; *The Mary Thom-*

as [1894] P. 108, 63 L. J. Prob. N. S. 49, 6 Reports, 792, 71 L. T. N. S. 104, 7 Asp. Mar. L. Cas. 495.

A third view is that it would be unjust and inequitable to permit the person whose fault has occasioned the peril to recover indemnity for any part of his losses sustained in rescuing the endangered property, and that the allowance of such right would be unreasonable and not consistent with public policy, in that it would tend to relieve shipowners, to some extent, from care in the selection of the master and crew.

The Irrawaddy (Flint v. Christall) 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831.

This court has therefore declared that, prior to the enactment of the Harter act, sound public policy forbade the participation by a shipowner in a general-average contribution when the danger which necessitated the general-average sacrifices was occasioned by the negligence of the shipowner's servants, and that the act has not changed the law in that respect.

The conclusion so forcibly contended for by the shipowners in the court below, referred to in its opinion, clearly overlooks and disregards a manifest distinction between an agreement made by the cargo owner after learning of the disaster, and one inserted in a bill of lading.

Phipps v. The Nicanor, 44 Fed. 504; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 441, 32 L. ed. 792, 9 Sup. Ct. Rep. 469.

It is the duty of the master, when confronted by a situation of danger, to exert himself to the utmost in caring for and saving the property intrusted to his care, and this duty is just as imperative when his own fault, whether actionable or not, has occasioned the danger.

The Portsmouth, 9 Wall. 682-687, 19 L. ed. 754-756.

Neither exemptions in a bill of lading nor statutory exemptions from liability relieve a shipowner from contribution to general-average sacrifices of cargo.

Schmidt v. Royal Mail S. S. Co. 45 L. J. Q. B. N. S. 646, 4 Asp. Mar. L. Cas. 217, note; Crookes v. Allen, L. R. 5 Q. B. Div. 38, 49 L. J. Q. B. N. S. 201, 41 L. T. N. S. 800, 28 Week. Rep. 304, 4 Asp. Mar. L. Cas. 216; Burton v. English, L. R. 12 Q. B. Div. 218, 53 L. J. Q. B. N. S. 133, 49 L. T. N. S. 768, 32 Week. Rep. 655, 5 Asp. Mar. L. Cas. 187, 24 Eng. Rul. Cas. 491; The Roanoke, 8 C. C. A. 67, 18 U. S. App. 407, 59 Fed. 161.

Neither U. S. Rev. Stat. § 4282, U. S. Comp. Stat. 1901, p. 2943, nor clauses in the bill of lading, providing that the car-

rier should not be liable for loss or damage arising from fire or wetting, and that the carrier should have the benefit of any insurance on the property, released the carrier from liability to contribute towards general average.

The Santa Ana, 84 C. C. A. 312, 154 Fed. 800; The W. J. Quillan, 175 Fed. 207.

It is true that in none of the cases cited did the danger result from negligence; but can negligence of the carrier's servants affect his liability to contribute?

The Strathdon, 94 Fed. 208; Strang v. Scott, L. R. 14 App. Cas. 609, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427.

Although reciprocity is ordinarily the rule in general average, it is, as is said in Heye v. North German Lloyd, 33 Fed. 64, rather a circumstance in the usual application of general average, than an indispensable part of the principle upon which general average is founded.

The decision in The Strathdon, 94 Fed. 206, violates a fundamental principle of the law of general average; namely, that all losses shall be borne equally.

Lowndes, General Average, 4th ed. pp. 38, 39; Arnould, Marine Ins. 8th ed. § 974.

It treats the statute as blotting out the fault of the shipowner, and placing him in the position of an innocent party.

The Ettrick, L. R. 6 Prob. Div. 127, 45 L. T. N. S. 399, 4 Asp. Mar. L. Cas. 465; The Hector, L. R. 8 Prob. Div. 218, 52 L. J. Prob. N. S. 51, 37 Week. Rep. 491, 5 Asp. Mar. L. Cas. 1013.

The Strathdon decision fails to distinguish between damages caused directly by the negligent navigation and the general-average sacrifices of the cargo to avert further loss.

The Roanoke, 8 C. C. A. 67, 18 U. S. App. 407, 59 Fed. 164; Pacific Mail S. S. Co. v. New York, H. & R. Min. Co. 20 C. C. A. 349, 45 U. S. App. 1, 74 Fed. 568.

The shipowner in this case claims the right to set off a claim which this court has held invalid when asserted in an affirmative action.

22 Am. & Eng. Enc. Law, 267; Carver, Carriage by Sea, 4th ed. § 103f, note (k).

The confusion which has arisen upon this question is due to the failure to recognize that it is the law not only that no one can recover general-average contribution if the danger to avert which a sacrifice was made has arisen from the fault of the claimant or his servants, but that those who are innocent can recover contribution from the guilty; that this latter right exists notwithstanding and ir-

respective of the liability in damages of the negligent shipowner, and that it is only the shipowner's liability in damages which has been affected by the Harter act.

Lowndes, General Average, p. 34; Strang v. Scott, L. R. 14 App. Cas. 601, 59 L. J. P. C. N. S. 1, 61 L. T. N. S. 597, 38 Week. Rep. 452, 6 Asp. Mar. L. Cas. 419, 24 Eng. Rul. Cas. 427; Carver, Carriage by Sea, 5th ed. § 373a; Chrystal v. Flint, 82 Fed. 475.

The principle for which the cargo owners contend, namely, that the negligence of his servants bars any claim by the shipowner for contribution to his sacrifices, but leaves his liability to contribute to the sacrifices of others unaffected, is the same principle that has been applied for more than a hundred years to cases of jettison of deck cargo.

2 Parsons, Marine Ins. 217; 3 Kent, Com. 3d ed. p. 240; Phillips, Ins. § 1396; MacLachlan, Merchant Shipping, 5th ed. p. 766.

Whenever the safety of the property intrusted to the shipowner is menaced, or the voyage interrupted, whether such peril or interruption be occasioned by *vis major* or by fault, and whether such fault be or be not of such character as to fall within an exception in the contract of carriage, or within the 3d section of the Harter act, the master is, nevertheless, bound to exert every effort to save the property, and if he fail in this duty, his owners are liable to the cargo for the resulting loss. When the performance of this duty calls for the sacrifice of a part of the property to save the rest, the master is bound to make such sacrifice; and whether such sacrifice gives rise to the equitable right of contribution will depend upon whether all of the circumstances connected with the original disaster or interruption of the voyage, as well as those connected with the sacrificial act itself, are such as will justify a contribution.

Notara v. Henderson, L. R. 7 Q. B. 225, 41 L. J. Q. B. N. S. 158, 26 L. T. N. S. 442, 20 Week. Rep. 442, 1 Asp. Mar. L. Cas. 278; The Maggie Hammond, 9 Wall. 435-459, 19 L. ed. 772-781; The Niagara v. Cordes, 21 How. 7-28, 16 L. ed. 41-48; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804; The Shand, 10 Ben. 294, Fed. Cas. No. 12,702.

It has been said in many cases (Columbian Ins. Co. v. Ashby, 13 Pet. 338, 10 L. ed. 190; The Star of Hope, 9 Wall. 229, 19 L. ed. 645; Ralli v. Troop, 157 U. S. 394, 39 L. ed. 747, 15 Sup. Ct. Rep. 657) that to constitute a valid claim to general-average contribution there must be a voluntary sacrifice of a part for the

benefit of the whole; but the word "voluntary," as here used, does not signify that it is optional with the master to make a sacrifice when such sacrifice is the only means of saving the adventure.

Ralli v. Troop, 157 U. S. 393, 39 L. ed. 746, 15 Sup. Ct. Rep. 657.

It is the duty of the master to make that sacrifice which, in his honest judgment, will save the adventure with the smallest immediate loss. Having determined that, he has no option.

L'Amerique, 35 Fed. 845; The Julia Blake, 107 U. S. 428, 27 L. ed. 599, 2 Sup. Ct. Rep. 692.

Mr. Justice Pitney, after stating the case as above, delivered the opinion of the court:

That the facts present a case of general average within the meaning of the clause embodied in the bills of lading is entirely clear. There was a common, imminent peril *involving ship and cargo, followed by [49 a voluntary and extraordinary sacrifice of property (including extraordinary expenses), necessarily made to avert the peril, and a resulting common benefit to the adventure. McAndrews v. Thatcher, 3 Wall. 347, 365, 18 L. ed. 155, 159; The Star of Hope, 9 Wall. 203, 228, 19 L. ed. 638, 645; Ralli v. Troop, 157 U. S. 386, 394, 39 L. ed. 742, 747, 15 Sup. Ct. Rep. 657.

The principal controversy is upon the question of the validity of the agreement that if the shipowner "shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped, and supplied," then, in case of danger, damage, or disaster resulting from (*inter alia*) negligent navigation, the cargo owners shall not be exempted from liability for contribution in general average, but, with the shipowner, shall contribute as if such danger, damage, or disaster, had not resulted from negligent navigation. The facts show that the shipowner had fulfilled the condition imposed upon him by this clause; that is, he had "exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped, and supplied." The question presented for solution turns upon the effect of the 3d section of the act of Congress approved February 13, 1893, chap. 105, 27 Stat. at L. 445, U. S. Comp. Stat. 1901, p. 2946, known as the Harter act, and of the decision of this court in the case of The Irrawaddy (Flint v. Christall) 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831.

Prior to the Harter act it was established that a common carrier by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence

of the master or crew of the vessel. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (The Montana) 129 U. S. 398, 438, 32 L. ed. 788, 791, 9 Sup. Ct. Rep. 469; following *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627.

But of course the responsibilities of the carrier were subject to modification by law, and with respect to vessels transporting merchandise from or between ports of the United States and foreign ports, they were 50]substantially *modified by the Harter act. The first three sections of this enactment are pertinent to the present discussion, and are set forth in full in the margin.†

Section 1 deals with the shipowner's responsibility for the proper loading, stowage, custody, care, and delivery of the cargo, prohibits the insertion in any bill of lading of an agreement relieving him from responsibility for negligence in respect of these duties, and declares such agreements null and void. Section 2 prohibits the insertion in any bill of lading of an agreement lessening or avoiding the obligation of the shipowner to "exercise due diligence (to) properly equip, man, provision, and outfit said vessel and to make said vessel seaworthy." etc. Section 3 proceeds to limit the responsibility of a shipowner who shall have exercised due diligence to make his vessel seaworthy and properly manned, equipped, and supplied. Instead of merely sanctioning covenants and agreements limiting his lia-

bility, Congress went further *and ren-51 dered such agreements unnecessary by repealing the liability itself, declaring that if the shipowner should exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner or owners, etc., should be responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel, etc., etc. The antithesis is worth noting. Congress says to the shipowner: "In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other respects (provided you fulfil conditions specified) you shall be relieved from responsibility, even without a stipulation from the owners of cargo."

In the case now before us it is argued in behalf of the shipowner that since by the 3d section of the Harter act he is absolved from responsibility for the negligence *of his master and crew under the52 circumstances existing, there is nothing in the policy of the law to debar him from bargaining with the owners of cargo for a participation in the general average contribution. In behalf of the cargo owners it is insisted that the construction placed upon the legislation in question by this court in *The Irrawaddy*, supra, leaves the shipowner still disabled from making

†The title and first three sections of the Harter act are as follows:

"An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property.

"Be it enacted, etc., that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly

56 L. ed.

equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servant to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

an agreement with the cargo owners for a participation with them in general average contributions resulting from negligent navigation or management of the ship by its master and crew.

The latter view was adopted by the district court in *New York & C. Mail S. S. Co. v. Ansonia Clock Co.* 139 Fed. 894, where a clause identical with the one now under consideration was held invalid. This decision was apparently followed, although not cited, by the same court (162 Fed. 56), and by the circuit court of appeals (101 C. C. A. 628, 178 Fed. 414, 416), in the case now under review. In reaching this result the courts below have, as we think, misconceived the effect of the language used by Mr. Justice Shiras, speaking for this court, in *The Irrawaddy*, and have given to that decision an import quite beyond its legitimate scope. In that case there was no agreement between shipowner and cargo owner respecting general average, nor respecting the consequences of a stranding or other peril that might result from the negligence of the master or crew of the vessel. On familiar grounds, all of the expressions employed in the opinion are to be construed in the light of the facts of the case and the question actually presented for decision. This was, whether § 3 of the Harter act, *proprio vigore*, gave to the shipowner, under the circumstances, a right to general average contribution for sacrifices made by him subsequent to the stranding of the vessel, in successful efforts to save her and her freight and cargo. It was pointed out in the opinion that previous to that enactment, in the case of a loss arising from the ship's fault, the shipowner was excluded from contribution by way of general average, and was also legally responsible to the owner of the cargo for loss and damage so occasioned; and that it was against the policy of the law to allow stipulations that would relieve a carrier from such liability. It was, however, recognized that it was "competent for Congress to make a change in the standard of duty." It was remarked that by the 1st and 2d sections of the Harter act, shipowners were prohibited from inserting in their bills of lading agreements limiting their liability in other respects. The opinion, after stating that, as the law stood before the passage of the act, the shipowner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in officers and crew, and that in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who might so contract, proceeded to say

that "Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect, contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty."

This language is laid hold of as indicating that the decision proceeded upon the ground that Congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that Congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation.

*The point of the decision in *The Irrawaddy* (and as an authority the case goes no further) is, that while the Harter act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence.

It is, however, further insisted in behalf of the cargo owners that the agreement in question is contrary to public policy in another respect; namely, in that it attempts to relieve the shipowner from one of the essential duties arising out of the relation of carrier and shipper, and from which the Harter act has not relieved him. The argument is that although that act exempts him from the consequences of the negligent stranding, it leaves him still under the duty and obligation of caring for and preserving the cargo, after the stranding; that whenever the safety of the property intrusted to the shipowner is menaced, whether the peril be occasioned by *vis major* or by fault, and whether such fault be or be not of such character as to fall within the 3d section of the Harter act, "the master is nevertheless bound to exert every effort to save the property, and if he fail in his duty, his owners are liable to the cargo for the resulting loss." If by "every effort" is meant every *reasonable* effort, we see no occasion to question the soundness of the reasoning. But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacri-

lices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo.

The cases cited do not support the con- 55]tention of counsel *for the cargo owners in this behalf. The *Niagara v. Cordes*, 21 How. 7, 28, 16 L. ed. 41, 48, holds that although the vessel be stranded, "the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances." The *Maggie Hammond*, 9 Wall. 435, 458, 19 L. ed. 772, 780, holds that when the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, it is the duty of the master to transship the goods and send them forward, if another vessel can be had in the same or a contiguous port or within a reasonable distance, and that upon so doing he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. In *The Star of Hope*, 9 Wall. 203, 230, 19 L. ed. 638, 645, it is pointed out that the duty imposed upon the master, in case of a peril arising to the common adventure, is "to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder." The duty to make a sacrifice of such portion of the associated interests as, in the judgment of the master, will save the common adventure, is obviously inconsistent with the suggested duty to first sacrifice the owner's property for the safety of the cargo. The other cases cited upon this point require no mention.

In our opinion, so far as the Harter act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, 56]the *provision in question is valid, and entitles him to contribution under the circumstances stated.

The second question is whether, under the like circumstances, the cargo owners can recover contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo, and freight.

This question was dealt with in *The* 56 L. ed.

Strathdon, 94 Fed. 206, 41 C. C. A. 515, 101 Fed. 600; where, however, there seems to have been no general average clause such as we have in the case before us; and by the same courts in this case (162 Fed. 56, 101 C. C. A. 628, 178 Fed. 414), where the general average clause was dealt with as invalid, and therefore, of course, was given no influence in the determination of the present point. The circuit court of appeals expressed the view that if the cargo owner were allowed to obtain indirectly through a general average adjustment, compensation for losses attributable to the faulty navigation of the ship, and which therefore he could not recover directly, because of § 3 of the Harter act, the result would be a judicial repeal of that section, and that therefore the cargo owner could not bring the shipowner as a contributing interest into a general average adjustment that might result in a claim which the Harter act disallows. With this view we have no present concern, because it seems to us that the response we are to make to the second question certified must depend upon the construction of the agreement between the parties. Having already held that the general average clause contained in the bill of lading is valid as against the cargo owner, it follows *ex necessitate* that it is valid in his favor; indeed, no ground is suggested for disabling the shipowner from voluntarily subjecting himself or his ship to liability to respond to the cargo in an action or in a general average adjustment, for the consequences of the negligence of his master or crew, even *though, by the[57 Harter act, he is relieved from responsibility for such negligence. Therefore we have only to determine whether, by the language of the general average clause, the cargo owners are entitled to contribution from the ship for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety. The language is that in the circumstances presented, "the consignee or owners of the cargo shall not be exempted from liability for contributions in general average, or for any special charges incurred, but, with the shipowner, shall contribute in general average, and shall pay such special charges, as if such danger, damage, or disaster had not resulted from such default, negligence," etc. This language clearly imports an agreement that the shipowner shall contribute in general average. The opposite view would render the clause inconsistent with the principles of equity and reciprocity upon which the entire law of general average is founded.

The foregoing considerations compel a negative answer to the third question. In

view of the valid stipulations contained in the bill of lading, it would be a contradiction of terms to permit the cargo owners to recover contribution from the ship in respect of general average sacrifices of cargo, without on their part contributing to the general average sacrifices and expenditures of the shipowner, made for the same purpose. This would not be general average contribution, the essence of which is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested.

Our conclusion, accordingly, is that of the questions certified to us by the Circuit Court of Appeals, the first question should be answered in the affirmative, the second question should be answered in the affirmative, and the third question should be answered in the negative; and it is so ordered.

58] *RAMON VALDES, Appt.,
v.

CENTRAL ALTAGRACIA, Incorporated,
and Nevers & Callaghan. (No. 193.)

CENTRAL ALTAGRACIA, Incorporated,
Appt.,
v.

RAMON VALDES, George B. Ackerson and
James G. Callaghan, Copartners under
the Firm Name of Nevers & Callaghan.
(No. 196.)

(See S. C. Reporter's ed. 58-79.)

Appeal — reversible error — setting case for trial.

1. Forcing to trial a consolidated cause arising out of the financial difficulties of a corporation whose property is in the hands of a receiver, without affording the corporation the time to plead allowed by the equity rules, is not reversible error, where the proceedings leading up to the appointment of the receiver and the power given to administer the property were largely the result of the assent of the corporation, and where the steps taken by the court for the purpose of bringing the cause to a speedy conclusion and thus avoiding further loss were also acquiesced in by all the parties in interest, who complied with the terms of the order setting the cause for trial, and took advantage of the rights which it conferred, and where the corporation's objection was the result of a change of front because of the action of the court in refus-

ing a continuance based upon the absence of witnesses.

[For other cases, see Appeal and Error, VIII. 1, 2, in Digest Sup. Ct. 1908.]

Appeal — discretion — continuance.

2. Refusing to grant a continuance of a consolidated cause arising out of the financial difficulties of a corporation whose property is in the hands of a receiver, based upon an affidavit as to the absence of material witnesses, is not an abuse of discretion, where the matter had been pending for more than a year, and all the parties in interest had acquiesced in the steps taken by the court for the purpose of bringing the cause to a speedy conclusion and thus avoiding further loss, and had complied with the terms of the order setting the cause for trial, and taken advantage of the rights which it conferred.

[For other cases, see Appeal and Error, VIII. 1, 2, in Digest Sup. Ct. 1908.]

Evidence — to explain writing — conditional sale or pledge.

3. The real character of a contract between a corporation and a creditor in the form of a conditional sale from the latter to the former may be shown in a case in Porto Rico which presents not only a controversy between the parties to the contract, but its effect and operation upon the creditors of the corporation,—especially where such contract was never inscribed upon the public records so as to bind third persons.

[For other cases, see Evidence, VI. g, in Digest Sup. Ct. 1908.]

Fixtures — machinery — installation by tenant.

4. Machinery is placed in a plant by the owner within the meaning of Porto Rico Code, § 335, defining the conditions under which property, movable in its nature, becomes immobilized, where it is installed by a tenant under a stipulation in the lease that it shall become a part of the plant belonging to the owner, without compensation to the lessee.

[Matters as to fixtures, see Fixtures, in Digest Sup. Ct. 1908.]

Real property — recording law — transfer of lease.

5. A transfer of a lease of real property which, among other obligations imposed on the lessee, stipulates for the immobilization of machinery to be installed by the tenant, is a contract concerning real rights to immovable property, within the meaning of P. R. Civ. Code, § 613, relating to the registration of property.

[Records of title, see Real Property, II. in Digest Sup. Ct. 1908.]

Execution — priority over secured creditor — fixtures.

6. Judgment creditors of a corporation operating a sugar factory in Porto Rico

ty—see note to Muir v. Jones, 19 L.R.A. 441.

On lease as conveyance within meaning of recording statutes—see note to Eadie v. Chambers, 24 L.R.A. (N.S.) 879.

NOTE.—As to what constitutes fixtures between landlord and tenant—see note to Van Ness v. Pacard, 7 L. ed. U. S. 374. and Overman v. Sasser, 10, L.R.A. 722.

On the effect of an agreement to prevent fixtures from becoming part of real-

under lease, who were not parties to the lease, and had no legal notice of a condition therein by which machinery installed by the lessee was to become the lessor's property, acquired rights in such machinery by the levy of an execution thereon, which are superior to those of a secured creditor of the corporation who claims under the lease and expressly assumed its obligations, since, as to such judgment creditors, the machinery remained movable property, while as to him it was a part of the realty, which, as a result of his obligations under the lease he could not proceed separately against for the purpose of collecting his debt.

[Priorities under levy, see Execution, II. d, in Digest Sup. Ct. 1908.]

[Nos. 193 and 196.]

Submitted March 6, 1912. Decided May 27, 1912.

TWO APPEALS from the District Court of the United States for Porto Rico to review a decree in a consolidated cause arising out of the financial difficulties of a corporation, which fixes the rights and priorities of the various creditors of the corporation. Affirmed.

See same case below, 5 Porto Rico, Fed. Rep. 155.

The facts are stated in the opinion.

Messrs. **F. Kingsbury Curtis**, **Hugo Kohlmann**, and **Martin Travieso, Jr.**, submitted the cause for Valdes:

The conditional sale from Valdes to Central Altagracia, Incorporated, was clearly valid under the Porto Rican law, and, pursuant to it, Valdes was entitled to the possession and ownership of the properties as against the levy under the Nevers-Callaghan judgment.

Blanchart v. Redondo, 75 *Jurisprudencia Civil*, Tribunal Supremo de Justicia, p. 215; 8 *Manresa*, Commentaries on the Spanish Civil Code, p. 607; *Urrea v. Perez*, 80 *Jurisprudencia del Tribunal Supremo*, pp. 254, 258.

The general rule of law laid down by the United States Supreme Court as applicable in the absence of local statutes or decisions also sustains the validity of this conditional sale, both as between the parties and as against creditors of the vendee.

Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; *William W. Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; *Bryant v. Swofford Bros. Dry Goods Co.* 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *The Marina*, 19 Fed. 760; *Blackwell v. Walker*, 2 McCrary, 33, 5 56 L. ed.

Fed. 419; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Kohler v. Hayes*, 41 Cal. 455; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Deshon v. Bigelow*, 8 Gray, 159; *Hirschorn v. Canney*, 98 Mass. 149; *Sere v. McGovern*, 65 Cal. 244, 3 Pac. 859; *Herring v. Hoppock*, 15 N. Y. 409; *Ballard v. Burgett*, 40 N. Y. 314; *Cole v. Mann*, 62 N. Y. 1; *Bean v. Edge*, 84 N. Y. 510.

In the absence of any statute requiring registration, such contract of conditional sale is valid without being recorded.

Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 291, 53 L. ed. 997, 1002, 29 Sup. Ct. Rep. 614; *Journey v. Priestly*, 70 Miss. 584, 12 So. 799.

The transfer from Central Altagracia, Incorporated, to Valdes, and the conditional sale from the latter to the former, being clear on their face, and representing a transaction valid in every respect, no extraneous evidence of any intention to effect a transaction different from that represented by these instruments can be considered.

11 Am. & Eng. Enc. Law, 548; *Shankland v. Washington*, 5 Pet. 590, 8 L. ed. 166; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 231, 20 L. ed. 621; *Hancock v. Cossett*, 45 Fed. 754; *Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865; *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Perry v. Bigelow*, 128 Mass. 129; *Frost v. Brigham*, 139 Mass. 43, 29 N. E. 217; *McGuinness v. Shannon*, 154 Mass. 86, 27 N. E. 881.

Having availed itself of the provisions of the order of July 21st, 1909, by filing an answer and an amended bill of complaint, Central Altagracia cannot complain of the conditions upon which said order granted the permission to file such additional pleadings.

Smith v. Rathbun, 75 N. Y. 126; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 650; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 786; *Burkholder v. Farmers' Bank*, 23 Ky. L. Rep. 2449, 67 S. W. 832; *McClure v. Bigstaff*, 18 Ky. L. Rep. 601, 37 S. W. 294, 38 S. W. 431; *Burgin v. Giberson*, 23 N. J. Eq. 403; *Supreme Lodge, K. H. v. Davis*, 26 Colo. 252, 58 Pac. 595.

The continuance of the trial on account of the absence of the testimony of material witnesses has always been held to be in the discretion of the trial court.

Barrow v. Hill, 13 How. 54, 14 L. ed. 48; *Cox v. Hart*, 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Isaacs v. United States*, 159 U. S. 487, 40 L. ed.

229, 16 Sup. Ct. Rep. 51; *Texas & P. R. Co. v. Nelson*, 1 C. C. A. 688, 2 U. S. App. 213, 50 Fed. 814; *Drexel v. True*, 20 C. C. A. 265, 36 U. S. App. 611, 74 Fed. 12.

Central Altagracia, Incorporated, cannot complain of the decision below on the ground that it declared the transaction between it and Valdes an equitable mortgage in favor of Valdes, rather than a sale by it to Valdes, with a subsequent conditional sale from Valdes to the corporation, or on the ground that it ordered a sale of the property, instead of placing Valdes in possession thereof.

Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263, 25 Sup. Ct. Rep. 76; *Tayloe v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Patrick v. Isenhardt*, 20 Fed. 339; *London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 515, 126 Fed. 593.

Messrs. N. B. K. Pettingill and Frederick L. Cornwell submitted the cause for Central Altagracia:

Equity courts are not a law unto themselves, but are subject to the equity rules, which parties are entitled to depend upon and assert as the measure of their rights, and the substantial violation of which must lead to reversal of any decree so obtained.

Bank of United States, v. White, 8 Pet. 262, 269, 8 L. ed. 938, 941; *Story v. Livingston*, 13 Pet. 359, 368, 10 L. ed. 200, 204; *Betts v. Lewis*, 19 How. 72, 15 L. ed. 576; *Northwestern Mut. L. Ins. Co. v. Keith*, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374; *Ingle v. Jones*, 9 Wall. 486, 19 L. ed. 621; *Jewell v. State L. Ins. Co.* 99 C. C. A. 372, 176 Fed. 64.

The creation of an equitable lien seems to result from an express agreement of the parties or from a finding by the court that the party claiming such lien has proved that both he and the other party intended to create it; but here no one was making such a claim.

Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453.

It is, of course, elementary that decrees must bear a logical relation to the allegations and proofs.

Washington, A. & G. R. Co. v. Bradley (*Washington, A. & G. R. Co. v. Washington*) 10 Wall. 299, 19 L. ed. 894; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. ed. 566; *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Beach v. Atkinson*, 87 Ga. 288, 13 S. E. 591; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437; *Gille v. Emmons*, 58 Kan.

118, 62 Am. St. Rep. 609, 48 Pac. 569; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 801.

The lien of an equitable mortgage is confined to the property described in the contracts creating it.

Woodworth v. Blair, 112 U. S. 8, 28 L. ed. 615, 5 Sup. Ct. Rep. 6; *Maxwell v. Wilmington Dental Mfg. Co.* 77 Fed. 938; *Mallory v. Maryland Glass Co.* 131 Fed. 111.

This court has held that upon a bill filed to foreclose a legal mortgage, it being proved that the mortgage was defective in execution and could create only an equitable lien, relief could not be granted by amendment in that suit, but it must be dismissed and complainant allowed to begin anew in the proper way.

Koehler v. Black River Falls Iron Co. 2 Black, 715, 17 L. ed. 339.

Mr. Francis H. Dexter submitted the cause for Nevers & Callaghan.

Mr. Chief Justice White delivered the opinion of the court:

These cases were consolidated below, tried together, a like statement of facts was made applicable to both, and the court disposed of them in one opinion. We shall do likewise. Stating only things deemed to be essential as shown by the pleadings and documents annexed to them and the finding of facts made below, the case is this: Joaquin Sanchez owned in Porto Rico a tract of land of about 22 acres (cuerdas) on which was a sugar house containing a mill for crushing cane and an evaporating apparatus for manufacturing the juice of the cane into sugar. All of the machinery was antiquated and of a limited capacity. The establishment was known as the Central Altagracia, and Sanchez, while not a cane grower, carried on the business of a central,—that is, of acquiring cane grown by others and manufacturing it into sugar at his factory. On the 18th day of January, 1905, Sanchez leased his land and plant to Salvador Castello for a period of ten years. The lease gave to the tenant (Castello), the right to install in the plant "such machinery as he may deem convenient, which said machinery, at the end *of the years mentioned (the[60 term of the lease) shall become the exclusive property" of the lessor, Sanchez. The tenant was given one year in which to begin the work of repairing and improving the plant, and it was provided that "upon the expiration of this term, if the necessary improvements shall not have been begun by him (Castello), then this contract shall be null and void, and no cause of action shall accrue to any of the contracting parties by

reason thereof." Further agreeing on the subject of the improved machinery which was to be placed in the plant, the contract provided: "Upon the expiration of the term agreed on under this contract, any improvement or machinery installed in the said central shall remain for the benefit of Don Joaquin Sanchez, and Don Salvador Castello shall have no right to claim anything for the improvements made." The rental was thus provided for: "After each crop such profits as may be produced by the Central Altagracia shall be distributed and twenty-five per cent (25%) thereof shall be immediately paid to Don Joaquin Sanchez as equivalent for the rental of said central and of the twenty-two (22) cuerdas of land surrounding the same. The remaining seventy-five per cent (75%) shall belong to Don Salvador Castello, who may interest therein whomsoever he may wish, either for the whole or part thereof." It was stipulated, however, that in fixing the profits no charge should be made for repairs of the existing machinery or for new machinery put in, as the entire cost of these matters was to be borne by the lessee, Castello. The lease provided, moreover, that in case of the death of Sanchez the obligations of the contract should be binding on his heirs, and in the case of the death of Castello, his brother, Gerardo Castello, should take his place "and be a contracting party if he so desired. Otherwise the plantation, in such a condition as it may be at his death, shall immediately pass into the possession of its owner, Don Joaquin Sanchez." In June, 1905, "by a supplementary contract, the lease was extended without change of its terms and conditions for an additional period of ten years, making the total term twenty years. Although executed under private signature, this lease, conformably to the laws of Porto Rico, was produced before a notary and made authentic, and in such form was duly registered on the public records, as required by the Porto Rican laws.

On the 1st day of July, 1905, Salvador and Gerardo Castello transferred all their rights acquired under the lease, as above stated, to Frederick L. Cornwell for "the corporation to be organized under the name of Central Altagracia, of which he is the trustee." This transfer bound the corporation to all the obligations in favor of the original lessor, Sanchez, provided that the corporation should issue to Castello a certain number of paid-up shares of its capital stock and a further number of shares as the output of sugar from the plant increased as the result of its enlarged capacity consequent upon the improvement of the machinery by the corporation. The lease fur-

ther provided for the employment of Castello as superintendent at a salary, for a substitution of Gerardo Castello, in the event of the absence or death of his brother Salvador, and, for this reason, it is to be assumed Gerardo made himself a party to the transfer of the lease. This transfer of the lease to the corporation was never put upon the public records. The corporation was organized under the laws of the state of Maine, and under the transfer took charge of the plant. The season for grinding cane and the manufacture of sugar in Porto Rico usually commences "about the month of December of each year, and terminates in the months of May, June, or July of the year following, according to the amount of cane to be ground." Central factories in Porto Rico usually "make contracts with the people (colonos) growing cane, so that growers of cane will deliver the same to be ground, and such contracts* are usually made and entered into in the months of June, July, and August." In other words, on the termination of one grinding season, in the months of June or July, it is usual in the ensuing August to make new contracts for the cane to be delivered in the following grinding season, which, as we have said, commences in December. The contract transferring the lease to the Central Altagracia, Incorporated, was made in July, 1905, at the end, therefore, of the grinding season of that year. To what extent the corporation contracted for cane to be delivered to it for grinding during the season of 1905-06, which began in December, 1905, does not appear. It is inferable, however, that the corporation began the work of installing new machinery to give the plant a larger capacity within the year stipulated in the lease from Sanchez to Castello. We say this because it is certain that in the fall of 1906 (October) the corporation borrowed from the commercial firm of Nevers & Callaghan in New York city, the sum of twenty-five thousand dollars (\$25,000) to enable the corporation to pay for new and enlarged machinery which it had ordered, and which was placed in the factory in time to be used in the grinding season of 1906-07, which began in December, 1906. While such grinding season was progressing, on April 11, 1907, the corporation, through its president, under the authority of its board of directors, sold to one Ramon Valdes all its rights acquired under the lease transferred by Castello. This transfer expressly included all the machinery previously placed by the corporation in the sugar house, as well as machinery which might be thereafter installed during the term of redemption hereafter to be referred to, and which, it was declared, conformably

to the original lease, "shall be a part of said factory for the manufacture of sugar." The consideration for the sale was stated in the contract to be "thirty-five thousand dollars (\$35,000) received by the corporation, twenty-five thousand four hundred dollars 63] (\$25,400) *whereof had been paid prior to this act (of sale), and to its entire satisfaction, and the balance of nine thousand six hundred dollars (\$9,600) shall be turned over to the vendor corporation by Señor Valdes immediately upon being required to do so by the former." This sale was made subject to a right to redeem the property within a year on paying Valdes the entire amount of his debt. There was a stipulation that Valdes assumed all the obligations of the lease transferred by Castello to the company.

The undoubted purpose was not to interfere with the operation of the plant by the corporation, since there was a provision in the contract binding Valdes to lease the property to the corporation pending the period of redemption. This sale was passed in Porto Rico before a notary public, but was never put upon the public records. At the time it was made there was a very considerable sum unpaid on the debt of Nevers & Callaghan. This fact, joined with the period when the sale with the right to redeem was made, that is, the approaching end of the sugar-making season of 1906 and 1907, coupled with other facts to which we shall hereafter make reference, all tend to establish that at that time, either because insufficient capital had been put into the venture, or because the business had been carried on at a loss, the affairs of the corporation were embarrassed, if it was not insolvent. A short while before the commencement of the grinding season of 1907-1908, in October, 1907, in the city of New York, the corporation, through its president, declaring himself to be authorized by the board of directors, sanctioned by a vote of the stockholders, apparently made an absolute sale of all the rights of the corporation under the lease, and all its title to the machinery which the corporation had put into the plant. This sale was declared to be for a consideration of sixty-five thousand (\$65,000) dollars which the company acknowledged to have received from Valdes, first, 64] by the payment of the thirty-five thousand (\$35,000) dollars cash, as stated in the previous sale made subject to the equity of redemption, and thirty thousand (\$30,000) dollars which "the company has received afterwards in cash from Valdes." There was a provision in the contract to the effect that as the purpose of the previous contract of sale, which had been made subject to the equity of redemption,

was accomplished by the new sale, the previous sale was declared to be no longer operative.

A few days afterwards, likewise in the city of New York (on November 2, 1907), Valdes sold to the company all the rights which he had acquired from it by the previous sale, the price being sixty-five thousand (\$65,000) dollars, payable in instalments falling due in the years 1908, 1909, 1910, and 1911, respectively. This transfer was put in the form of a conditional sale which reserved the title in Valdes until the payment of the deferred price, and upon the stipulation that any default by the corporation entitled Valdes *ipso facto* to take possession of the property. Neither this act of sale from Valdes to the corporation nor the one made by the corporation to Valdes were ever put upon the public records.

Prior to the making of the sales just stated, or about that time, the corporation defaulted in the payment of a note held by Nevers & Callaghan for a portion of the money which they had loaned the corporation under the circumstances which we have previously stated, and that firm sued in the court below the corporation to recover the debt.

The grinding season of 1907-1908 commenced in December, 1907, and was obviously not a successful one, for the debt of Nevers & Callaghan was not paid, and in May, 1908, a judgment was recovered by them against the corporation for about \$17,000, with interest, and in the same month execution was issued and levied upon the machinery in the sugar house. Previous to, or not long subsequent to, the time Nevers & Callaghan *commenced their suit, the 65 precise date not being stated in the record, the heirs of Sanchez, the original lessor, brought a suit in the court below against the corporation. The nature of the suit and the relief sought is not disclosed, but it is inferable from the facts stated that the suit either sought to recover the property on the ground that there was no power in Castello to transfer the lease, or upon the ground of default in the conditions as to payment of profits as rental which the lease stipulated. It would seem also at about the same time either one or both of the Castellós brought a suit against the company, presumably upon the theory that there had been a default in the obligations assumed in their favor by the corporation at the time it took the transfer of the lease. In the meanwhile also, probably as the result of the want of success of the corporation, discord arose between its stockholders, and a suit growing out of that state of things was brought in the lower court.

This litigation was commenced in June, 1908, by the bringing by Valdes of an action at law in the court below to recover the plant on the ground that, by the default in paying one of the instalments of the price stated in the conditional sale, the right to the relief prayed had arisen. On the same day Valdes commenced a suit in equity against the corporation in aid of the suit at law. The bill alleged the default of the corporation, the bringing of the suit at law, the confusion in the affairs of the corporation, the judgment and levy of the execution by Nevers and Callaghan, and the threat to sell the machinery under such execution; the refusal of the corporation to deliver possession of the property, the waste and destruction of the value of the property which would result if there was no one representing the corporation having power to contract for cane to be delivered during the next grinding season, etc., etc. The prayer was for the appointment of a receiver to take charge [66] of the property, with authority *to carry on the same, make the necessary contracts for cane for the future, it being prayed that the receiver should be empowered to issue receiver's certificates to the extent necessary to the accomplishment of the purposes which the bill had in view.

On the same day a bill was filed on behalf of the corporation against Valdes. This bill attacked the sale made to Valdes and by him to the corporation. It was charged that the price stated to have been paid by Valdes as a consideration of the conditional sale was fictitious, and that the only sum he had advanced at that time was the \$35,000 which it was the purpose to secure by means of the sale with the equity of redemption. That at that time Valdes exacted as a consideration for his loan that he be made a director and vice president of the company. The bill then stated that, it having become evident in the following autumn that the corporation would require more money to increase its plant, to pay off the sum due Nevers & Callaghan, and for the operation of the plant, Valdes agreed to advance the money if he were made president of the company at a stipulated salary, given a bonus in the stock of the company, and upon the condition that the papers be executed embodying the so-called sale of the company to Valdes and the practically simultaneous conditional sale by Valdes to the company. The bill then alleged that Valdes, having thus become the president of the company, failed to carry out his agreement to advance the money, failed to provide for the debt of Nevers & Callaghan, mismanaged the affairs of the property in many alleged par-

ticulars, and did various acts to the prejudice of the company and to his own wrongful enrichment, which it is unnecessary to recapitulate. The necessity of contracting for cane during the contract season, in order that the plant might continue during the next operating season to be a going concern, and the waste and loss which would otherwise *be occasioned, were fully [67] alleged. Valdes and the firm of Nevers & Callaghan and the individual members of that firm were made defendants. The prayer was for the appointment of a receiver and with power to carry on the business of the central, with power, for that purpose, to contract for cane for the coming season, with authority to issue receiver's certificates for the purpose of borrowing the money which might be required.

The judge, being about to leave Porto Rico for a brief period, declined to appoint a permanent receiver, but named a temporary one to keep the property together until a further hearing could be had, interference in the meanwhile with the custodian being enjoined. Shortly thereafter creditors of the corporation intervened and joined in the prayer made by both of the complainants for the appointment of a receiver. In July the two suits were by order consolidated, and after a hearing a receiver was appointed and authority given him to continue the property as a going concern and to borrow a limited amount of money on receiver's certificates, if necessary, to secure contracts for cane for the coming crop season. The execution of the Nevers & Callaghan judgment was stayed pending an appeal which had been taken to this court. The only difference which seems to have arisen concerning the appointment of the receiver grew out of the fact that a prayer of the Central Altagracia, asking the court to appoint as receiver Mr. Pettingill, a member of the bar and one of the counsel of the corporation, and who was also its treasurer, was denied. Despite this, the fair inference is that the ultimate action of the court was not objected to by anyone, because of the hope that the result of a successful operation of the plant during the coming crop season might ameliorate the affairs of the corporation, and thus prevent further controversies. We say this, not only because of the conduct of the parties prior to the order appointing the receiver, but because, after that order, [68] the solicitors of the Altagracia Company and Valdes put a stipulation of record that until the following October no steps whatever should be taken in the proceedings, and not even then unless the attorneys for both parties should be in Porto Rico.

The hope of a beneficial result from the operation of the plant by the receiver proved delusive. As a result of such operation there was a considerable loss represented by outstanding receiver's certificates, with no means of paying except out of the property. Obviously, for this reason, the record contains a statement that on July 12, 1909, a conference was had between the court and all parties concerned, to determine what steps should be taken to meet the situation. It appears that at that conference the counsel representing the heirs of Sanchez and of Nevers & Callaghan stated their opposition to a continuance of the receivership.

On July 17, 1909, the court placed a memorandum on the files, indicating its purpose to bring the litigation, receivership, etc., to an end, and to cause "immediate issue to be raised on the pleadings for that purpose." This memorandum was entitled in all the pending causes concerning the property. It directed that demurrers which had been filed in the consolidated cause of Valdes against the corporation and of the corporation against Valdes be overruled, and the defendants were required to answer on or before Monday, July 26, in order that upon the following day, the 27th of July, the issues raised might be tried before the court without the intervention of a master. It was provided in the order, however, that nothing in this direction should prevent the parties from filing such additional pleadings as it is deemed necessary for the protection of their rights by way of cross bill or amendment, etc. To make the order efficacious it was declared that nothing would be done in the suit of the heirs of Sanchez against 69]Castello and the Altagracia, *which was pending on appeal, and that a demurrer filed to the suit of Castello against the central would be overruled; that the demurrer in the suit at law of Valdes would remain in abeyance to await the final action of the court on the trial of all the issues in the equity causes, and that a stay of the Nevers & Callaghan execution would be also disposed of when the equity cases came to be decided. This order was followed by a memorandum opinion filed on July the 21st, stating very fully the position of the respective suits, the necessity for action in order to preserve the property from waste, and reiterating the view that whatever might be the rights of the Central Altagracia or of Valdes under the lease, those rights would be subordinate to the ultimate determination of the suit brought by the heirs of Sanchez. To the action of the court, as above stated, no objection appears to have been made. On the contrary,

between the time of that order and the period fixed for the commencement of a hearing, the Central Altagracia, Valdes, and Nevers & Callaghan modified their pleadings to the extent deemed by them necessary to present for trial the issues upon which they relied. In the case of the Central Altagracia this was done by filing, on July 22, an amended bill of complaint in its suit against Valdes, and on July 26 its answer in the suit of Valdes. The acceptance by Valdes of the terms of the order was shown by an answer filed to the bill in the suit of the company and the cross bill in the same cause; and Nevers & Callaghan manifested their acquiescence by obtaining leave to make themselves parties, and asserting their rights by cross bill and answers, which it is unnecessary to detail.

When the consolidated cause was called for trial on the morning of July 27, the counsel for the Central Altagracia moved a continuance in order to take the testimony of certain witnesses in Philadelphia and New York for the purpose of proving some of the allegations of the complaint *as[70 to the wrongdoing of Valdes in administering the affairs of the corporation. This application was supported by the affidavit of Mr. Pettingill, the counsel of the corporation. The record states that the request for continuance was opposed by all the other counsel, and the application was denied. In doing so the court stated: "That the matter has been pending for more than a year, and that counsel had full notice of the court's intention to press the matters to issue and trial, and that it is not disposed to delay matters at this time, when the admissions of the pleadings are so broad that the proofs available here in Porto Rico are probably sufficient, and the amended complaint already on file in suit No. 565,—Valdes v. Central Altagracia,—and the answer thereto and the answer recently filed in suit No. 564,—Central Altagracia v. Valdes [5 Porto Rico Fed. Rep. 155],—as well as the cross bill also recently filed in suit No. 465, make so many allegations and admissions as that the real issue between the parties can be plainly seen, and that, in the opinion of the court, enough proof is available here in Porto Rico." The court thereupon declared that the Altagracia Company might by the next day, if it so desired, file exceptions to the answer in suit 565 and an answer to the cross complaint; indeed, that the corporation might, if it wished, treat them as filed, and proceed with the cause and file them at any convenient time thereafter. Thereupon the record states: "Said counsel for the Central Altagracia stated that he desired time to file exceptions to the answer

and an answer to the cross bill in suit No. 565; and the court granted until the morning of July 28 for such purpose. Later in the day of July 27, one of the counsel for Valdes having requested the court to postpone the hearing of the cause until the morning of the 29th, because of an unexpected professional engagement elsewhere, the request was communicated by the court to the other counsel in the cause." Thereupon the record again recites: "Messrs. Pettingill & *Cornwell, attorneys for the Central Altagracia, stated that they withdrew any statement they have hitherto made in the cause in that regard, and desired to be understood that they would not except to the answer in suit No. 565, or plead or answer to the cross bill therein, save and except within the time which they contended the rules governing this court of equity gave them, and would stand upon what they considered their rights in that regard." When the court assembled the next day, on the morning of the 28th, a statement concerning the occurrence of the previous day as to the continuance, etc., just reviewed, was read by the court in the presence of all the counsel, whereupon the record recites: "N. B. Pettingill, counsel for the Central Altagracia, in response to the same, stated that he objected to proceeding to take any evidence in any of the causes at that time, or the testimony of any witnesses, because the same was not at issue or in condition for the taking of evidence, and objected to the taking of such evidence until the issues of said causes are made up in accordance with the rules of practice applicable to equity causes." The record further recites: "Which objection was overruled by the court on the ground that the action called for thereby is not necessary. That the bill was amended within three days; an answer was immediately filed to it and a cross bill also filed, the said cross bill making only the same claims as were made in suit No. 563 at law, and that any way the issue could be tried on the bill and answer in both suits." . . . This ruling of the court having been excepted to, the trial proceeded from day to day, the counsel for the Central Altagracia taking no part in the same, and virtually treating the proceedings as though they did not concern that corporation.

In substance, the court decided: First, that as the result of the contracts between Valdes and the Central Altagracia, he was not the owner of the rights of that corporation under the lease, or of the machinery which *had been placed in the sugar house by the Altagracia Company, or of the other assets of the corporation, but that he was merely a secured creditor. The sum of 56 L. ed.

the secured debt was fixed after making allowances for some not very material credits which the corporation was held to be entitled to. Second, that the judgment in favor of Nevers & Callaghan was valid, and that that firm, by virtue of its execution and levy upon the machinery, had a prior right to Valdes. Third, the sums due to various creditors of the corporation were fixed and the equities or priorities were classified as follows: (a) Taxes due by the corporation and the sum of the receiver's certificates and certain costs; (b) the judgment of Nevers & Callaghan; and (c) the debt of Valdes; (d) debts due the other creditors. Without going into details it suffices to say that for the purpose of enforcing these conclusions the decree directed a sale of all the rights of the Central Altagracia in and to the lease, machinery, contract, etc., and imposed the duty upon Valdes, if he became the purchaser, to pay enough cash to discharge the costs, taxes, receiver's certificates, and the claim of Nevers & Callaghan.

These appeals were then prosecuted, the one by the Central Altagracia and the other by Valdes. We shall endeavor as briefly as may be to dispose of the contentions relied upon to secure a reversal.

1. The Central Altagracia appeal.—The alleged errors insisted on in behalf of that company relate to the asserted arbitrary action of the court in forcing the cause to trial without affording the time which it insisted the corporation was entitled to under the equity rules applicable to the subject; and, second, the refusal of the court to grant a continuance upon the affidavit as to the absence of material witnesses.

We think all the contentions on this subject are demonstrated to be devoid of merit by the statement of the case which we have made. In the first place, it is manifest *from that statement that the proceed-[73 ing leading up to the appointment of a receiver and the power given to administer the property was largely the result of the assent of the corporation. In the second place, when the unsuccessful financial issue of the receivership had become manifest, we think the statement makes it perfectly clear that the steps taken by the court for the purpose of bringing the case to a speedy conclusion, and thus avoiding the further loss which would result to all interests concerned, were also acquiesced in by all the parties in interest who complied with the terms of that order and took advantage of the rights which it conferred. We think also the statement makes it apparent that the refusal on the part of the corporation to proceed with the trial, upon the theory

that the time to plead allowed by the equity rules had not elapsed, was the result of a change of view because of the action of the court in refusing the continuance on account of the absent witnesses,—a change of front which was inconsistent with the rights which the corporation had exercised in accord with the order setting the cause for trial, and with the rights of all the other parties to the cause which had arisen from that order and from the virtual approval of it, or at least acquiescence in it, by all concerned.

Considering the assignments of error in so far as they relate alone to overruling of the application for continuance, based upon the absence of witnesses, it suffices to say that the elementary rule is that the granting of a continuance of the cause was peculiarly within the sound discretion of the court below,—a discretion not subject to be reviewed on appeal except in case of such clear error as to amount to a plain abuse springing from an arbitrary exercise of power. Instead of coming within this latter category, we think the facts as to the refusal to continue and the conduct of the parties make it clear that there was not only no abuse but a just exercise of discretion.

74] *2. As to the Appeal of Valdes.—Two propositions are relied upon: First, that error was committed in treating Valdes merely as a secured creditor, and in not holding him to be the absolute owner of the rights and property alleged to have been transferred by the so-called conditional sale. Second, that in any event error was committed in awarding to Nevers & Callaghan priority over Valdes.

The first proposition is supported by a reference to the Porto Rican Code and decisions of the Supreme Court of Spain and the opinions of Spanish law writers. But the contention is not relevant, and the authorities cited to sustain it are inapposite to the case to be here decided, because the argument rests upon an imaginary premise: that is, that the ruling of the court below denied the right under the Spanish law to make a conditional sale, or held that such a sale if made would not have the effect which the argument insists it was entitled to. This is true because the action of the court was solely based upon a premise of fact: *viz.*, that under the circumstances of the case, and in view of the prior sale with the equity of redemption, the cancelation of that sale, and the transfer made by the corporation to Valdes, and the immediate transfer of the same rights by him to the corporation in the form of a conditional sale, the failure to register any of the contracts, and the relation of Valdes

to the corporation at the time the contracts were made, it resulted that whatever might be the mere form, in substance and effect no conditional sale was made, but a mere contract was entered into which the parties intended to be a mere security to Valdes for money advanced and to be advanced by him. This being the case, it is manifest that it is wholly irrelevant to argue that error was committed in not applying the assumed principles of the Porto Rican and Spanish law governing in the case of a conditional sale, when the ruling which the court made proceeded upon the conclusion that there was no conditional sale.

*The contention that, under the Porto Rican law, the form was controlling because proof of the substance was not admissible, seems not to have been raised below, but, if it had been, is obviously without merit, as the case as presented involved not a controversy alone between the parties to the contract, but the effect and operation of the contract upon third parties, the creditors of the corporation. The contention is additionally without merit, since it assumes that the mere form of the contract excluded the power of creditors to inquire into its reality and substance, even although the contract was never inscribed upon the public records so as to bind third parties. That its character was such as to require inscription we shall in a few moments demonstrate in coming to consider the second proposition: that is, upon the hypothesis that Valdes was but a secured creditor, was error committed in subordinating his claim to the prior claim of Nevers & Callaghan under their judgment and execution?

To determine this question involves fixing the nature and character of the property from the point of view of the rights of Valdes, and its nature and character from the point of view of Nevers & Callaghan as a judgment creditor of the Altagracia Company, and the rights derived by them from the execution levied on the machinery placed by the corporation in the plant. Following the Code Napoleon, the Porto Rican Code treats as immovable (real) property, not only land and buildings, but also attributes immovability in some cases to property of a movable nature; that is, personal property, because of the destination to which it is applied. "Things," says § 334 of the Porto Rican Code, "may be immovable either by their own nature or by their destination, or the object to which they are applicable." Numerous illustrations are given in the 5th subdivision of article 335, which is as follows: "Machinery, vessels, instruments, or *implements[76 intended by the owner of the tenements for the industry or works that they may carry

on in any building or upon any land, and which tend directly to meet the needs of the said industry or works." See also Code Napoleon, articles 516, 518, *et seq.*, to and inclusive of article 534, recapitulating the things which, though in themselves movable, may be immobilized. So far as the subject-matter with which we are dealing,—machinery placed in the plant,—it is plain, both under the provisions of the Porto Rican law and of the Code Napoleon, that machinery which is movable in its nature only becomes immobilized when placed in a plant by the owner of the property or plant. Such result would not be accomplished, therefore, by the placing of machinery in a plant by a tenant or a usufructuary or any person having only a temporary right. Demolombe, Tit. 9, No. 203; Aubry et Rau, Tit. 2, p. 12, § 164; Laurent, Tit. 5, No. 447; and decisions quoted in Fuzier-Herman ed. Code Napoleon, under article 522 *et seq.* The distinction rests, as pointed out by Demolombe, upon the fact that one only having a temporary right to the possession or enjoyment of property is not presumed by the law to have applied movable property belonging to him so as to deprive him of it by causing it, by an act of immobilization, to become the property of another. It follows that, abstractly speaking, the machinery put by the Altagracia Company in the plant belonging to Sanchez did not lose its character of movable property and become immovable by destination. But, in the concrete, immobilization took place because of the express provisions of the lease under which the Altagracia held, since the lease in substance required the putting in of improved machinery, deprived the tenant of any right to charge against the lessor the cost of such machinery, and it was expressly stipulated that the machinery so put in should become a part of the plant belonging to the owner without compensation of the lessee. *Under such conditions the tenant, in putting in the machinery, was acting but as the agent of the owner, in compliance with the obligations resting upon him, and the immobilization of the machinery which resulted arose in legal effect from the act of the owner in giving by contract a permanent destination to the machinery. It is true, says Aubry and Rau, vol. 2, § 164, ¶ 2, p. 12, that "the immobilization with which the article is concerned can only arise from an act of the owner himself or his representative. Hence the objects which are dedicated to the use of a piece of land or a building by a lessee cannot be considered as having become immovable by destination except in the case where they have been applied for account of

the proprietor, or in execution of an obligation imposed by the lease." It follows that the machinery placed by the corporation in the plant, by the fact of its being so placed, lost its character as a movable, and became united with and a part of the plant as an immovable by destination. It also follows that as to Valdes, who claimed under the lease, and who had expressly assumed the obligations of the lease, the machinery, for all the purposes of the exercise of his rights, was but a part of the real estate,—a conclusion which cannot be avoided without saying that Valdes could at one and the same time assert the existence in himself of rights, and yet repudiate the obligations resulting from the rights thus asserted.

Nevers & Callaghan were creditors of the corporation. They were not parties to nor had they legal notice of the lease and its conditions from which alone it arose that machinery put in the premises by the Altagracia became immovable property. The want of notice arose from the failure to record the transfer from Castello to the Altagracia, or from the Altagracia to Valdes, and from Valdes apparently conditionally back to the corporation,—a clear result of § 613 of the Civil Code of Porto Rico, providing, "The titles of ownership or of other real rights relating *to immovables[78 which are not properly inscribed or annotated in the registry of property shall not be prejudicial to third parties." It is not disputable that the duty to inscribe the lease by necessary implication resulted from the general provisions of article 2 of the mortgage law of Porto Rico, as stated in paragraphs 1, 2, and 3 thereof, and explicitly also arose from the express requirement of paragraph 6, relating to the registry of "contracts for the lease of real property for a period exceeding six years. . . ." It is true that, in a strict sense, the contracts between Castello and the Altagracia Company and with Valdes were not contracts of lease, but for the transfer of a contract of that character. But such a transfer was clearly a contract concerning real rights to immovable property within the purview of article 613 of the Civil Code, just previously quoted. Especially is this the case in view of the stipulations of the lease as to the immobilization of movable property placed in the plant, and the other obligations imposed upon the lessee. "The sale which a lessee makes to a third person to whom he transfers his right of lease is the sale of an immovable right, and not simply a sale of a movable one." See numerous decisions of the courts of France, beginning with the decision on February 2, 1842, of the court of cassation (*Journal du Palais*

[1842] vol. 1, 171). See also numerous authorities collected under the heading above stated in paragraph 21, under articles 516, 517, and 518 of the Code Napoleon. Fuzier-Herman ed. of that Code, p. 643.

The machinery levied upon by Nevers & Callaghan, that is, that which was placed in the plant by the Altagracia Company, being, as regards Nevers & Callaghan, movable property, it follows that they had the right to levy on it under the execution upon the judgment in their favor, and the exercise of that right did not in a legal sense conflict with the claim of Valdes, since as to him the property was a part of the real-
79]ty, which, as the result *of his obligations under the lease, he could not, for the purpose of collecting his debt, proceed separately against.

As a matter of precaution we say that nothing we have said affects the rights, whatever they may be, of the heirs of Sanchez, the original lessor.

Affirmed.

CHARLES A. CHASE, Appt.,

v.

EMIL WETZLAR, Surviving Executor of the Estate of Gustave J. Wetzlar, Deceased.

(See S. C. Reporter's ed. 79-89.)

Appeal — from circuit court — jurisdiction.

1. The dismissal of a bill filed against nonresident aliens in a Federal circuit court because complainant offered no proof to establish the fact that the property sought to be affected was within the district, as contemplated by the act of March 3, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513), § 8, which authorizes the exertion of jurisdiction as to the property of absent defendants, the bill's averment in this regard having been traversed by plea, involves a question as to the power of the court as a Federal court, reviewable by direct appeal to the Supreme Court.

[For other cases, see Appeal and Error, 895-902, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — averment of jurisdictional facts.

2. Complainant invoking the jurisdiction of a Federal circuit court of a suit against nonresident aliens, under the act of March 3, 1875, § 8, which authorizes the exercise of jurisdiction as to property of absent defendants, is charged with the burden of proving the jurisdictional fact that the

property sought to be affected is within the jurisdiction, where the averments of the bill in this respect are traversed by plea.

[For other cases, see Evidence, II.b, in Digest Sup. Ct. 1908.]

Federal courts — territorial jurisdiction — nonresident defendants in local suit — constructive presence.

3. A Federal circuit court sitting in New York cannot take jurisdiction of a suit against nonresident aliens to establish an equitable title to certain bonds held by them as executors, on the theory that such bonds were within the district, within the meaning of the act of March 3, 1875, § 8, which authorizes the exertion of jurisdiction as to property of absent defendants, because that state, by virtue of the probate therein of the testator's will and the appointment there of defendants as executors, may have the power to treat both them and the estate as constructively present and subject to its jurisdiction.

[For other cases, see Courts, 956-959, in Digest Sup. Ct. 1908.]

[No. 1045.]

Submitted April 22, 1912. Decided May 27, 1912.

A PPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, a bill filed against nonresident aliens to establish title to personal property held by them as executors. Affirmed.

The facts are stated in the opinion.

Mr. Charles H. Burr submitted the cause for appellant. Mr. Frederick W. Frost was on the brief:

The bill was filed in accordance with the decisions in *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92; and *Waterman v. Canal-Louisiana Bank & T. Co.* 215 U. S. 33, 54 L. ed. 80, 30 Sup. Ct. Rep. 10; which hold that in a suit between citizens of different states, or in a suit to which an alien is a party, the right and title to a legacy may be determined in the Federal court of the district where administration of the estate is had, and that the decree of the court operates to establish the right, which must be thereafter recognized and enforced in the appropriate surrogate proceedings in the state court.

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 40 L. ed. U. S. 741; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333; and *B. Atiman & Co. v. United States*, ante, 894.

On jurisdiction of Federal courts to enforce or remove liens or encumbrances on property of parties not inhabitants of nor found in district of suit—see note to *Jones v. Gould*, 80 C. C. A. 7.

It is not a question of fact to be determined in any case where it is sought to sue an executor, whether or not he has the personal assets of the estate physically within the state of his appointment. The practice is quite otherwise. The executor cannot even be sued where he is found outside of the state of his appointment. He must be sued in that state.

Story, Conf. L. § 513; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639.

The assets of a decedent's estate must be regarded in the eye of the law as in the possession of the court appointing the executor. His possession is the possession of the court, as the possession by a receiver is the possession of the court. He is the officer of the court, and subject to its jurisdiction.

Williams v. Benedict, 8 How. 107, 12 L. ed. 1007; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536.

This action is not an action *in personam*. It is not an action strictly *in rem*. It is an action quasi *in rem*.

Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

The question is not one for a strict construction of the statute. It is a remedial statute, to be liberally construed.

IBBS v. ARCHER, 107 C. C. A. 141, 185 Fed. 37.

The plea to the jurisdiction was not established by any evidence, and the issue should therefore have been resolved in favor of complainant.

SHEPPARD v. GRAVES, 14 How. 505, 14 L. ed. 518; De Sobry v. Nicholson, 3 Wall. 420, 18 L. ed. 263; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241.

Inasmuch as issue has been joined, the decree to be entered should be a final decree in favor of the complainant.

Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075; Lilienthal v. Washburn, 4 Woods, 65, 8 Fed. 707; Earll v. Metropolitan Street R. Co. 87 Fed. 528; Eagle Oil Co. v. Vacuum Oil Co. 89 C. C. A. 463, 162 Fed. 671.

Mr. Howard S. Gans submitted the cause for appellee Messrs. Paul M. Herzog and Julius Wallerstein were on the brief:

The appeal should be dismissed because the jurisdiction of the court below was never in question within the meaning of the act of March 3d, 1891, under which this appeal is taken.

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; 56 L. ed.

Baehre v. Hunt, 193 U. S. 523, 525, 48 L. ed. 774, 775, 24 Sup. Ct. Rep. 547; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185.

The circuit court had control neither of the person of the defendant nor of the property sought to be affected.

Freeman v. Alderson, 119 U. S. 185, 188, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 419; Ward v. Boyce, 152 N. Y. 191, 36 L.R.A. 549, 46 N. E. 180; United States v. Southern P. R. Co. 49 Fed. 300; Nashua & L. R. Corp. v. Lowell & L. R. Corp. 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; Oregon R. & Nav. Co. v. Shell, 143 Fed. 1005; Klenk v. Byrne, 143 Fed. 1009.

This proceeding being in the nature of a proceeding *in rem*, the situs of the property is where it is actually located.

Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165; 1 Parmele's Wharton, Conf. L. 3d ed. § 368 B.

The plea being a negative one, the burden of proof as to the issue raised by the replication was upon the complainant.

Street, Fed. Eq. Pr. § 896; Vacuum Oil Co. v. Eagle Oil Co. 154 Fed. 867, affirmed in 89 C. C. A. 463, 162 Fed. 671; Oregon R. & Nav. Co. v. Shell, 143 Fed. 1004; Gibson, Suit in Ch. 2d ed. §§ 323, 837, 838.

The plea having been previously adjudged sufficient in point of law, and because of the failure of the complainant to offer proof, correctly decreed true in point of fact, nothing remained for the court to do but to dismiss the bill.

Street, Fed. Eq. Pr. § 904; Eveleth v. Southern California R. Co. 123 Fed. 836.

Mr. Chief Justice White delivered the opinion of the court:

Suing as a citizen of Pennsylvania, Chase, who was complainant below, made defendants to the bill by which this cause was commenced Emil Wetzlar and William P. Bonn, alleged to be "alien subjects of the Emperor of Germany, residing in Frankfurt-on-the-Main, executors of the estate of Gustave J. Wetzlar, deceased." It was averred that the testator, a naturalized citizen of the United States and a resident of the city of New York, died in 1898; that his will was probated on February 1, 1899, in the surrogate's court of the county of New York, and that letters testamentary were duly issued to the defendants. It was further averred that, by virtue of the fourth paragraph of the will, Julius G.

Wetzlar, a son of the testator, was entitled, on reaching the age of twenty-five years, to receive a sixth part of the principal of the residuary estate; that such share was invested by the defendants, as executors, in railroad bonds, and they "held the said bonds in the city of New York, as executors, subject to the jurisdiction of your honorable court" (the circuit court). It was further averred that Julius G. Wetzlar 81]*reached the age of twenty-five years on August 23, 1908, at which time the one-sixth part of the entire residuary estate exceeded in value the sum of \$100,000; and that about three years theretofore Julius had mortgaged an undivided one-third interest of such share, to secure the payment of a promissory note for \$5,000, bearing interest. On default in payment, it was alleged, the interest so mortgaged was sold in February, 1909, at public auction, for the sum of \$3,000; and Chase, claiming through the purchaser at the sale, became vested on June 20, 1910, with and entitled to the immediate possession of the said one third of one sixth of such residuary estate. The defendants, as executors, it was charged, neglected and refused to pay to Chase the share of the estate in question. A copy of the will was attached to the bill as a part thereof. In the will the defendants were stated to be residents of the German Empire, and express power was conferred upon them to remove the trust estate at any time from the state of New York. The specific relief asked was that complainant might be declared entitled to the immediate possession of one third of one sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, "and may pay your orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him." There was also a prayer for general relief.

To obtain an order for service outside of the district, an affidavit was made in which it was averred that the bill had been filed to determine disputed claims to a fund which the defendants, as executors and trustees, held within the jurisdiction of the court, and that defendants were alien subjects of the Emperor of Germany, and resided within that Empire, and that neither was within the district, and neither had voluntarily appeared in the action. 82]*The court, reciting that it appeared "both by the averments contained in the bill . . . and by the affidavit of . . . complainant . . . that the suit was commenced to enforce equitable liens upon, or claims to the title of, personal property

within this district, and that all of the defendants are not inhabitants thereof," entered an order on October 25, 1910, requiring the defendants, on or before a date named, to appear, plead, answer, or demur to the bill, and that on or before a named date a certified copy of the order and of the bill should be served upon them wherever found. Presumably in consequence of such service having been made upon him at his residence in Germany, Emil Wetzlar, one of the defendants, appearing specially for the sole purpose of challenging the jurisdiction of the court, filed a plea verified by his attorney, and moved the dismissal of the cause upon the ground "that no portion of the property of the estate of Gustave J. Wetzlar, and no portion of the trust fund of said estate referred to in the bill herein, is now or has been, for at least five years prior hereto, within the city, county, or state of New York, nor within the southern district of New York, nor within the United States, but is and has been in Germany, in the possession and control of the said Emil Wetzlar, there residing." Argument was heard before Circuit Judge Lacombe upon the sufficiency of the plea. It was held to be "sufficient in law and form." and complainant was allowed to file a general replication thereto.

No proceeding for the examination of witnesses out of court having been taken by either party within thirty days after replication, the complainant set the cause down for hearing upon the pleadings, as authorized by court rule 109. The case was heard before Hazel, District Judge. The previous ruling of Judge Lacombe was followed. It was held that the plea was but a negative one, and that the burden was on the complainant to establish the existence *of the essential jurisdictional facts[83 which the plea traversed, and that, as no proof had been offered by the complainant, there was an absence of jurisdiction, and the bill was dismissed. This direct appeal was then taken, the assignments of error being as follows:

"First. That the court erred in sustaining the sufficiency of the plea to the bill in the above-entitled cause.

"Second. The court erred in dismissing the bill after hearing upon bill, plea, and replication.

"Third. The court erred in refusing to maintain jurisdiction of the above-entitled cause.

"Fourth. The court erred in dismissing the bill in the above-entitled cause for lack of jurisdiction."

The court also filed a certificate to the effect that the bill had been dismissed for

want of jurisdiction, and that an appeal was allowed solely to review such question.

At the threshold it is insisted that there is a want of authority to entertain this direct appeal because the bill was dismissed for lack of proof, and not because of the want of power of the circuit court as a Federal court. The contention is without merit. *United States v. Congress Constr. Co.* 222 U. S. 199, ante, 163, 32 Sup. Ct. Rep. 44. As the defendants were without the territorial jurisdiction of the circuit court, its authority was dependent upon the property sought to be affected being within the district, as contemplated by § 8 of the act of March 3, 1875, chap. 137, 18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 513, which authorizes the exertion of jurisdiction as to property of absent defendants. The ruling clearly, therefore, concerned the power of the court as a Federal court—that is, under the statute—to entertain the case under the circumstances presented.

As, in order to dispose of the merits, it becomes essential to fix the meaning of § 8 of the act of 1875 above referred to, the section is excerpted in the margin.†

84] *All the errors pressed upon our attention will be disposed of by considering two questions,—the correctness of the ruling of the court below as to the burden of proof, and whether, under the hypothesis that the court correctly held that the burden was on the complainant, *nevertheless error was committed in dismissing the

bill, in view of the averments therein contained and the admissions made by the plea.

First. As to the burden of proof.

On this subject the contention is that although the averment of the bill that the property sought to be affected was within the district was traversed by the plea, nevertheless the defendant was bound to prove the allegations of his plea, and hence it was error, in the absence of proof, to dismiss the bill on the assumption that the burden was on the complainant to prove that the case was within the jurisdiction of the court. The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard v. Graves* (1852) 14 How. 505, 14 L. ed. 518; *De Sobry v. Nicholson* (1865) 3 Wall. 420, 18 L. ed. 263; *Wetmore v. Rymer* (1898) 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293, and *Hunt v. New York Cotton Exch.* (1907) 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529. And a decision of the circuit court of appeals for the eighth circuit in *Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 241, is also referred to as containing a full summary of the decided cases on the subject. None of the cases relied upon, however, involved a question of jurisdiction under § 8 of the act of 1875. On the contrary, they all concerned merely the sufficiency or verity of allegations as to the citizenship of parties

†Section 8 of act March 3, 1875, chap. 137, 18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 513.

Sec. 8. That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever, found, and also upon the person or persons in possession or charge of said property, if any there be: or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service of publication of

said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state: Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

or the value of the matter in dispute. The cases rested, therefore, upon the proposition that averments concerning such matters were *prima facie* to be taken as true, and hence the burden of proof was cast upon the one assailing the sufficiency or want of verity of such averments. We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875, requiring a Federal court of its own [86] motion to dismiss a pending suit *when it is found not to be really within its jurisdiction,—see *Roberts v. Lewis*, 144 U. S. 653, 36 L. ed. 579, 12 Sup. Ct. Rep. 781, and the cases cited in the dissenting opinion in *Hill v. Walker*, *supra*,—because we think, in any view, the doctrine is here inapplicable. We say this because, while questions concerning the sufficiency or verity of averments as to citizenship or amount in dispute assail the jurisdiction of the court, they do not address themselves to the want of all foundation for judicial action because of an entire absence of elements which are essential to the existence of any jurisdiction whatever,—that is, the presence of persons or property within the jurisdiction of the court, over which its authority may be exerted. The character of the questions involved in the cases relied on, and the nature of the rule as to *prima facie* presumption as to the adequacy of averments concerning such subjects, and the resultant burden of proof, is at once demonstrated by the well-settled rule that questions of that character do not go to the power of the court to make a binding decree. *Butler v. Huston*, 158 U. S. 423, 430, 39 L. ed. 1040, 1042, 15 Sup. Ct. Rep. 868; *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* 198 U. S. 188, 198, 49 L. ed. 1008, 1016, 25 Sup. Ct. Rep. 629.

On the other hand, in a case like the one at bar, the existence of the property within the jurisdiction is essentially necessary to the exertion of the power of the court to render a binding decree. The statute does not leave this to implication, since it expressly provides that the decree to be rendered shall be limited to the property within the jurisdiction which therefore forms the sole basis of the power to judicially act. The prerequisite and absolute limitation on power which arises from these considerations is aptly illustrated by the rule enunciated in *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897, and *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and the numerous cases which have enforced the doctrine there laid down. And this

wide distinction, in the very nature of things, precludes the possibility of the application here of the *prima facie* presumption *upon which the cases relied upon [87] proceeded, and therefore also demonstrates the inapplicability of the theory of burden of proof, applied in those cases. In other words, even putting aside, for the sake of argument, the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things, rested upon the complainant.

Second. Even although the court rightly applied the burden of proof, did it nevertheless err in dismissing the bill?

The insistence on this subject is in substance this: That as the plea admitted the probate of the will, the appointment of the executors in New York, and the purchase and possession of the bonds, even although there was no proof that the bonds were actually within the district, the pleadings were adequate to show property within the district, even under the requirements of § 8 of the act of 1875. Asserting that what was sought was a decree establishing “the title” of the complainant to property within the district, counsel argue as follows:

“This narrows the question down to what is meant by property within the district; and it is submitted that for all purposes connected with the administration of an estate, at least that portion of the personal property which was received by the executor within the district is, within the meaning of the law, within that district. . . . The decree sought is only a determination of the rights of complainant against the estate of Gustave J. Wetzlar, deceased. This estate is, in the eye of the law, within the county of New York, where any and all suits pertaining to the distribution of the estate, and to accounting therefor, must be brought. Respondent cannot, certainly by setting up an absolutely illegal act (removing the property to Germany), be heard to deny that, within the *contemplation [88] of law, the estate is, for the purposes of distribution, within the county of New York. . . . The proceeding in this case is a proceeding to enforce an equitable lien upon personal property which is, within the intendment of the law, *in gremio legis* within this district, and therefore within the jurisdiction of the United States circuit court for the southern district of New York.”

It requires no close analysis to sustain the interpretation given by the court below to the statute, *viz.*, that it exclusively deals

with property which is within the district where a suit is brought, and which property is therefore capable of being made subject to the dominion and resulting control of the court. No other interpretation is in reason possible in view of the terms of the section, causing its provisions to come into play only when there is "real or personal property within the district where such suit is brought." The meaning is additionally illustrated by the requirement that the service of the order to appear, etc., must be made not only upon the absent defendant or defendants "wherever found," but also "upon the person or persons in possession or charge of said property;" that is, the property within the district and within the dominion of the court, which is made the essential foundation for the jurisdiction to be exercised over the property in a case where the court cannot acquire personal jurisdiction because of the absence of the defendant. The meaning of the statute and the limited jurisdiction which it confers is further clearly shown by the provision that an adjudication against an absent defendant or defendants shall "affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a Federal court upon the assumption of its control over property when there is no property subject to [89] control within the jurisdiction. In other words the power conferred rests upon a real, not an imaginary, base. This being true, we are of opinion that a Federal court has not jurisdiction over a person not within its territorial jurisdiction, or over property in the custody of such person, not within such territorial jurisdiction, merely because a state court may, as to such person and such property, because of some proceeding pending before it, have the authority to treat both the persons and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace. Indeed, if, because a state court had the power to treat in a given case a person and his property outside of the territorial jurisdiction as constructively within it, in order to afford particular relief, a like power must be imputed to a Federal court under the act of Congress, it would result that in such a case the act of Congress would become inapplicable, since there would be no

absent defendant, as the person as well as the property would be constructively present.

Affirmed.

*LAWRENCE E. SEXTON, as Trustee [90 in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Appt.,

v.

KESSLER & COMPANY, Limited, and Frank Youatt, Liquidator.

(See S. C. Reporter's ed. 90-99.)

Bankruptcy — preference — equitable lien.

A creditor who, within four months of the bankruptcy of his debtor, takes possession of securities negotiable by delivery or indorsed in blank, contained in a separate package in the debtor's safe deposit vaults, marked "escrow" for the creditor's account, does not obtain a preference voidable under the bankruptcy law, where these securities, or others for which they had from time to time been substituted, were so set apart years before, at the creditor's request, to secure the debtor's drawing credit, since an equitable lien was thus created, and in taking the securities the creditor only exercised an equitable right to possession that had been created in good faith long before the bankruptcy.

[For other cases, see Bankruptcy, 193-201, in Digest Sup. Ct. 1908.]

[No. 92.]

Argued December 12 and 13, 1911. Decided May 27, 1912.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which, reversing a decree of the District Court for the Southern District of New York, dismissed the bill in a suit brought by the trustee in bankruptcy to set aside an alleged fraudulent preference. Affirmed.

See same case below, — L.R.A. (N.S.) —, 97 C. C. A. 161, 172 Fed. 535.

The facts are stated in the opinion.

Mr. John Larkin argued the cause, and, with Mr. Alexander S. Andrews, filed a brief for appellant:

There was no valid legal pledge to the defendants because possession was not given until October 25, 1907.

Casey v. Cavaroc, 96 U. S. 467, 24 L.

NOTE.—On avoidability of transfer within four months' period, pursuant to agreement antedating that period—see note to Godwin v. Murchison Nat. Bank, 17 L.R.A. (N.S.) 935.

ed. 779; *Wilson v. Little*, 2 N. Y. 446, 51 Am. Dec. 307; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 170, 48 L.R.A. 107, 56 N. E. 521; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 429, 51 L. ed. 1117, 1121, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; *Casey v. National Park Bank*, 96 U. S. 492, 24 L. ed. 789; *Casey v. Schnehardt*, 96 U. S. 494, 24 L. ed. 790; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260.

The necessary basis for an equitable lien is an express agreement to subject certain property thereto. As possession is a *sine qua non* for a legal pledge, so an express agreement to deliver possession is a *sine qua non* for an equitable lien in the nature of pledge.

Re Great Western Mfg. Co. 18 Am. Bankr. Rep. 259; *Page v. Rogers*, 211 U. S. 575, 53 L. ed. 332, 27 Sup. Ct. Rep. 159; *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; *Fourth Street Nat. Bank v. Millbourne Mills Co.* 30 L.R.A. (N.S.) 552, 96 C. C. A. 629, 172 Fed. 177; *Re Sheridan*, 98 Fed. 406; *Copeland v. Barnes*, 147 Mass. 388, 18 N. E. 65; *Second Nat. Bank v. Hunt*, 11 Wall. 394, 20 L. ed. 190; *Griswold v. Sheldon*, 4 N. Y. 581; *Wood v. Lowry*, 17 Wend. 492.

Will a court of equity uphold, on the theory of equitable lien, an attempted pledge which fails at law, when the rights of creditors are involved?

Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; *Wilson v. Little*, 2 N. Y. 446, 51 Am. Dec. 307; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 48 L.R.A. 107, 56 N. E. 521; *Ryttenberg v. Schefer*, 11 Am. Bankr. Rep. 664; *Re Sheridan*, 98 Fed. 406; *Nisbet v. Macon Bank & T. Co.* 4 Woods, 464, 12 Fed. 686; *Fourth Street Nat. Bank v. Millbourne Mills Co.* 30 L.R.A. (N.S.) 552, 96 C. C. A. 629, 172 Fed. 177; *Zartman v. First Nat. Bank*, 189 N. Y. 271, 12 L.R.A. (N.S.) 1083, 82 N. E. 127; *Van Zile, Bailments & Carriers*, § 237a; *Skilton v. Codington*, 185 N. Y. 88, 113 Am. St. Rep. 885, 77 N. E. 790; *Frank v. Vollkommer*, 205 U. S. 529, 51 L. ed. 915, 27 Sup. Ct. Rep. 596.

Even if the parties had intended to make a mortgage, it would have been invalid (a) in so far as it purported to cover after-acquired property; and (b) *in toto* because of provisions in it, and in the method of carrying it out, that made it

fraudulent in law and absolutely void as to creditors.

Zartman v. First Nat. Bank, 189 N. Y. 271, 12 L.R.A. (N.S.) 1083, 82 N. E. 127; *Skilton v. Codington*, 185 N. Y. 86, 113 Am. St. Rep. 885, 77 N. E. 790.

To constitute a declaration of trust where the property remains in the possession of the declarant or settlor, the latter must intend to divest himself of all beneficial interest in the property, and to hold it thereafter as trustee for the benefit of another.

Martin v. Funk, 75 N. Y. 137, 31 Am. Rep. 446; *Re Totten*, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 748, 1 Ann. Cas. 900; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Barry v. Lambert*, 98 N. Y. 306, 50 Am. Rep. 677; *Re Bolin*, 136 N. Y. 177, 32 N. E. 626; *Locke v. Farmers' Loan & T. Co.* 140 N. Y. 141, 35 N. E. 578.

If a pledge, imperfect or invalid because of want of delivery of the pledged property, can be sustained as a declaration of trust, the result will practically be to abolish technical pledges whose very essence is the possession of the pledged property by the pledgee.

Young v. Young, 80 N. Y. 437, 36 Am. Rep. 634.

The transaction between Kessler & Company of New York and Kessler & Company of Manchester was inequitable and in bad faith, and deceived existing as well as prospective creditors.

Martin v. Mathiot, 14 Serg. & R. 214, 16 Am. Dec. 491; *H. K. Porter Co. v. Boyd*, 96 C. C. A. 197, 171 Fed. 305; *Zartman v. First Nat. Bank*, 189 N. Y. 273, 12 L.R.A. (N.S.) 1083, 82 N. E. 127; *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; *Bowdish v. Page*, 153 N. Y. 109, 47 N. E. 44; *Hangen v. Hachmeister*, 114 N. Y. 566, 5 L.R.A. 137, 11 Am. St. Rep. 691, 21 N. E. 1046; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755; *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951; *Wood v. Lowry*, 17 Wend. 492; *Chatham Nat. Bank v. O'Brien*, 6 Hun, 231; *Griswold v. Sheldon*, 4 N. Y. 584; *Gardner v. McEwen*, 19 N. Y. 123; *Brackett v. Harvey*, 91 N. Y. 214; *Bainbridge v. Richmond*, 17 Hun, 391; *Knapp v. Milwaukee Trust Co.* 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; *Seherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

When an agreement for security or protection is thus fraudulent in law, and void, it may be attacked by any creditor, whether having a judgment or not, if it is im-

practicable or useless to obtain a judgment.

Skilton v. Codington, 185 N. Y. 86, 113 Am. St. Rep. 885, 77 N. E. 790; *Russell v. St. Mart*, 180 N. Y. 359, 73 N. E. 31; *Karst v. Gane*, 136 N. Y. 323, 32 N. E. 1073; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11.

Messrs. **Abram I. Elkus** and **Frederick C. McLaughlin** argued the cause, and, with Mr. Rufus W. Sprague, Jr., filed a brief for appellees:

The distinctions between a pledge and a mortgage of goods and chattels at common law are that (1) a mortgage is a conveyance which transfers the general property, while a pledge transfers only a special property by delivery of possession; (2) in the case of a mortgage which transfers the general property, possession in the creditor is not essential, whereas possession in the creditor is of the very essence of a pledge; (3) a mortgagee's title becomes absolute upon default, while a pledgee can sell after default only upon notice to the pledgeor.

Story, Bailm. 9th ed. § 287; *Parshall v. Eggert*, 54 N. Y. 18; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 170, 48 L.R.A. 107, 56 N. E. 521; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

The only substantial difference between a mortgage and a pledge of incorporeal personalty is in the contract. If the contract gives the debtor a legal right to redeem upon payment of the debt at any time before actual sale, although after default, it is a pledge. Otherwise it is a mortgage.

Wilson v. Little, supra.

A pledge of stock is therefore like a mortgage, a transfer of the stock, and there can be no manual delivery. Possession of a script is of no importance. Physical possession of goods and chattels is an indicia of ownership. The statutes of New York, following the common law, emphasize the distinction.

Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; *Booth v. Kehoe*, 71 N. Y. 341; *Young v. Upson*, 115 Fed. 192; *National Hudson River Bank v. Chaskin*, 28 App. Div. 311, 51 N. Y. Supp. 64.

Aside from the provisions of the bankrupt law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right.

56 L. ed.

Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203.

Even in the case of goods and chattels, where the presumption of fraud is rebutted, there is not the slightest doubt, under the New York decisions, that sales and transfers by way of security (other than mortgages), without change of possession (the possession remaining in the debtor), are valid as against creditors or even bona fide purchasers without notice.

Parshall v. Eggert, 54 N. Y. 18; *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Munroe v. Bonanno*, 31 Abb. N. C. 1, 28 N. Y. Supp. 375; *Carter v. Arguimbau*, 31 Abb. N. C. 3; *English Bank v. Barr*, 31 Abb. N. C. 7; *Dennistown v. Barr*, 31 Abb. N. C. 21, 28 N. Y. Supp. 255; *National Bank of Deposit v. Rogers*, 166 N. Y. 380, 59 N. E. 922.

By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract.

Benjamin, Sales, 7th ed. § 3.

Of course, the act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention.

Martin v. Funk, 75 N. Y. 137, 31 Am. Rep. 446.

The contract was at all times enforceable in equity against the specific property set aside.

Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; *Holroyd v. Marshall*, 10 H. L. Cas. 191, 33 L. J. Ch. N. S. 193, 9 Jur. N. S. 213, 7 L. T. N. S. 172, 11 Week. Rep. 171, 10 Eng. Rul. Cas. 426; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Central Trust Co. v. West India Improv. Co.* 169 N. Y. 314, 62 N. E. 387; *Pom. Eq. Jur.* 3d ed. §§ 1234, 1235; *Ingersoll v. Coram*, 211 U. S. 335, 368, 53 L. ed. 208, 229, 29 Sup. Ct. Rep. 92; *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; *Howard v. Delgado*, 57 C. C. A. 270, 121 Fed. 30; *Goodnough Mercantile & Stock Co. v. Galloway*, 156 Fed. 504; *Chattanooga Nat. Bank v. Rome Iron Co.* 102 Fed. 755; *National Bank of Deposit v. Rogers*, 166 N. Y. 380, 59 N. E. 922; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614; *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475; *Coats v. Donnell*, 94 N. Y. 168; *Spring v. Short*, 90 N. Y. 538; *Husted v. Ingraham*, 75 N. Y. 251; *Parshall v. Eggert*, 54 N. Y. 18; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290.

Physical delivery was not essential.

Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; New York, N. H. & H. R. Co. v. Schuyler, 17 N. Y. 592, 34 N. Y. 30; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Weaver v. Barden, 49 N. Y. 286; Pom. Eq. Jur. § 1233; Parker v. Muggridge, 2 Story, 334, Fed. Cas. No. 10,743; Re National Cash Register Co. 98 C. C. A. 425, 174 Fed. 579; Lowell, Bankr. 3d ed. p. 66, § 86.

A promise to give security at some future, indefinite time, or when required, or a general covenant for further security, will not authorize the debtor to give, and the creditor to receive, security under circumstances which would make it a preference. In other words, a general and indefinite promise is disregarded. A bona fide engagement to convey specific property, amounting to an equitable lien, will, however, be valid, and this is the test.

Page v. Rogers, 211 U. S. 575, 579, 53 L. ed. 332, 334, 29 Sup. Ct. Rep. 159; Ingersoll v. Coram, 211 U. S. 335, 368, 53 L. ed. 208, 229, 29 Sup. Ct. Rep. 92; Arnold v. Maynard, 2 Story, 358, Fed. Cas. No. 561; Graham v. Stark, 3 Ben. 534, Fed. Cas. No. 5,676; Ex parte Ames, 1 Low. Dec. 564, Fed. Cas. No. 323; Second Nat. Bank v. Hunt, 11 Wall. 391, 20 L. ed. 190; Brett v. Carter, 2 Low. Dec. 458, Fed. Cas. No. 1,844; Barron v. Morris, 14 Nat. Bankr. Reg. 371, Fed. Cas. No. 1,055; Lloyd v. Strobridge, 16 Nat. Bankr. Reg. 197, Fed. Cas. No. 8,435; Burdick v. Jackson, 7 Hun, 488, 15 Nat. Bankr. Reg. 318; Holmes v. Winchester, 135 Mass. 299; National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922.

Possession taken even of goods and chattels, under a contract for security, relates back so as to cut off all except creditors who had intervened by execution or attachment, and bona fide purchasers.

Parshall v. Eggert, 54 N. Y. 18; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 17 L.R.A.(N.S.) 935, 59 S. E. 154; Fisher v. Zollinger, 79 C. C. A. 76, 149 Fed. 54; Union Trust Co. v. Bulkeley, 80 C. C. A. 328, 150 Fed. 510; First Nat. Bank v. Pennsylvania Trust Co. 60 C. C. A. 100, 124 Fed. 968.

An equitable lien under the law of New York is always preferred over general creditors, subsequent judgment creditors, mechanics' lienors, and everyone except purchasers for value.

American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Re Howe, 1 Paige, 125, 19 Am. Dec. 395; Payne v. Wilson, 74 N. Y. 348; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922.

The local law governs.

Hiscoek v. Varick Bank, 206 U. S. 28, 38, 51 L. ed. 945, 952, 27 Sup. Ct. Rep. 681; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Bryant v. Swoford Bros. Dry Goods Co. 214 U. S. 279, 290, 53 L. ed. 997, 1002, 29 Sup. Ct. Rep. 614.

The trustee does not have the rights of attachment or execution creditors.

Loveland, Bankr. 3d ed. pp. 423, 450; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 132, 53 L. ed. 729, 733, 29 Sup. Ct. Rep. 466; Re Chase, 59 C. C. A. 631, 124 Fed. 753.

The taking possession on October 25, 1907, was not a preference.

Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; Humphrey v. Tatman, 198 U. S. 94, 49 L. ed. 958, 25 Sup. Ct. Rep. 567; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

A valid pledge of securities is usually secret.

Stackhouse v. Holden, 66 App. Div. 426, 73 N. Y. Supp. 203.

A general creditor cannot attack a legal or equitable assignment of property of this character where there is no actual fraud.

Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; McNeeley v. Welz, 166 N. Y. 124, 59 N. E. 697; Central Trust Co. v. West India Improv. Co. 169 N. Y. 314, 62 N. E. 387; Young v. Upson, 115 Fed. 192.

An equitable lien is not in the nature of a pledge. It is in the nature of a mortgage.

Pom. Eq. Jur. §§ 1233, 1234; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075.

Equity enforces the contract, not the pledge. A contract for a pledge, ineffective for want of delivery under it, is not void against creditors.

Parshall v. Eggert, 54 N. Y. 18; National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075. See also Payne v. Wilson, 74 N. Y. 348.

It is only in cases of fraud or express statutory inhibition that the rights of general creditors may be said to intervene in equity.

Parshad v. Eggert, 54 N. Y. 18; Payne v. Wilson, 74 N. Y. 348; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

It is not necessary that appellees' title should have been enforceable in an action at law four months before bankruptcy. Nor was the test whether the appellees could have then maintained an action of replevin.

Ibid.

The statement of the learned district judge, that the property was not sufficiently identified to create an equitable lien, is hopelessly inconsistent with his statement that the agreement was and is valid in equity *inter partes*.

Pom. Eq. Jur. § 1234.

The enforcement of an equitable lien will not be denied because it is an infraction of the law of pledge.

Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504.

Appellees have a valid legal title against which the trustee cannot prevail. This legal title is not a voidable preference because it was exchanged for an equally valid equitable title.

Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

Under the New York law, such a contract concededly being enforceable in equity *inter partes*, it was enforceable against the trustee in bankruptcy, who only represented the bankrupts and their general creditors. The contract was not void against general creditors.

Humphrey v. Tatman, *supra*.

Messrs. Henry Wollman and Kurnal R. Babbitt filed a brief in support of a motion by John Gorlow for leave to intervene.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by a trustee in bankruptcy to set aside an alleged fraudulent preference. The circuit court of appeals reversed a decree of the district court for the plaintiffs, and dismissed the bill. 56 L. ed.

— L.R.A.(N.S.) —, 97 C. C. A. 161, 172 Fed. 535. It will be enough for our decision to state the following facts: The appellee was an English company and the bankrupts a New York firm, intimately connected with it, which for many years had drawn upon it. In February, 1903, the English house requested the New York firm to set aside securities for their drawing credit. The New York firm wrote on June 30 that they had that day placed in a separate package in their safe deposit vaults certain securities named, the package being marked, "Escrow for account of Kessler & Co., Limited, Manchester;" adding, "This escrow is intended as a protection against our long drawings against your good selves." This letter was acknowledged, and it was added, "If at any time you have the opportunity to realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality." In *December[96 of the same year the English house suggested a form of certificate as follows: "We certify that we have specially set aside and hold for your account, on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities. Name secs. and market value." This was conformed to and the New York house also entered the securities and all substitutions on their loan book. Substitutions were made from time to time and the English house notified. The securities always were either negotiable by delivery or indorsed in blank. They were marked and kept as stated in the letter upon a separate shelf of the New York firm's vault, and they never were removed except in 1905 and 1906, when they were taken to the office to be examined and checked off by representatives of the English company. Business went on in this way until the panic of 1907. On October 25 of that year, the stability of the New York firm being in doubt, it handed over the escrow securities to an agent of the English company then in New York, and he deposited them in a safe deposit vault in the name of the company. On November 8 a petition of bankruptcy was filed, and on November 27 the New York firm was adjudged bankrupt. Notwithstanding arguments to the contrary, it may be assumed that the arrangement between the parties was made in good faith and intended and believed to be valid, and, on the other hand, that, at the time of the change of custody on October 25, within four months of the petition, the New York firm was insolvent, and that the English company had reasonable

cause to believe that a preference was intended if its rights began only on that date.

So far as the interpretation of the transaction is concerned, it seems to us that there is only one fair way to deal with it. The parties were business men, acting without lawyers, and in good faith attempting to create a present security out of specified bonds and stocks. Their *conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. If an express declaration of an equitable lien, or, again, a statement that the New York firm constituted itself the servant of the English company to maintain possession for the latter, or that it held upon certain trusts, or that a mortgage was intended, or any other form of words, would effect what the parties meant, we may assume that it was within the import of what was done, written, and said. So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or, at least, on that is to be preferred to the claim of the trustee.

The bankruptcy law by itself does not avoid the transaction. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Humphrey v. Tatman*, 198 U. S. 91, 95, 45 L. ed. 956, 958, 25 Sup. Ct. Rep. 567. A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Zartman v. First Nat. Bank*, 216 U. S. 134, 138, 54 L. ed. 418, 419, 30 Sup. Ct. Rep. 368. The most obvious objection is that the continued physical power of the New York firm over the securities, and its right to withdraw and substitute, admittedly reserved, are inconsistent with a title or lien of the English house in any form. But the decisions of this court and of New York agree that there may be title in a stronger case than this. When a broker agrees to carry stock for a customer, he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand, or that he buys when the time for delivery comes. Yet, as he is bound to keep stock enough to satisfy his contracts, 98]as the New York *firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to

him by an insolvent broker is not a preference. *Richardson v. Shaw*, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; *Markham v. Jaudon*, 41 N. Y. 235. So, a depositor in a grain elevator may have a property in grain in a certain elevator, although the keeper is at liberty to mix his own or other grain with the deposit, and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned.

Whether enough has been done to give a right of any kind in certain property is a question of more or less. See *Union Trust Co. v. Wilson*, 198 U. S. 530, 537, 49 L. ed. 1154, 1156, 25 Sup. Ct. Rep. 766. In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, retaining possession and full power to sell and replace or not, as he sees fit, it well may happen that the security fails. *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; *Zartman v. First Nat. Bank*, 189 N. Y. 267, 12 L.R.A. (N.S.) 1083, 82 N. E. 127. So, a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It was confined to specific identified stocks and bonds on hand, and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal of the remaining securities had risen sufficiently in value. It purported not to promise, but to transfer; and the subject-matter was not goods and chattels in the sense of the New York mortgage law, as we understand that law to be interpreted by the New York courts. The transaction was not void as against creditors, irrespective of attachment, as in *Knapp v. Milwaukee Trust Co.* 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; *Niles v. Mathusa*, 162 N. Y. 546, 57 N. E. 184. There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right, at least, to possession if it wanted it. While the phrase "equitable lien" *may not carry the reasoning further[99 or do much more than express the opinion of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least; or, in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce. *Hurley v. Atchison, T. & S. F. R. Co.* 213 U. S. 126, 134, 53 L. ed. 729, 734, 29 Sup. Ct. Rep. 466. When the English firm took the securities, it only exercised a right that had been created long before the bankruptcy, and in good faith.

Such we understand to be the law of New York; and in the absence of any controlling statute to the contrary, such we understand to be what the law should be. *Parshall v. Eggert*, 54 N. Y. 18. *National Bank of Deposit v. Rogers*, 166 N. Y. 380, 59 N. E. 922.

Decree affirmed.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.
BURLINGTON LUMBER COMPANY.

(See S. C. Reporter's ed. 99, 100.)

Commerce — state regulation of carrier — conflicting Federal regulation.

Congress has so completely taken control of the subject of railroad rate making and charging as to invalidate the provisions of a state statute so far as they penalize the refusal of a railway carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state, where the carrier had no rate for such shipment.

[For other cases, see *Commerce*, I. c; III., in Digest Sup. Ct. 1908.]

[No. 236.]

Argued and submitted May 3, 1912. Decided May 27, 1912.

IN ERROR to the Supreme Court of the State of North Carolina to deview a judgment which affirmed a judgment of the Superior Court of Alamance County, in that state, enforcing a state statute penalizing the refusal of a carrier to accept a tender of an interstate shipment. *Reversed*.

See same case below, 152 N. C. 70, 67 S. E. 167.

The facts are stated in the opinion.

Mr. John K. Graves argued the cause, and, with Mr. Alfred P. Thom, filed a brief for plaintiff in error:

The test is not whether the state legislature might have enacted a valid statute under which the penalty in question could lawfully have been visited upon the plaintiff in error for the acts or omissions on account of which this case was insti-

tuted, but whether the state has enacted a law which, so far as interstate commerce is concerned, is valid as applied to all cases falling within it.

Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; *Richmond v. Model Steam Laundry*, 111 Va. 760, 69 S. E. 932; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Employer's Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 327, 32 Sup. Ct. Rep. 169; *Roller v. Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 530, 531, 50 L. ed. 597, 583, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174.

The statute is invalid in that it seeks to regulate a subject the control of which has been assumed by Congress, and in that it imposes a burden upon interstate commerce.

Southern R. Co. v. Reid, 222 U. S. 424, 437, ante, 257, 32 Sup. Ct. Rep. 140.

Assuming, for the sake of the argument, that legislation by Congress plays no part in this case, the North Carolina statute contravenes the commerce clause of the Constitution because it seeks to regulate, and, if enforced, will impose a burden upon, interstate commerce.

Gibbons v. Ogden, 9 Wheat, 1, 189, 210, 6 L. ed. 23, 68, 73; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 150, 54 L. ed. 698, 705, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; *Atlantic Coast Line R. Co. v.*

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McAnna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R.* 56 L. ed.

Co. 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Baekus*, 38 L. ed. U. S. 1041.

Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Southern R. Co. v. Reid, 222 U. S. 424, 435, ante, 257, 259, 32 Sup. Ct. Rep. 140.

The decisions of this court clearly lay down the principles to be applied in the determination of whether a statute of the sort here involved does or does not contravene the Federal Constitution. Among others, the following may be cited as showing where the line is to be drawn:

Statutes upheld.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399.

Statutes condemned:

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 1 Inters. Com. Rep. 306, 30 L. ed. 1187, 7 Sup. Ct. Rep. 1126; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476.

The common-law duty of the carrier in respect to the receiving of goods for transportation is to receive them upon reasonable request therefor (See Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262, 270, 20 L. ed. 423, 428); and this is likewise the national policy in respect to the regulation of interstate commerce.

The statute cannot be saved from invalidity by the exercise or by the promised exercise by the judicial department of the state of a power analogous to the pardoning power vested in the Executive.

Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 134, 53 L. ed. 441, 442, 29 Sup. Ct. Rep. 246; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Roller v. Hardy, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410.

Mr. Lee S. Overman submitted the cause for defendant in error. Mr. W. H. Carroll was on the brief:

The duty to receive freight whenever tendered was a common-law duty.

Alsop v. Southern Exp. Co. 104 N. C. 1002

278, 6 L.R.A. 271, 10 S. E. 297; Garrison v. Southern R. Co. 150 N. C. 582, 64 S. E. 578.

Interstate commerce does not and cannot begin until the goods are accepted for shipment and a bill of lading issued.

Diamond Match Co. v. Ontonagon, 188 U. S. 94, 47 L. ed. 399, 23 Sup. Ct. Rep. 266; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The statutory enforcement, under penalty, of the common-law duty to accept freight whenever tendered, is not within the scope or terms of any act of Congress, and is neither an interference with nor a burden upon interstate commerce, but in aid of it.

Burlington Lumber Co. v. Southern R. Co. 152 N. C. 70, 67 S. E. 169. See also Harrill Bros. v. Southern R. Co. 144 N. C. 532, 57 S. E. 383.

Refusing to receive for shipment is an act done wholly within this state; it is not a part of the act of transportation.

Bagg v. Wilmington, C. & A. R. Co. 109 N. C. 279, 14 L.R.A. 596, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79; Currie v. Raleigh & A. A. L. R. Co. 135 N. C. 536, 47 S. E. 654; Walker v. Southern R. Co. 137 N. C. 168, 49 S. E. 84.

Notwithstanding the creation of the Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, the state may, in the absence of express action by Congress or by such Commission, regulate, for the benefit of its citizens, local matters indirectly affecting interstate commerce.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Reid v. Southern R. Co. 150 N. C. 764, 64 S. E. 874, 17 Ann. Cas. 247.

The right of the state to establish regulations for the public-service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or admit discussion.

Efland v. Southern R. Co. 146 N. C. 146, 59 S. E. 355; Harrill Bros. v. Southern R. Co. 144 N. C. 532, 57 S. E. 383; Stone v. Atlantic Coast Line R. Co. 144 N. C. 220, 56 S. E. 932; Walker v. Southern R. Co. 137 N. C. 168, 49 S. E. 84; McGowan v. Wilmington & W. R. Co. 95 N. C. 417; Branch v. Wilmington & W. R. Co. 77 N. C. 347; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Missouri P. R. Co. v. Humes,

115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Orient Ins. Co. v. Daggs*, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 286, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594.

Until some action by Congress, the legislation of a state, not directed against commerce, but relating to the rights, duties, and liabilities of citizens, is of obligatory force within the territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or interstate commerce, or persons engaged in such commerce.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

When the subjects within the commercial power of Congress are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until Congress intervenes and supersedes their action.

Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The regulation of commerce applies to the subjects of commerce, and not to matters of internal police.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 325, 41 L. ed. 1022, 17 Sup. Ct. Rep. 548; *Hopkins v. United States*, 171 U. S. 597, 43 L. ed. 297, 19 Sup. Ct. Rep. 40.

The Federal power to regulate commerce does not supersede the power of the states to legislate with reference to matters within the state which can be most advantageously regulated by the state itself, such as quarantine, inspection, health, internal communication, and the like.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

The independence of the commercial power and of the police power, and the limitations between them, must always be recognized and observed.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Boyer*, 85 Fed. 434; *Norfolk & W. R. Co. v. Com.* 93 Va. 749, 56 L. ed.

34 L.R.A. 109, 57 Am. St. Rep. 827, 24 S. E. 837.

Statutes passed under admitted police powers, and necessarily affecting interstate commerce, are not for that reason alone invalid, and, if not for some other reason invalid, will be respected until Congress acts upon the matter.

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

In local matters concerning the public policy of a state, though incidentally affecting interstate commerce, regulations by the state in the exercise of its police powers are valid, in the absence of action by Congress.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments, not forbidden by the Constitution, to regulate the relative rights of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.

Ibid.; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 398, 46 L. ed. 611, 22 Sup. Ct. Rep. 410.

*Mr. Justice Holmes delivered the [100 opinion of the court:

This is an action to recover penalties under a statute of North Carolina for refusal to receive goods for shipment. As the statute is the same that was held bad, so far as it concerns commerce among the states, in *Southern R. Co. v. Reid*, 222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140, and *Southern R. Co. v. Reid*, 222 U. S. 444, ante, 263, 32 Sup. Ct. Rep. 145, a short statement will be enough. On January 26, 1907, the Burlington Lumber Company tendered to the railway company at Burlington, North Carolina, certain machinery for shipment to Saginaw, Michigan, on a through bill of lading. Saginaw was not on the railway company's line, the company had no rates to Saginaw, and the agent had to delay in order to inquire of his superiors. The result was that the through bill of lading was not issued until April 3. The suit, as we have said, is for the penalty, and nothing else. The supreme court of the state decided against the railway on the same ground that it did in the decisions already reversed. In the circumstances it seems unnecessary to discuss the case more at length.

Judgment reversed.

**101]*RAILROAD COMMISSION OF
OHIO, Appt.,
v.**

B. A. WORTHINGTON, Receiver of the
Wheeling & Lake Erie Railroad Com-
pany.

(See S. C. Reporter's ed. 101-111.)

**Appeal—from circuit court of appeals
—diverse citizenship—Federal ques-
tion.**

1. An appeal lies to the appropriate Federal circuit court of appeals from a final decree of a circuit court in a suit in which jurisdiction was invoked both because the case was ancillary to a receivership suit which depended upon diverse citizenship, and upon grounds which involved alleged infractions of the Federal Constitution and rights secured thereby which might have warranted a direct appeal to the Federal Supreme Court.

[For other cases, see Appeal and Error, 727-742, in Digest Sup. Ct. 1908.]

**Appeal—from circuit court of appeals
—jurisdiction below.**

2. The jurisdiction of a Federal circuit court of a suit brought by the receiver of a railway company appointed in another suit in that court, by which he seeks to enjoin the enforcement of an order of a state railroad commission, regulating freight rates, as interfering with interstate commerce, as depriving the owners of the receivership estate of their property without due process of law and without compensation, and as denying them the equal protection of the laws, was not dependent entirely upon diverse citizenship, within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), making the decrees of the circuit courts of appeals final in such cases.

[For other cases, see Appeal and Error, 780-784, in Digest Sup. Ct. 1908.]

**Commerce—state regulation—rates
—lake-cargo coal.**

3. An unconstitutional attempt directly to regulate and control interstate commerce is made by an order of the Ohio Railroad Commission establishing a freight rate on "lake-cargo coal" billed from Ohio coal fields to Ohio ports on Lake Erie, where such rate is applicable only to such coal as is in fact placed upon vessels at those ports for carriage to points outside the state, and covers the actual placing of such coal upon the vessels, and the trimming or distributing of it in the holds so

that the vessels may safely proceed on their interstate journey.

[For other cases, see Commerce, 46-48, 191-203, in Digest Sup. Ct. 1908.]

[Nos. 776 and 505.]

Argued April 15 and 16, 1912. Decided
May 27, 1912.

A PPEAL from, and PETITION for a Writ of Certiorari to, the United States Circuit Court of Appeals for the Sixth Circuit, to review a decree which affirmed a decree of the Circuit Court for the Northern District of Ohio, Eastern Division, enjoining the enforcement of an order of the Ohio Railroad Commission, fixing a rate on lake-cargo coal. Affirmed on appeal; petition for Writ of Certiorari denied. Also an

A PPEAL from the United States Circuit Court for the Northern District of Ohio, Eastern Division, to review the decree of that court. Dismissed.

See same case below, 110 C. C. A. 85, 187 Fed. 965.

The facts are stated in the opinion.

Mr. Thomas H. Hogsett argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, and Messrs. Frank Davis, Jr., and Charles C. Marshall, filed a brief for appellant:

The movement in question was intra-state, because the contract of carriage between the shipper and the carrier called only for carriage between two points, both within the state of Ohio, and the delivery of the coal at the point of destination to the shipper or his order.

Cooke, Commerce Clause of Fed. Const. §§ 26, 55; Heiserman v. Burlington, C. R. & N. R. Co. 63 Iowa, 732, 18 N. W. 903; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Carrier v. Gordon, 21 Ohio St. 605; Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. 849; Missonri & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 30; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 142, 1 Drinker. Interstate Commerce Act, 84; Ft. Worth & D. C. R. Co. v. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and Paducah v. East Tennessee Telegraph. Co. 106 C. C. A. 333.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On state regulation of interstate or for-

eign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

L. ed. 1151, 22 Sup. Ct. Rep. 900; Noble v. Chicago, St. P. R. Co. 1 Wis. R. Com. Rep. 767; Elbertson v. Chicago & St. P. R. Co. 2 Wis. R. Com. Rep. 593; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 43 L. ed. 325, 24 Sup. Ct. Rep. 202; United States v. Geddes, 65 C. C. A. 320, 131 Fed. 452; White v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 86 S. W. 962; Larabee Flour Mills Co. v. Missouri P. R. Co. 74 Kan. 808, 88 Pac. 72, 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Hope Cotton Oil Co. v. Texas & P. R. Co. 12 Inters. Com. Rep. 266; Laning-Harris Coal & Grain Co. v. Missouri P. R. Co. 13 Inters. Com. Rep. 154; Kansas City Southern R. Co. v. Brooks, 84 Ark. 233, 105 S. W. 93; Augusta Brokerage Co. v. Central R. Co. 5 Ga. App. 187, 62 So. 996; Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 14; Dobbs v. Louisville & N. R. Co. 18 Inters. Com. Rep. 210; Texas & N. O. R. Co. v. Sabine Tram Co. — Tex. Civ. App. —, 121 S. W. 256; Texarkana & Ft. S. R. Co. v. Sabine Tram Co. — Tex. Civ. App. —, 129 S. W. 198; Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 130 S. W. 857; Texas & P. R. Co. v. Taylor, 103 Tex. 367, 126 S. W. 1117, 1200; Wells-Higman Co. v. Grand Rapids & I. R. Co. 19 Inters. Com. Rep. 487; Oregon R. & Nav. Co. v. Campbell, 180 Fed. 253; Re Transportation by Chesapeake & O. R. Co. 21 Inters. Com. Rep. 207.

But assuming that the commerce in question is interstate, and further assuming, contrary to the express provisions of the interstate commerce act, that Congress by that act authorized the Interstate Commerce Commission to regulate this traffic, then, if the state, prior to the passage of the act to regulate commerce, had power, as suggested by the court of appeals, to make the order attacked, the state still retained and retains that power, owing to the fact that the Interstate Commerce Commission has never acted in the premises; for this court has expressly held that the mere delegation of power to the Interstate Commerce Commission is not such an act of Congress as will effect a change from state to Federal control.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

56 L. ed.

Messrs. W. M. Duncan and William B. Sanders argued the cause and filed a brief for appellee:

The transportation of lake cargo coal from the No. 8 district is interstate commerce.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Texas & P. R. Co. v. Railroad Commission, 183 Fed. 1005; Cutting v. Florida R. & Nav. Co. 3 Inters. Com. Rep. 665, 46 Fed. 641; The Daniel Ball, 10 Wall. 557, 564, 19 L. ed. 999, 1001; General Oil Co. v. Crain, 209 U. S. 211, 228, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475; J. Rosenbaum Grain Co. v. Chicago, R. I. & T. R. Co. 130 Fed. 46; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; Ex parte Koehler, 30 Fed. 867; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 238, 30 L. ed. 888, 892, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889; State v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 44 S. W. 542; State v. Southern Kansas R. Co. — Tex. Civ. App. —, 49 S. W. 252; Gulf, C. & S. F. R. Co. v. Fort Grain Co. — Tex. Civ. App. —, 72 S. W. 419; Porter v. St. Louis Southwestern R. Co. 78 Ark. 182, 95 S. W. 453; Mattingly v. Pennsylvania Co. 3 Inters. Com. Rep. 592; Beale & W. Railroad Rate Regulation, §§ 896, 898; Massillon Coal Min. Co. v. Railroad Commission, S. D. E. D. Ohio.

The lake-cargo rate applies to a service that is either wholly interstate or in part interstate, and the regulation of it falls within the exclusive jurisdiction of Congress, because rate-making is national in its character and admits of only one uniform system.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 577, 30 L. ed. 244, 251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Kaeiser v. Illinois C. R. Co. 5 McCrary, 496, 18 Fed. 153; 4 Harvard L. Rev. 221, 223; Philadelphia & S. Mail S. S. Co. v. Pennsylvania. 122 U. S. 326, 338, 30 L. ed. 1200, 1202, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Cooley v. Port Wardens, 12 How. 299-319, 13 L. ed. 996-1005; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 219, 38 L. ed. 962, 969, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1037; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 247, 30 L. ed. 888, 895, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Dow v. Beidelman, 125 U. S. 680, 689, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; 9 Harvard L. Rev.

324, 336; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *United States v. Colorado & N. W. R. Co.* 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; *Beale & W. Railroad Rate Regulation*, §§ 1336, 1339.

Mr. Justice Day delivered the opinion of the court:

The case originated in a bill filed in the United States circuit court for the northern district of Ohio, eastern division, against the Railroad Commission of Ohio and 103]*other parties, to enjoin the enforcement of an order of the commission, fixing and establishing a rate of 70 cents a ton on what is called "lake-cargo coal," transported from the No. 8 coal field, in eastern Ohio, to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. A permanent injunction was granted in the circuit court against the enforcement of the rate, on the ground that it was a regulation of interstate commerce. An appeal was taken to the circuit court of appeals for the sixth circuit, and that court affirmed the decree of the circuit court. 110 C. C. A. 85, 187 Fed. 965. From the decree of the circuit court of appeals an appeal was taken to this court. An appeal was also prayed and allowed from the circuit court directly to this court, being case No. 505 on the docket of this term, which is submitted with the present case. A petition for a writ of certiorari to review the decree of the circuit court of appeals has also been filed and submitted upon briefs.

The first question to be dealt with is one of jurisdiction. The question of the jurisdiction of the circuit court of appeals was raised and decided in that court, which held that it had jurisdiction of the case, also intimating that there were grounds of jurisdiction which might have warranted a direct appeal to this court, and that court allowed the present appeal to this court.

The argument that the jurisdiction of the circuit court of appeals is final is based upon the contention that, as *Worthington*, the complainant in the present case, was appointed receiver of the *Wheeling & Lake Erie Railroad Company* in a suit in equity in the circuit court of the United States for the northern district of Ohio, eastern division, wherein jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the origi-

nal case, therefore, under the circuit court of appeals act, *the decree of the court[104 of appeals is final. It is undoubtedly true that in cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case (*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510), and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the circuit court, shows that the order of the commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Macfadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

*The question, then, is: Is this one[105 of the cases made final in the circuit court of appeals by the act creating that court? The 6th section of that act provides that the judgment of the circuit court of appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the

patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550.] In all other cases there is a right of review by this court if the matter in controversy exceeds \$1,000. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of \$5,000. The case is therefore one not made final in the circuit court of appeals, and the appeal to this court was properly allowed. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Macfadden v. United States*, 213 U. S. 288, 294, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.* 220 U. S. 446, 460, 55 L. ed. 536, 543, 31 Sup. Ct. Rep. 456.

Case No. 505 is dismissed and the petition for writ of certiorari is denied.

Coming now to the merits of the case, the circuit court found the facts to be as follows:

"It appears that bituminous coal, such as is mined in the No. 8 district, is classified by the complainant, for tariff purposes, as (a) railway fuel, being coal sold to railroad companies; (b) lake-cargo coal, that is, coal intended for shipment by lake to points in the northwest; and (c) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes.

"The No. 8 coal district of Ohio is situated in Jefferson, Harrison, and Belmont counties, and the members of the Pittsburgh Vein Operators' Association of Ohio are interested in mining coal in that district. The traffic is large, about 400,000 tons of [106]lake-cargo coal being shipped over *the complainant's railroad from that district in 1909, and transhipped by vessel to points in the northwest.

"At and prior to the time of the complaint being lodged with the Railroad Commission by the Operators' Association, the tariff rate in force on the complainant's railroad on lake-cargo coal from the No. 8 district to Huron and Cleveland, Ohio, f. o. b. vessel, was 90 cents per ton. The rate covers, in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels, so that they can safely proceed.

"The rate on commercial coal to Huron or Cleveland is \$1 per ton.

"The vessels for lake-cargo coal are generally furnished by the operators, but the coal is sometimes sold f. o. b. vessel, the title to the coal in that case passing to 56 L. ed.

the purchaser upon being properly loaded into the vessel.

"The coal in question is shipped from the mines to Huron or Cleveland, principally Huron, where the complainant has large dock facilities and expensive machinery and appliances for unloading coal into vessels, during the season of navigation, simply marked 'Lake coal,' consigned to the operator, or to some office employee whose name is used as a mere matter of convenience for the purpose of designating a particular grade of coal. The operator notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a particular grade of coal. The railroad then picks up such cars of the operator's coal as are necessary to fill the cargo, and moves them onto the dock alongside of the vessel, loads the vessel, trims or distributes the coal properly in her hold, and furnishes the shipper with a cargo statement showing the car numbers and weights and total tons of coal in the vessel, on which information the bill of lading for the vessel shipment is made out.

"It appears that all the coal shipped at the lake-cargo *rate remains on the [107 cars of the complainant until unloaded into a vessel, unless it should be diverted *en route* and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is \$1 a ton, would govern.

"There is testimony to the effect that when the coal leaves the times it is not known in what vessel it will be loaded, nor to what particular ultimate destination it will go; and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, but it is subject to demurrage charge if it remains on the cars beyond a specified time.

"All coal thus loaded in vessels is, and must practically be, carried to points in other states—or to Canada. The lake ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal, so small as to be negligible, is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it."

This finding of fact was practically approved and adopted in the circuit court of appeals, and we have no occasion to dissent from its correctness.

The question thus presented is: Was the Railroad Commission of Ohio authorized to put in force the rate in question as to

lake-cargo coal? It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well-settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 108]416, 22 Sup. Ct. Rep. 277. *And an order made by a state commission under assumed authority of the state, which directly burdens or regulates interstate commerce, will be enjoined. *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

The question is, then, one of fact. Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers constitute interstate commerce?

It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron on Lake Erie. The so-called "lake-cargo coal" is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the state, usually to upper lake ports, and then, and only then, the 70 cent rate fixed by the commission applies. This 70 cent rate covers the transportation of the coal to Huron, the placing of it on board vessels, and, if necessary, trimming it for the continuance of its interstate journey. It is true, as argued by the learned counsel for the commission, that this coal may be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the state, but it must always be remembered that this 70 cent rate applies solely to such coal as is in fact placed upon vessels for carriage to beyond the state points; and, as the circuit court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this: that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels, and thence carried to upper lake ports beyond the state. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in

controversy here, is applicable *alone[109 to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage.

Much stress is laid in argument for the commission upon the fact that the coal is billed only to Huron, and it is said that in that aspect of the case it is controlled by *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360. There it was sought to hold a railroad company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the state railroad commission applicable to intrastate carriers. The company contended that the shipment was in fact an interstate carriage from Hudson, South Dakota, to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the state of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination.

*That the test of through billing is[110 not necessarily determinative is shown in the late case of *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279. In that case Young bought cottonseed cakes at various points in Texas and shipped them to himself at the port of Galveston, where they were prepared for export. This court held that such transportation was within the jurisdiction of the Interstate Commerce Commission, and that the special privileges given by the Southern Pacific Terminal Company to Young on the wharf at Galveston were undue preferences in his favor. As to the

fact that the shipments were not made on through bills of lading, but were to Galveston from other places in Texas, this court said:

"It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg, & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce, when they have 'actually started in the course of transportation to another state, or delivered to a carrier for transportation.'"

It is contended that this transportation of the coal under the rate fixed by the Railroad Commission is not within the power and authority of the Interstate Commerce Commission under § 1 of the act to regulate commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one state and not shipped to or from a foreign country, from or to a state or territory; and, 111] furthermore, that a transportation *of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject-matter in question is left within the state jurisdiction. On the other hand, it is contended that this transportation is within the jurisdiction of the Commission under the act to regulate commerce. It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority.

We therefore reach the conclusion that, under the facts shown in this case, the Railroad Commission, in fixing the rate of 70 cents for the transportation above described, attempted to directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined.

Decree affirmed.

ALBERT S. BIGELOW, Plff. in Err.,
v.

OLD DOMINION COPPER MINING &
SMELTING COMPANY.

(See S. C. Reporter's ed. 111-142.)

Judgment — estoppel — joint tortfeasor — participation in suit.

1. The assistance by one of two joint tortfeasors in the defense of a suit against the other, because of interest in the decision as a judicial precedent which might influence the decision in his own case, will not create an estoppel by the judgment as to him.

[For other cases, see Judgment, 775-780, in Digest Sup. Ct. 1908.]

Judgment — full faith and credit — joint tortfeasors.

2. A decree of a Federal circuit court sitting in New York, dismissing a suit *in personam* brought against one of two joint tortfeasors, is not denied full faith and credit by the refusal of a Massachusetts court to give it effect as a bar to a suit upon the same facts against the other, who was not a resident of New York, and not a party to the first suit, where such refusal was rested upon the ground that, under the general law,—whatever might be the rule in New York,—the relationship between two joint tortfeasors was not such as to make the one not sued a party by either privity or representation, this being a jurisdictional question which the Massachusetts court was at liberty to determine for itself.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

[Nos. 191 and 192.]

Argued March 5 and 6, 1912. Decided May 27, 1912.

TWO WRITS OF ERROR to the Supreme Judicial Court of the State of Massachusetts to review decrees which enforced the liability to a corporation of one of its two joint promoters for secret profits made out of the sale of property to the corporation, notwithstanding a decree of a Federal court, sitting in New York, in favor of the other promoter, which was pleaded in bar. Affirmed.

NOTE.—As to the effect of a judgment against one joint tortfeasor upon the liability of the other—see note to *Blackman v. Simpson*, 58 L.R.A. 410.

As to full faith and credit to be given to state records and judicial proceedings—see notes to *Lindley v. O'Reilly*, 1 L.R.A. 79; *Cumington v. Belchertown*, 4 L.R.A. 131; *Rand v. Hanson*, 12 L.R.A. 574; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; *Mills v. Duryee*, 3 L. ed. U. S. 411; *D'Arcy v. Ketchum*, 13 L. ed. U. S. 648; and *Huntington v. Attrill*, 36 L. ed. U. S. 1123.

See same case below, 203 Mass. 159, — L.R.A.(N.S.) —, 89 N. E. 193.

The facts are stated in the opinion.

Mr. John C. Spooner argued the cause, and, with Messrs. George Rublee and Joseph P. Cotton, Jr., filed a brief for plaintiff in error:

The maxim, *Interest reipublicæ ut sit finis litium*, which is as old as the law, is the foundation of the law of *res judicata*.

Jeter v. Hewitt, 22 How. 352, 364, 16 L. ed. 345, 348; Robbins v. Chicago, 4 Wall. 657, 662, 18 L. ed. 427, 428; Reynolds v. Stockton, 140 U. S. 254, 268, 269, 35 L. ed. 464, 468, 469, 11 Sup. Ct. Rep. 773; Marsh v. Pier, 4 Rawle, 273, 26 Am. Dec. 131.

When a judgment from another state is presented to a court, the only open question in regard to that judgment is whether the court which rendered it had jurisdiction. If it had, then exactly the same effect must be given to the judgment that it has in the state in which it was rendered.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

The question of jurisdiction is not to be determined by the law of Massachusetts.

Rogers v. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257; German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

The question of jurisdiction must be determined by this court in accordance with principles of general jurisprudence by which the Massachusetts rule that estoppel by judgment depends upon mutuality of estoppel is not recognized.

Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 63; Krolik v. Curry, 148 Mich. 214, 111 N. W. 761; State use of Hempstead v. Coste, 36 Mo. 437, 88 Am. Dec. 148; Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; Delaplain v. Kansas City, 109 Mo. App. 107, 83 S. W. 71; Montfort v. Hughes, 3 E. D. Smith, 591; Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co. 165 Ind. 361, 75 N. E. 649; Hayes v. Chicago Teleph. Co. 218 Ill. 414, 2 L.R.A.(N.S.) 764, 75 N. E. 1003; Bradley v. Rosenthal, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875; Logan v. Atlantic & C. Air Line R. Co. 82 S. C. 518, 64 S. E. 515; Rookard v. Atlantic & C. Air Line R. Co. 84 S. C. 190, 27 L.R.A.(N.S.) 435, 137 Am. St. Rep. 839, 65 S.

E. 1047; Spencer v. Dearth, 43 Vt. 98; Atkinson v. White, 60 Me. 396.

The same question as to jurisdiction would arise if the plaintiff should claim that a decision by a New York court that the Lewisohn decree was a bar to a suit by the plaintiff against Bigelow was not due process of law. In that case there could be no claim that the question of jurisdiction should be determined by the law of Massachusetts.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

If the Massachusetts doctrine as to jurisdiction is correct, a judgment in favor of a principal debtor in Iowa which would bar an action against a surety there, or in any of the states where the general rule prevails, would not have that effect if the surety were sued in Arkansas, because the courts in Arkansas would be at liberty to hold that, by the law of Arkansas, the Iowa court had no jurisdiction to protect the surety by its judgment.

2 Van Fleet, Former Adjudication, § 572; Jackson v. Griswold, 4 Hill, 522; Ames v. Maelay, 14 Iowa, 281; Michener v. Springfield Engine & Thresher Co. 142 Ind. 130, 31 L.R.A. 59, 40 N. E. 679; Hill v. Morse, 61 Me. 541; State v. Parker, 72 Ala. 181; Crum v. Wilson. 61 Miss. 233; Gill v. Morris, 11 Heisk. 614. 27 Am. Rep. 744; Brown v. Bradford, 30 Ga. 927; State Bank v. Robinson, 13 Ark. 214.

The adoption of the Massachusetts doctrine would have a very disturbing effect upon the settled law as to the statutory liability of stockholders. The general rule is that where the statute requires the recovery of a judgment against the corporation as a condition precedent to the enforcement by a creditor of the statutory liability of stockholders, such a judgment against the corporation is conclusive in an action against a stockholder who was not a party to the action against the corporation. In New York, however, the law is otherwise.

McMahon v. Macy, 51 N. Y. 155; Stephens v. Fox, 83 N. Y. 317.

Under the law of Kansas a former judgment against a corporation is *res judicata* as to the existence of a corporate debt in an action to enforce the statutory liability of a stockholder. Suppose a stockholder of a Kansas corporation to be sued in a New York court by a creditor who had recovered judgment against the corporation in Kansas, and had had execution returned unsatisfied. Could the New York court decide that the Kansas judgment was not *res judicata* as to the defendant stockholder who was not a party to the former action in Kansas?

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

By the law and usage of the state of New York the claim asserted in the present suits against Bigelow, had they been pending in New York, would have been barred by the decree of the circuit court of the United States for the southern district of New York in favor of Lewisohn's executors.

Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401; People v. Stephens, 51 How. Pr. 235; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603; Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334; Bates v. Stanton, 1 Duer, 79.

In New York there is no absolute rule of law that estoppel by judgment must be mutual.

Tyng v. Clarke, 9 Hun, 269; Miller v. White, 50 N. Y. 137; Jackson v. Griswold, 4 Hill, 522.

Trustee and *cestui que trust* are in privity with one another, and a judgment for or against a trustee is binding upon the beneficiary of the trust, although the latter was not a party to the action in which it was rendered.

Re Straut, 126 N. Y. 201, 27 N. E. 259; Bracken v. Atlantic Trust Co. 36 App. Div. 67, 55 N. Y. Supp. 506, affirmed in 167 N. Y. 510, 82 Am. St. Rep. 731, 60 N. E. 772; Russell v. Lasher, 4 Barb. 232.

Where an agent in a transaction is sued after the termination of his agency, and, upon a trial of the merits, the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action.

Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401. See also Castle v. Noyes, 14 N. Y. 329; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603.

If the decree in the Lewisohn suit had been against the defendants, and they had satisfied it, they would have had a right to contribution against Bigelow, who, having had notice of the former suit, and having participated in the defense thereof, would have been bound by the decree in a proceeding against him by the former defendants for contribution.

Jacobs v. Pollard, 10 Cush. 288, 57 Am. Dec. 105; Palmer v. Wick Steam Shipping Co. [1894] A. C. 318, 6 Reports, 245, 71 L. T. N. S. 163; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368; First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 111 Am. St. Rep. 541, 95 56 L. ed.

N. W. 622; Eaton & P. Co. v. Mississippi Valley Trust Co. 123 Mo. App. 117, 100 S. W. 551; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Stone v. Hooker, 9 Cow. 154; Getty v. Devlin, 70 N. Y. 511, 7 Mor. Min. Rep. 119.

The right to contribution which Lewisohn's executors would have had against Bigelow in case the decree had been against them gave Bigelow a legal interest to defend in the Lewisohn suit.

Oceanic Steam Nav. Co. v. Campania Transatlantica, Espanola, 144 N. Y. 663, 39 N. E. 360.

As he had notice of the suit and participated in the defense, he was, under the law of New York, a privy to the decree, and would have been bound by it, if it had been the other way. In a suit by Lewisohn's executors against him for contribution, Bigelow would have been concluded by the former decree against them.

Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987; Castle v. Noyes, 14 N. Y. 329; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422.

A decree upon demurrer, if it goes to the merits, is as conclusive in bar as one founded upon a hearing of evidence.

Yates v. Utica Bank, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. Rep. 646 Northern P. R. Co. v. Slaght, 105 U. S. 122, 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 418; Alley v. Nott, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; Bouchaud v. Dias, 3 Denio, 244; People v. Stephens, 51 How. Pr. 235.

The decree of a Federal court in New York is entitled to the same faith and credit in every state of the Union as a decree of a state court of New York.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 645, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154; Riverdale Cotton Mills v. Alabama & G. Mfg. Co. 198 U. S. 188, 49 L. ed. 1008, 25 Sup. Ct. Rep. 629.

It is also settled that a decree of a Federal court in a state must be given the same effect by the courts of that state as it has in the Federal court.

Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

The fact that the suits in Massachusetts were begun before the commencement of the Lewisohn suit, in which the decree relied on as a bar was rendered, is not material.

Mitchell v. First Nat. Bank, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; *United States v. Dewey*, 6 Biss. 501, Fed. Cas. No. 14,956; *Nugent v. Philadelphia Traction Co.* 87 Fed. 251; *Rogers v. Odell*, 39 N. H. 452; *Sharon v. Hill*, 26 Fed. 344.

Messrs. Charles H. Tyler, Owen D. Young, Burton E. Eames, and William C. Rice also filed a brief for plaintiff in error:

The fact that the Lewisohn decree is a decree of a Federal court, and not of a New York state court, does not detract from its efficacy as a bar, as it is well settled that the judgment of a Federal court, sitting within the state of New York, is entitled in another state to the same faith and credit as the decree of a state court of New York; certainly when the Federal jurisdiction is based on diverse citizenship.

Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Dupasseur v. Rochereau*, 21 Wall. 130, 134, 135, 22 L. ed. 588, 590, 591; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The Lewisohn decree is entitled to the same faith and credit and to the same force and effect in the state of New York as if it were a decree of one of the state courts of New York.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 147, 30 L. ed. 614, 617, 7 Sup. Ct. Rep. 472; *Metcalf v. Watertown*, 153 U. S. 671, 676, 38 L. ed. 861, 863, 14 Sup. Ct. Rep. 947; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498, 33 Am. Rep. 655; *Oceanic Steam Nav. Co. v. Compañia Transatlantica Española*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987.

The fact that the Lewisohn decree was rendered upon a demurrer does not in any way detract from its efficacy as a bar to

these proceedings, inasmuch as the demurrer went to the merits, and the decision shows that the bill was dismissed for want of equity.

Northern P. R. Co. v. Slaght, 205 U. S. 122, 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; *Bissell v. Spring Valley Twp.* 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Yates v. Utica Bank*, 206 U. S. 181, 183, 184, 51 L. ed. 1015-1017, 27 Sup. Ct. Rep. 646; *Wrightman v. Shankland*, 18 How. Pr. 79; *Alley v. Nott*, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; *Bouchaud v. Dias*, 3 Denio, 238; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111; *Baker v. Cummings*, 181 U. S. 117, 124, 45 L. ed. 776, 779, 21 Sup. Ct. Rep. 578; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 688, 39 L. ed. 859, 862, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205.

The question of the force and effect of the decree by law or usage in New York will be determined by this court on the evidence introduced below.

Tilt v. Kelsey, 207 U. S. 43, 57, 52 L. ed. 95, 101, 28 Sup. Ct. Rep. 1; *Harding v. Harding*, 198 U. S. 317, 331, 335, 49 L. ed. 1066, 1072, 1074, 25 Sup. Ct. Rep. 679; *Finney v. Guy*, 189 U. S. 335, 340, 47 L. ed. 389, 843, 23 Sup. Ct. Rep. 558; *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 122, 127, 47 L. ed. 735, 740, 23 Sup. Ct. Rep. 527; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

Under the full faith and credit clause such effect must be given the Lewisohn decree as it has by law or usage in the state of New York, not only as regards what is decided, but also as to who is entitled to the benefit.

Harris v. Balk, 198 U. S. 215, 223, 49 L. ed. 1023, 1026, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Hekking v. Pfaff*, 82 Fed. 403; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1.

This result cannot be defeated by the technical rule, peculiar to Massachusetts, which denies to alleged joint tortfeasors the benefits of a former adjudication as a bar.

Renaud v. Abbott, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; *Laing v.*

Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

The Lewisohn decree, being entered in an action where the subject-matter of the controversy was the same, determined not merely that Lewisohn was under no liability, but also that the defendant in error had no cause of action arising out of the transaction in question.

People v. Stephens, 51 How. Pr. 235, affirmed in 71 N. Y. 527; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 408; Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 63; Spencer v. Dearth, 43 Vt. 98; Williams v. McGrade, 13 Minn. 46, Gil. 39; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Sonnentheil v. Moody, — Tex. Civ. App. —, 56 S. W. 1001; Sonnentheil v. Christian Moerlein Brewing Co. 21 C. C. A. 390, 41 U. S. App. 491, 75 Fed. 350, affirmed in 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; Sonnentheil v. Texas Guarantee & T. Co. 23 Tex. Civ. App. 436, 56 S. W. 143; Atkinson v. White, 60 Me. 398; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Ferrers v. Arden, Cro. Eliz. pt. 2, p. 668; Mitchell v. First Nat. Bank, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; 2 Black, Judgm. 1902, 2d ed. § 781.

There is no requirement of mutuality of estoppel in such cases as the present, where the plaintiff, after failing on the merits to maintain one suit, brings a second suit upon the same cause of action, against another defendant, who acted jointly with the first defendant in the transaction. The reason for the general rule that estoppels must be mutual fails in such cases, and they constitute a recognized exception to the rule.

Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 68; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401; Spencer v. Dearth, 43 Vt. 98; Williams v. McGrade, 13 Minn. 46, Gil. 39; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Sonnentheil v. Moody, — Tex. Civ. App. —, 56 S. W. 1001; 2 Black, Judgm. 1902, 2d ed. § 781; Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Atkinson v. White, 60 Me. 396; Douglass v. Howland, 24 Wend. 35; Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; Jackson v. Griswold, 4 Hill, 522; Woodhouse v. Dancan, 106 N. Y. 527, 13 N. E. 334; Carter v. Bowe, 41 Hun, 516; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603; Gleason v. Northwestern Mut. L. Ins. 56 L. ed.

Co. 189 N. Y. 100, 81 N. E. 777; Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Moss v. McCullough, 5 Hill, 131; Tyng v. Clarke, 9 Hun, 269; Calkins v. Allerton, 3 Barb. 171; Castle v. Noyes, 14 N. Y. 329; Doremus v. Root, 23 Wash. 710, 54 L.R.A. 656, 63 Pac. 572; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; People v. Stephens, 51 How. Pr. 235.

This exception to the rule of mutuality is also expressly applied in cases of joint tortfeasors, or where the liability claimed to exist is a liability *ex delicto*.

Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 68; Atkinson v. White, 60 Me. 396; Williams v. McGrade, 13 Minn. 46, Gil. 39; Sonnentheil v. Moody, — Tex. Civ. App. —, 56 S. W. 1001; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401; Ferrers v. Arden, Cro. Eliz. pt. 2, p. 668; 1 Greenl. Ev. p. 663; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603; Biggs v. Benger, 2 Ld. Raym. 1372; Marks v. Sullivan, 8 Utah, 410, 20 L.R.A. 590, 32 Pac. 668; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Doremus v. Root, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572; Stevieck v. Northern P. R. Co. 39 Wash. 501, 81 Pac. 999; Anderson v. Fleming, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443; Anderson v. West Chicago Street R. Co. 200 Ill. 329, 65 N. E. 717; Muntz v. Algiers & G. Street R. Co. 116 La. 236, 40 So. 688; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Chicago, St. P. M. & O. R. Co. v. McManigal, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243; 2 Black, Judgm. 1902, 2d ed. § 781.

These cases are clearly to be distinguished from cases where the facts alleged, if proved, would amount to a tort, since it has been decided in the Lewisohn case that all the facts set up do not state a cause of action.

Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634.

Cases of promoters' liability in any event involve only fiduciary obligation, and in the absence of moral turpitude there is a right to contribution between promoters.

Jacobs v. Pollard, 10 Cush. 287, 57 Am. Dec. 105; Andrews v. Murray, 33 Barb. 354; Peck v. Ellis, 2 Johns. Ch. 136; Kolb v. National Surety Co. 176 N. Y. 233, 68 N. E. 247; Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Re Cape

Breton Co. L. R. 26 Ch. Div. 229, L. R. 29 Ch. Div. 795, L. R. 12 App. Cas. 652, 57 L. J. Ch. N. S. 552, 57 L. T. N. S. 773, 36 Week. Rep. 641; Arkwright v. Newbold, L. R. 17 Ch. Div. 320, 50 L. J. Ch. N. S. 372, 44 L. T. N. S. 393, 29 Week. Rep. 455; Loudenslager v. Woodbury Heights Land Co. 58 N. J. Eq. 556, 43 Atl. 671; Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 940, 40 L. T. N. S. 804.

There is no jurisdictional or other constitutional objection to giving effect to the Lewisohn decree as an estoppel in favor of the plaintiff in error in Massachusetts.

Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401.

The jurisdiction assumed by the foreign court is not to be denied unless it falls short of the standard of jurisdiction as determined by the general and settled principles of general jurisprudence.

D'Arey v. Ketchum, 11 How. 165, 175, 176, 13 L. ed. 648, 652, 653; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 289, 32 L. ed. 239, 243, 8 Sup. Ct. Rep. 1370; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; Renaud v. Abbott, 116 U. S. 277, 288, 29 L. ed. 629, 632, 6 Sup. Ct. Rep. 1194; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 902, 14 Sup. Ct. Rep. 1108.

There is sufficient privity between Bigelow and the Lewisohn defendants to entitle Bigelow to the benefit of said decree, not only under the law of New York, but under the general principles of law.

(1) The cause of action in the Lewisohn suit was based upon the identical subject-matter and transaction as in the cases at bar. Bigelow was therefore privy with Lewisohn in the act complained of.

Ferrers v. Arden. Cro. Eliz. pt. 2, p. 668.

(2) The defendant in error, by its own choice, both of forum and of remedy, has litigated and determined that the title to the shares of stock which it claims were wrongfully issued to Bigelow and Lewisohn was rightfully in them, free from any interest or equity in its favor.

Bates v. Stanton. 1 Duer, 79; Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; Bush v. Knox, 2 Hun, 578; Ferrers v. Arden. Cro. Eliz. pt. 2, p. 668; 1 Greenl. Ev. p. 663; Williams v. McGrade, 13 Minn. 46, Gil. 39; Atkinson v. White, 60 Me. 396; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401.

(3) Lewisohn was the trustee, agent, and representative of Bigelow in the transaction complained of.

King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29, 70 N. Y. 504, 7 Mor. Min. Rep. 119; Castle v. Noyes, 14 N. Y. 329; Tyng v. Clarke, 9 Hun, 269; Carter v. Bowe, 41 Hun, 516; Re Straut, 126 N. Y. 201, 27 N. E. 259; Bracken v. Atlantic Trust Co. 36 App. Div. 71, 55 N. Y. Supp. 506, 42 App. Div. 621, 59 N. Y. Supp. 1099, 167 N. Y. 510, 82 Am. St. Rep. 731, 60 N. E. 772; Freeman, Judgm. § 173; Lawrence v. Schaefer, 19 Misc. 239, 42 N. Y. Supp. 992, affirmed in 20 App. Div. 80, 46 N. Y. Supp. 719; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Parker v. Paine, 37 Misc. 768, 76 N. Y. Supp. 942; Seymour v. Smith, 114 N. Y. 481, 11 Am. St. Rep. 683, 21 N. E. 1042; Duncan v. China Mut. Ins. Co. 129 N. Y. 237, 29 N. E. 76; Coffin v. Grand Rapids Hydraulic Co. 136 N. Y. 655, 32 N. E. 1076; Hoffman House v. Foote, 172 N. Y. 348, 65 N. E. 169; Stearns v. Shepard & M. Lumber Co. 91 App. Div. 49, 86 N. Y. Supp. 391; Perry, Tr. 5th ed. ¶ 328; Western R. Co. v. Nolan, 48 N. Y. 513; 1 Greenl. Ev. p. 523; Lichty v. Lewis, 63 Fed. 535, affirmed in 23 C. C. A. 159, 44 U. S. App. 678, 77 Fed. 111; Kelly v. Forty-second Street M. & St. N. Ave. R. Co. 37 App. Div. 500, 55 N. Y. Supp. 1096; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603.

(4) Bigelow participated in the defense of the Lewisohn suit with the knowledge of all parties.

Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422; Van Koughnet v. Denic, 68 Hun, 179, 22 N. Y. Supp. 823; Woodhouse v. Duncan, 106 N. Y. 528, 13 N. E. 334; Demarest v. Darg, 32 N. Y. 281; Leavitt v. Wolcott, 95 N. Y. 221; Oceanic Steam Nav. Co. v. Campana Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Port Jervis v. First Nat. Bank, 96 N. Y. 557; Heiser v. Hatch, 86 N. Y. 614; Kelly v. Forty-second Street M. & St. N. Ave. R. Co. 37 App. Div. 506, 55 N. Y. Supp. 1096; Prescott v. Le Conte, 83 App. Div. 487, 82 N. Y. Supp. 411, affirmed in 178 N. Y. 585, 70 N. E. 1108; Bush v. Knox, 2 Hun, 578; Fake v. Smith, 2 Abb. App. Dec. 76; Konitsky v. Meyer, 49 N. Y. 571; Stedman v. Patchin, 34 Barb. 218; Henek v. Barnes, 84 Hun, 546, 32 N. Y. Supp. 840; Australian Knitting Co. v. Gormly, 148 Fed. 96; Rumford Chemical Works v. Hygienic Chemical Co.

86 C. C. A. 416, 159 Fed. 436; Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 924.

The Lewisohn decree is also entitled, in the courts of Massachusetts, to the same force and effect as it has in the Federal court, and in that court it would be a bar to these actions.

Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634; Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 63; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401.

The full faith and credit clause requires full faith and credit to the statutory and common law of other states as well as to their judgments.

Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Smithsonian Inst. v. St. John, 214 U. S. 19, 28, 53 L. ed. 892, 897, 29 Sup. Ct. Rep. 601; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Finney v. Guy, 189 U. S. 335, 340, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 415, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534.

Messrs. Louis D. Brandeis and Edward F. McClennen argued the cause and filed a brief for defendant in error.

There is no failure to give full faith and credit to the decree dismissing the bill of complaint against Lewisohn's executors in deciding, however erroneously, that Bigelow — not a party — acquired no rights under it.

The consequences resulting to a third person, claiming privity, from such a decree, are to be determined finally by the general law of the forum in which it is presented, and not by giving it full faith and credit.

Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 316, 38 L. ed. 450, 456, 14 Sup. Ct. Rep. 592; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 155, 30 L. ed. 614, 620, 7 Sup. Ct. Rep. 472; Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct.

56 L. ed.

Rep. 275; Chicago & A. R. Co. v. Wiggins Ferry Co. 108 U. S. 18, 27 L. ed. 656, 1 Sup. Ct. Rep. 614, 617; Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

This decree was entered in a suit of which the circuit court had jurisdiction on account of diversity of citizenship only. In such a suit no higher right arises from the decree than from a similar decree entered in the state court of the same district.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

When the force and effect of a judgment have been determined, some of the consequences thereof are unquestionable. For instance, it is established by common juridical consent that an action may be maintained on an ordinary judgment. Since this is so, the denial of recovery in an action properly brought on such a judgment is a denial of its validity. If, however, the judgment is of such a nature that the forum where it is presented may properly refuse it enforcement without questioning its validity, then the question of its consequences is to be decided by that forum. Instances of this are where the judgment is for a penalty under the criminal law (*Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370), or for future alimony (*Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555), or for a foreign transaction between foreign corporations (*Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92). Whether it is of such a character has been held to be a Federal question (*Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224). If it is, the consequences present no Federal question.

Whether a third person can invoke a judgment *in personam* as an estoppel or otherwise is a question not of its force and effect, its meaning and validity, but of the consequences resulting from it. This question does not arise under the Constitution. The judgment of the state court upon it is final; this court is without ju-

jurisdiction to consider it; and the proper judgment is dismissal.

Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341.

The Constitution requires a state to give to the judgments of the courts of another state, or of the Federal courts, having jurisdiction of the parties and of the subject-matter, in suits between the same parties or *in rem*, the same faith and credit which they have by the law and usage of the courts of the states where rendered.

Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; *Embrey v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 649, 11 Sup. Ct. Rep. 960; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154; *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; *American Exp. Co. v. Mullins*, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536.

This means that they are to be treated as having the same force and effect in the sense of meaning, purport, and validity, as conclusive adjudications between the parties, but not that they are to be followed by the same consequences.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; *Ward v. Joslin*, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807.

The full faith and credit clause did not increase the jurisdiction of a state to affect the rights of nonresidents, not parties to a suit therein.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853.

Whether the court had jurisdiction to

make a binding adjudication for or against a nonresident is to be determined by the forum in which the judgment is presented, notwithstanding that the court rendering the judgment has decided that he was a privy and subject to the jurisdiction.

D'Arey v. Ketchum, 11 How. 165, 13 L. ed. 648; *Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

The privy or representative relationship or lack thereof, of a nonresident, not a party of record, is to be determined by the forum in which the judgment is presented, and not by the law of the state in which the judgment was entered.

D'Arey v. Ketchum, 11 How. 165, 13 L. ed. 648; *Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271.

Full faith and credit does not require that a judgment *in personam* be held binding upon persons not parties.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588.

Full faith and credit does not require a court to hold that a judgment against the plaintiff in one suit is conclusive against him in another suit, based upon the same ground of liability, against another defendant.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 316, 38 L. ed. 450, 456, 14 Sup. Ct. Rep. 592; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 155, 30 L. ed. 614, 620, 7 Sup. Ct. Rep. 472; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

Whether a judgment operates as an estoppel as to a person not a party to the suit presents no Federal question, but is to be determined finally by the court of the state in which it is presented.

Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 20 Sup. Ct. Rep. 341; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

The misinterpretation of the statutes of another state is not a failure to give them due faith and credit.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Allen v. Alleghany Co. 196 U. S. 459, 49 L. ed. 553, 25 Sup. Ct. Rep. 311; Smithsonian Inst. v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601.

This is also true of the misinterpretation of a decree (St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510); and of a misinterpretation of the opinions of the courts of another state (Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972).

There was no failure to give full faith and credit to the laws of New York and New Jersey.

Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

Whether Bigelow acquired rights under this decree should be determined by the law of Massachusetts, the forum in which it was pleaded.

Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56; Ewer v. Coffin, 1 Cush. 23, 48 Am. Dec. 587; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 58, 22 L. ed. 70; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; Cooper v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446; Ward v. Joslin, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A. (N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853.

The failure of a plaintiff to recover after litigating fully against one is no estoppel on the same matter in favor of another, not a party or a privy.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 56 L. ed.

S. 301, 316, 38 L. ed. 450, 456, 14 Sup. Ct. Rep. 592; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 155, 30 L. ed. 614, 620, 7 Sup. Ct. Rep. 472; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; Brigham v. Fayerweather, 140 Mass. 415, 5 N. E. 265; Moore v. Albany, 98 N. Y. 396; Trimmer v. Rochester, 130 N. Y. 401, 29 N. E. 746; Stone v. State, 138 N. Y. 124, 33 N. E. 733; Wallace v. Straus, 113 N. Y. 238, 21 N. E. 66; Collins v. Hydorn, 135 N. Y. 320, 32 N. E. 69; Groth v. Washburn, 39 Hun, 324; Furlong v. Banta, 80 Hun, 248, 29 N. Y. Supp. 985; Nelson v. Illinois C. R. Co. — Miss. —, 31 L.R.A. (N.S.) 689, 53 So. 619; Illinois C. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97; Biddle & S. Co. v. Burnham, 91 Me. 578, 40 Atl. 669; Carson v. Southern R. Co. 68 S. C. 55, 46 S. E. 525, affirmed in 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

The reason for the rule is obvious. A man ought not to get the benefit of a decision as a binding adjudication in his favor unless he would have been bound by an adverse judgment. He ought not to be bound by an adverse judgment unless he was a party or a privy, having a legal right and opportunity to defend.

Humes v. Seruggs, 94 U. S. 22, 24 L. ed. 51; Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 244, 23 L. ed. 317; Stone v. Farmers' Bank, 174 U. S. 409, 43 L. ed. 1027, 19 Sup. Ct. Rep. 880; Sessions v. Johnson, 95 U. S. 347, 353, 24 L. ed. 596, 598.

It is a fundamental principle of the law of estoppel by judgment that the estoppel must be mutual.

Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 20, 26 L. ed. 61, 63; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 317, 38 L. ed. 450, 457, 14 Sup. Ct. Rep. 592; Tregea v. Modesto Irrig. Dist. 164 U. S. 179, 188, 41 L. ed. 395, 398, 17 Sup. Ct. Rep. 52; Lanning v. Osborne, 76 Fed. 319; Larison v. Hager, 44 Fed. 49; Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 173; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224; Spence v. Williams, L. R. 2 Prob. & Div. 230, 40 L. J. Prob. N. S. 45, 24 L. T. N. S. 513, 19 Week. Rep. 703; Nelson v. Brown, 144 N. Y. 384, 39 N. E. 355; Collins v. Hydorn, 135 N. Y. 320, 32 N. E. 69; Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265; Masten v. Olcott, 101 N. Y. 152, 4 N. E. 274; Moore v. Albany, 98 N. Y. 396; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Booth v. Powers, 56 N. Y. 22; Atlantic Dock Co. v. New York, 53 N. Y. 64; Lawrence v.

Campbell, 32 N. Y. 455; Brower v. Bowers, 1 Abb. App. Dec. 214; Shipman v. Fanshaw, 15 Abb. N. C. 288; Muller v. Ferry, 27 N. Y. S. R. 357, 7 N. Y. Supp. 472; Sweetser v. Davis, 26 App. Div. 398, 49 N. Y. Supp. 874; Craig v. Ward, 3 Abb. Pr. N. S. 235; Brennan v. Blath, 3 Daly, 480; Ransom v. Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919; Wright v. Hazen, 24 Vt. 143; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843; Bigelow, Estoppels, 5th ed. p. 113; 1 Freeman, Judgm. § 159; 1 Greenl. Ev. 16th ed. § 524; Trimmer v. Rochester, 130 N. Y. 401, 29 N. E. 746; Stone v. State, 138 N. Y. 124, 33 N. E. 733; Wallace v. Straus, 113 N. Y. 238, 21 N. E. 66; Groth v. Washburn, 34 Hun, 509; Furlong v. Banta, 80 Hun, 248, 29 N. Y. Supp. 985.

Where two persons have co-operated equally in doing an act or series of acts which are of such a nature that, if they impose any liability, it is *ex delicto*, such liability, if any, is joint and several; and if one of them is sued and judgment goes for the defendant on the ground that the act or transaction did not constitute a wrong, such judgment is not an estoppel in favor of the other person when sued by the same person, for the same transaction.

Sprague v. Waite, 19 Pick, 455; Nelson v. Illinois C. R. Co. — Miss. —, 31 L.R.A. (N.S.) 689, 53 So. 619; Lansing v. Montgomery, 2 Johns. 382; Marsh v. Berry, 7 Cow. 344; Moore v. Tracy, 7 Wend. 229; Gittleman v. Feltman, 122 App. Div. 385, 106 N. Y. Supp. 839; Carson v. Southern R. Co. 68 S. C. 55, 46 S. E. 525, affirmed in 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Atlantic Dock Co. v. New York, 53 N. Y. 64; Tyng v. Clarke, 9 Hun, 269; Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Illinois C. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97; Thompson v. Chicago, St. P. & K. C. R. Co. 71 Minn. 89, 73 N. W. 707; Three States Lumber Co. v. Blanks, 118 Tenn. 627, 102 S. W. 79; 1 Freeman, Judgm. § 159.

The rule is the same where the liability, if any, arises *ex contractu* and is joint and several.

Larison v. Hager, 44 Fed. 49; Townsend v. Riddle, 2 N. H. 448; McLelland v. Ridgeway, 12 Ala. 482; State Bank v. Robinson, 13 Ark. 214; Cameron v. Paul, 6 Pa. 323; Berghaus v. Alter, 9 Watts, 386; Ligon v. Dunn, 28 N. C. (6 Ired. L.) 133; Hazard v. Irwin, 18 Pick. 108.

Conversely, a judgment against one of two persons liable jointly and severally is not an estoppel against the other.

Public Works v. Columbia College, 17

Wall. 521, 21 L. ed. 687; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Douglass v. Howland, 24 Wend. 35; Bigelow, Estoppels, 5th ed. p. 112; Booth v. Powers, 56 N. Y. 22; Bath Gaslight Co. v. Rowland, 178 N. Y. 631, 71 N. E. 1127, 84 App. Div. 563, 82 N. Y. Supp. 841; McLelland v. Ridgeway, 12 Ala. 482; Buckingham v. Ludlum, 37 N. J. Eq. 137; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. 411; Runkel v. Phillips, 9 Phila. 619; Marr v. Southwick, 2 Port. (Ala.) 351; Fletcher v. Jackson, 23 Vt. 592, 56 Am. Dec. 98; State Bank v. Robinson, 13 Ark. 221; Leake & W. Orphan House v. Lawrence, 11 Paige, 80.

Joint tort feors are liable jointly, and severally also.

Buddington v. Shearer, 22 Pick. 427; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; McAvoy v. Wright, 137 Mass. 207; Elliott v. Hayden, 104 Mass. 180; Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330; Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227; 1 Freeman, Judgm. § 236; 2 Van Fleet, Former Adjudication, § 532.

In the case of joint tort feors, both of whom participate equally in the act in question, there is no right of exoneration or even of contribution.

Union Stock Yards Co. v. Chicago, B. & Q. R. Co. 196 U. S. 217, 49 L. ed. 453, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525; Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825; Dent v. Ferguson, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; Hoffman v. McMullen, 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Gray v. Boston Gaslight Co. 114 Mass. 149; Jacobs v. Pollard, 10 Cush. 287, 57 Am. Dec. 105; Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Vose v. Grant, 15 Mass. 505; Kolb v. National Surety Co. 176 N. Y. 233, 68 N. E. 247; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153; Pollock, Torts, 7th ed. 195; Cooley, Torts, 3d ed. 254; Avery v. Halsey, 14 Pick. 174; Douglass v. Howland, 24 Wend. 53.

The rule applies to any equal joint breach of fiduciary duty committed with knowledge of the facts.

Ervin v. Oregon R. & Nav. Co. 22 Blatchf. 187, 20 Fed. 582; Power v. O'Connor, 19 Week. Rep. 923; Atty. Gen. v. Wilson, Craig & Ph. 28, 10 L. J. Ch. N. S. 53, 4 Jur. 1174; Heath v. Erie R. Co. 8 Blatchf. 411, Fed. Cas. No. 6,306.

The fact that the particular wrong involves no moral obliquity does not give a right of contribution.

Andrews v. Murray, 33 Barb. 354; Peek

v. Ellis, 2 Johns. Ch. 131; Miller v. Fenton, 11 Paige, 18.

This rule applies to the directors of a corporation, however innocently they may have misapplied the funds of the corporation.

Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133.

The mere fact that the situation of the two parties is the same makes no difference.

Geraud v. Stagg, 10 How. Pr. 369; St. John v. Andrews Institute, 192 N. Y. 387, 85 N. E. 143.

Interest in the question in suit as a precedent, as distinguished from interest in the right involved, does not constitute privity.

Jackson ex dem. Hogarth v. Nelson, 6 Cow. 248; St. John v. Andrews Institute, 192 N. Y. 382, 85 N. E. 143; Jackson v. Griswold, 4 Hill, 522; Douglass v. Howland, 24 Wend. 35; Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230; McConnell v. Poor, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Giltinan v. Strong, 64 Pa. 242; Arrington v. Porter, 47 Ala. 714; De Greiff v. Wilson, 30 N. J. Eq. 435; McKellar v. Howell, 11 N. C. (4 Hawks) 34; Clark v. Montgomery, 23 Barb. 464.

Wherever the question has arisen it has been held that the most intimate class of coadventurers or joint participants—namely partners—were not bound by an adverse decision against their copartners, even when the existence of the partnership was not in dispute, and the liability, if any existed, was a partnership liability.

Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Booth v. Powers, 56 N. Y. 22; McLelland v. Ridgeway, 12 Ala. 482; Buckingham v. Ludlum, 37 N. J. Eq. 137; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. 411; Leake & W. Orphan House v. Lawrence, 11 Paige, 80; Runkel v. Phillips, 9 Phila. 619; Marr v. Southwick, 2 Port. (Ala.) 351; Fletcher v. Jackson, 23 Vt. 582, 56 Am. Dec. 98; State Bank v. Robinson, 13 Ark. 214; Bath Gaslight Co. v. Rowland, 178 N. Y. 631, 71 N. E. 1127, 84 App. Div. 563, 82 N. Y. Supp. 841; Douglass v. Howland, 24 Wend. 53.

Participation for the purpose of obtaining a favorable precedent upon a similar state of facts, or upon an identical state of facts, does not render the judgment binding as to the participant. The authorities to this effect are believed to be unanimous.

Litchfield v. Goodnoy (Litchfield v. 56 L. ed.

Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; Shutesbury v. Hadley, 133 Mass. 242; Jackson v. Griswold, 4 Hill, 522; Elliott v. Hayden, 104 Mass. 180; Booth v. Powers, 56 N. Y. 22; People v. Knickerbocker L. Ins. Co. 106 N. Y. 619, 13 N. E. 447; Lownsdale v. Portland, 1 Or. 381, Fed. Cas. No. 8,578; Hunt v. Haven, 52 N. H. 162; State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S. W. 399; Central Baptist Church v. Manchester, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30; Allin v. Hall, 1 A. K. Marsh. 525; Rumford Chemical Works v. Hygienic Chemical Co. 148 Fed. 862; O'Brien v. Browning, 49 How. Pr. 109; Behrman v. Louisiana R. & Nav. Co. 127 La. 775, 54 So. 25; 1 Freeman, Judgm. § 189; 2 Black, Judgm. §§ 540, 541; Williams v. Barkley, 165 N. Y. 48, 58 N. E. 765; St. John v. Andrews Institute, 192 N. Y. 382, 85 N. E. 143.

Knowledge by the plaintiff that the defendant participated in the former action is a necessary condition to the defendant's having the benefit of the former judgment on the ground of participation.

Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 173; Lane v. Welds, 39 C. C. A. 525, 99 Fed. 286; Cramer v. Singer Mfg. Co. 35 C. C. A. 508, 93 Fed. 636; Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat, & P. Co. 128 Fed. 751, 135 Fed. 365, 71 C. C. A. 481, 139 Fed. 385; Lacroix v. Lyons, 33 Fed. 437; Cannon River Mfrs. Asso. v. Rogers, 42 Minn. 123, 18 Am. St. Rep. 497, 43 N. W. 792; 2 Van Fleet, Former Adjudication, § 523; 2 Black, Judgm. § 540.

Control of the suit by the person participating is necessary in order to make a judgment binding as an estoppel as to him.

Wilgus v. Germain, 19 C. C. A. 188, 44 U. S. App. 369, 72 Fed. 773; Burr v. Bigler, 16 Abb. Pr. 177; Mankato v. Barber Asphalt Paving Co. 73 C. C. A. 439, 142 Fed. 329; Rumford Chemical Works v. Hygienic Chemical Co. 148 Fed. 862; Wilkie v. Howe, 27 Kan. 518; Cockins v. Bank of Alma, 84 Neb. 624, 133 Am. St. Rep. 642, 122 N. W. 16; 2 Black, Judgm. § 540.

An interest of the participant's own in the event of the suit is necessary to make the judgment an estoppel as to him.

Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; 2 Black, Judgm. § 540.

A judgment on demurrer has been held

to be as conclusive as one rendered on proof, on substantially the same state of facts.

Northern P. R. Co. v. Slaght, 205 U. S. 122, 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; *Bissell v. Spring Valley Twp.* 124 U. S. 225, 228, 31 L. ed. 411, 412, 8 Sup. Ct. Rep. 495; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Lindsley v. Union Silver Star Min. Co.* 52 C. C. A. 640, 115 Fed. 46.

But if a plaintiff fails on demurrer for lack of essential allegations, the judgment is not a bar to another suit in which these allegations are made, even if the cause is the same.

Yates v. Utica Bank, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. Rep. 646; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; *Gilman v. Rives*, 10 Pet. 298, 9 L. ed. 432; *Bissell v. Spring Valley Twp.* 124 U. S. 225, 232, 31 L. ed. 411, 414, 8 Sup. Ct. Rep. 495; *Cromwell v. Sac County*, 94 U. S. 351, 364, 24 L. ed. 195, 201; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Aurora v. West*, 7 Wall. 90, 99, 19 L. ed. 42, 48; *Miller v. Margerie*, 96 C. C. A. 30, 170 Fed. 710; *Dennison Mfg. Co. v. Sharf Tag, Label & Box Co.* 57 C. C. A. 9, 121 Fed. 313; *Haug v. Great Northern R. Co.* 42 C. C. A. 167, 102 Fed. 74; *North Mnskegon v. Clark*, 10 C. C. A. 591, 22 U. S. App. 522, 62 Fed. 694; *Ohio River R. Co. v. Fisher*, 53 C. C. A. 411, 115 Fed. 929; *Gilmer v. Morris*, 30 Fed. 476, 46 Fed. 333; *Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59; *Stowell v. Chamberlain*, 60 N. Y. 272; *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580; 24 Am. & Eng. Enc. Law, 800; 1 Freeman, Judgm. 4th ed. § 267, p. 482; 2 Van Fleet, Former Adjudication, §§ 305, 306, pp. 658, 661.

Mr. Justice **Lurton** delivered the opinion of the court:

The question upon which these cases have been brought to this court is whether the Massachusetts court gave to a New York judgment pleaded as a bar to a Massachusetts suit that full faith and credit required by the 1st section of article 4 of the Constitution of the United States, and § 905, Revised Statutes (U. S. Comp. Stat. 1901, p. 677), enacted in pursuance thereof.

The Old Dominion Copper & Smelting Company, hereafter designated the Copper [125] Company, a corporation *of New Jersey, filed two bills in an equity court of Massachusetts against the plaintiff in error, Albert S. Bigelow, to recover secret profits realized by him and an associate, one Lewisohn, as organizers or promoters

of the Copper Company, in selling the mining property of another corporation, called the Baltimore Company, and certain neighboring properties, designated in the transcript, "outside properties."

The two sales were for distinct considerations. The bills alleged that when these sales were made the Copper Company was under the absolute control of the two promoters, Bigelow and Lewisohn, and that they divided the profits between them. The fundamental facts in each case were the same. The two cases were heard together in the state courts, and are now heard as if one case, though upon separate writs and distinct records.

Demurrers were interposed and overruled. The allegations of the bills are fully shown in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, where one of the cases was considered on demurrer. Answers were then filed and a great mass of evidence taken. Upon a full hearing the allegations of the respective bills were held to be sustained by the proofs, and final decrees were rendered for the plaintiff in sums aggregating \$2,178,673.33. The decrees were affirmed in the supreme judicial court.

The Federal question, upon which the judgment of this court is sought, arose in this wise: Bigelow, the plaintiff in error here, was a citizen of Massachusetts, and was therefore sued in the courts of that state. Lewisohn, who was Bigelow's associate promoter, was a citizen of New York. He was therefore sued separately in the circuit court of the United States for the southern district of New York. The bills filed there were identical in every essential with those filed in Massachusetts. In the two sets of bills it was alleged that Bigelow and Lewisohn were joint promoters of the Copper Company, and *as such [126 made the sales to it while under their entire control, and that they had realized fraudulent profits. Demurrers were interposed in the New York cases, which were sustained, and the bills dismissed. These judgments were affirmed in the circuit court of appeals for the second circuit. The judgment in one of these cases, that relating to the sale of "outside properties," was brought to this court by certiorari and affirmed, the opinion being by Mr. Justice Holmes (210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634), where the facts of the case are stated.

The final decree in one of the New York cases was pleaded in a supplemental answer in the pending Massachusetts cases as a bar to the suits against Bigelow. The Massachusetts court adjudged that Bigelow was neither a party nor a privy to

the New York suits, and was therefore not protected by the judgment therein.

To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was therefore a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against Lewisohn as a precedent is not that of *res judicata*, and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent. Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own case, create an estoppel as to Bigelow. *Stryker v. Goodnow* (*Stryker v. Crane*) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203. Also *Rumford Chemical Works v. Hygienic Chemical Co.* 215 U. S. 156, 54 L. ed. 137, 30 Sup. Ct. Rep. 45.

[127] *But it is said that if Bigelow was not in every sense a party, he was privy to Lewisohn, who was, and that the estoppel in the adverse judgment in the suit against Lewisohn protected Bigelow as well.

But would that judgment, if it had been for the plaintiff in that case, have bound Bigelow in a subsequent suit by the same plaintiff, upon the same facts? If not, upon what principle may he claim the advantage of it as a bar to the present suit? The cause of action was one arising *ex delicto*. It was several as well as joint. The right of action against both might have been extinguished by a settlement with one, or by a judgment against one, and satisfaction. But the claim has come in substance to this: that although the plaintiff had a remedy against Lewisohn and Bigelow severally or jointly, a failure to recover in an action against one is a bar to his action against the other, the facts being the same, although there has been no satisfaction for the injury done. The only basis upon which such a result can be asserted is that Bigelow would have been bound by the judgment if it had been adverse to Lewisohn, and may therefore shelter himself behind it, since it was favorable to his joint wrongdoer.

It is a principle of general elementary law that the estoppel of a judgment must be mutual. *Brooklyn & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; 56 L. ed.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Freeman, Judgm.* § 159; 1 Greenl. Ev. 13th ed. § 524. The mutuality of estoppel by judgment is fully recognized in both the New York and Massachusetts decisions: *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Brigham v. Fayerweather*, 140 Mass. 411, 415, 5 N. E. 265; *Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355.

An apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the *same plaintiff. [128 See *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A. (N.S.) 677, 85 C. C. A. 393, 158 Fed. 63, where the cases are collected. The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.

The principle upon which one may avail himself of the effect of a judgment adverse to the plaintiff in a former suit against the immediate actor, is thus stated in *New Orleans & N. E. R. Co. v. Jopse*, 142 U. S. 18, 24, 27, 35 L. ed. 919, 923, 925, 12 Sup. Ct. Rep. 109.

"It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. . . . If the immediate actor is free from responsibility, because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? . . . The question carries its own answer, and it may be generally affirmed that if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in co-operation with Lewisohn. The liability of each was several as well as joint, and a failure to recover against one is no bar to a suit against the other upon the same facts. But a judgment not only estops those who are actually parties, but also such persons as were represented

by those who were or claim under or in privity with them.

What is privity? As used when dealing **129]** with the estoppel *of a judgment, privity denotes mutual or successive relationship to the same right of property. *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210. The ground upon which privies are bound by a judgment, says Prof. Greenleaf, in his work upon Evidence, 13th ed. vol. 1, § 523, "is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

But it is said that the relationship of joint tort feors is such as to constitute privity, and that a judgment in a suit in favor of one upon the same identical cause of action is a bar to a suit by the same plaintiff against the other wrongdoer. Whether the estoppel of a judgment is to be confined to those who were actually parties or privies in estate or interest, or may be expanded so as to include joint tort feors, not actually parties, is a question concerning which there is some diversity of opinion. But, as we shall later see, the sounder reason, as well as the weight of authority, is that the failure to recover against one of two joint tort feors is not a bar to a suit against the other upon the same facts.

Passing this for the time, we come to a consideration of the contention that, whatever the general law upon this subject, if such was the effect of such a judgment under the law of New York, it was the duty of the Massachusetts court, under the full faith and credit clause, to give it like effect in the present suit.

That the judgment in question is entitled to the same sanction which would attach to a like judgment of a court of the state of New York is plain. The United States court was in the exercise of jurisdiction to administer the laws of the state, since its jurisdiction depended solely upon diversity of citizenship. Its judgment is therefore entitled in the courts of another state to the **130]** *same faith and credit which would attach to a judgment of a court of the state of New York. *Dupasseur v. RocherEAU*, 21 Wall. 130, 22 L. ed. 588; *Deposit Bank v. Frankfort*, 191 U. S. 499, 514, 48 L. ed. 276, 282, 24 Sup. Ct. Rep. 154. What, then, is the effect of such a judgment, under the law of New York, as an estoppel in a subsequent suit upon the same facts by the same plaintiff against Bigelow. This was a question of fact in the Massachusetts

court. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242. Expert legal opinion is favorable to the view urged by the plaintiff in error, though the ground upon which such a consequence rests is by no means clear. The highest courts of New York have not clearly decided the precise question here presented. The cases referred to or commented upon by the witnesses cannot be said to clearly point to the conclusion claimed. Nevertheless, the Massachusetts court, treating the question as one of fact, accepted the view that, under the law of New York, this judgment would have been a bar to another suit upon the same facts against Bigelow, in the courts of New York. We shall do likewise. The Massachusetts courts held that, under the general law, which was the applicable law of Massachusetts, the New York court had no such jurisdiction over the person of Bigelow as to affect him, either as a party who might have controlled the case or appealed from the judgment; and that he was in no sense such a privy as to be bound by it. Upon the general law as to the estoppel of such a judgment, that court said:

"This can hardly be regarded as an open question in this commonwealth. In *Sprague v. Oakes*, 19 Pick. 455, which was an action for trespass *quare clausum fregit*, it was said, respecting such a defense: 'The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it.' This case has never been overruled or questioned, and must be regarded as stating the law of this commonwealth. There are other authorities to the same point. *Lansing v. *Mont-[131 gomery*, 2 Johns. 382; *Marsh v. Berry*, 7 Cow. 344; *Moore v. Tracy*, 7 Wend. 229; *Gittleman v. Feltman*, 122 App. Div. 385, 106 N. Y. Supp. 839; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Tyng v. Clark*, 9 Hun, 269; *Calkins v. Allerton*, 3 Barb. 171, 174; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Thompson v. Chicago*, St. P. & K. C. R. Co. 71 Minn. 89, 73 N. W. 707; *Three States Lumber Co. v. Blanks*, 118 Tenn. 627, 102 S. W. 79. The reasons upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the *Lewisohn* suit against the defendant would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. *Brigham v. Fayerweather*, 140 Mass. 411, 415,

5 N. E. 265; Dallinger v. Richardson, 176 Mass. 77, 83, 57 N. E. 224; Worcester v. Green, 2 Pick. 425, 429; Biddle & S. Co. v. Burnham, 91 Me. 578, 40 Atl. 669; Moore v. Albany, 98 N. Y. 396. 'Estoppels, to be good must be mutual.' Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 552, 31 L. ed. 199, 202, 8 Sup. Ct. Rep. 210; Nelson v. Brown, 144 N. Y. 384, 390, 39 N. E. 355. Bigelow could not have appeared as of right and made a defense in that suit. No judgment can be regarded as *res judicata* as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 233, 6 Am. Rep. 222. There is no privity between joint wrongdoers, because all are jointly and severally liable. Corey v. Havener, 182 Mass. 132]250, 65 N. E. 69; Feneff v. *Boston & M. R. Co. 196 Mass. 575, 581, 82 N. E. 705; Pinkerton v. Randolph, 200 Mass. 24, 28, 85 N. E. 892. There is no right of contribution between joint wrongdoers, where they are *in pari delicto* with each other. Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355. They are equally culpable, and the wrong complained of results from their joint effort." [203 Mass. 216, — L.R.A. (N.S.) —, 89 N. E. 193.]

The cause of action was one arising *ex delicto*, and the liability of Lewisohn and Bigelow was several as well as joint. In many cases this court has held that a judgment without satisfaction against one of two joint trespassers is no bar to another action against the other for the same tort. The common law imposes upon each joint tortfeasor the burden of bearing the entire loss which he, in co-operation with another, has inflicted. The injured person may sue those who co-operated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, and may have a judgment for unequal sums against all who are joined in the suit. Or, if he sue one such wrongdoer and recover judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied. Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Sessions v. Johnson, 95 U. S. 347, 348, 24 L. ed. 596, 597; The Beaconsfield, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. Rep. 860. If Lewisohn and Bigelow were severally liable, and a judgment against one,

without full satisfaction, was not a bar to a suit against the other, it is difficult to see why a failure to obtain a judgment against one should be an answer to a suit against the other, who was not a party to the first suit. That a failure to recover in one suit against one such tortfeasor is not a bar to a suit in the courts of another state against another, who was not a party to the first suit, seems to be supported by considerations of justice and the weight of authority.

But did the Massachusetts court deny full faith and credit to the New York judgment by denying to it the *effect[133 of estoppel which attached to it in the courts of New York, or may it determine for itself, under principles of general law, whether the judgment was a bar to the suit against Bigelow?

The answer must turn upon the construction and effect of the full faith and credit clause of the Constitution, and the act of Congress giving effect thereto. Section 1, article 4 of the Constitution, reads as follows:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The act of Congress of May 26, 1790 [1 Stat. at L. 122, chap. 11], now § 905, Revised Statutes (U. S. Comp. Stat. 1901, p. 677) reads as follows:

"The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved and admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The effect of this clause is to put the judgment of a court of one state, when sued upon, or pleaded in estoppel, in the courts of another state, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged. But

for this provision, such state judgments would stand upon the footing of foreign [134] judgments, *which are examinable when sued on in the courts of another country, being only prima facie evidence of the matter adjudged *D'Arcy v. Ketchum*, 11 How. 165, 175, 13 L. ed. 648, 652. Thus, in *Hanley v. Donoghue*, 116 U. S. 1, 4, 29 L. ed. 535, 536, 6 Sup. Ct. Rep. 242, it is said:

"Judgments recovered in one state of the Union, when proved in the courts of another, differ from the judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Citing *Buckner v. Finley*, 2 Pet. 592, 7 L. ed. 531; *M'Elmoyle v. Cohen*, 13 Pet. 312, 324, 10 L. ed. 177, 183; *D'Arcy v. Ketchum*, 11 How. 165, 176, 13 L. ed. 648, 653; *Christmas v. Russell*, 5 Wall. 290, 305, 18 L. ed. 475, 479; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897.

This requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice, protected by other constitutional provisions which it was never intended to modify or override.

It is therefore well settled that the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the subject or of the parties. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Public Works v. Columbia College*, 17 Wall. 521, 528, 21 L. ed. 687, 691; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Hanley v. Donoghue*, 116 U. S. 1, 4, 29 L. ed. 535, 536, 6 Sup. Ct. Rep. 242; *Huntington v. Attrill*, 146 U. S. 657, 685, 36 L. ed. 1123, 1134, 13 Sup. Ct. Rep. 224; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271.

Mr. Justice Story, in his commentaries on the Conflict of Laws, § 609, says:

"It [the Constitution] did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the *lex fori* [135] gives to *them by its own laws in their character of foreign judgments."

The general effect of a judgment of a court of one state, when relied upon as an estoppel in the courts of another state, is that which it has, by law or usage, in the courts of the state from which it comes.

But the faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced.

Referring to the case of *Mills v. Duryee*, 7 Cranch, 484, 3 L. ed. 413, where the language used was supposed to indicate that the effect to be given to the judgment of one state by the courts of another was in all respects that which attached to domestic judgments, Mr. Justice Bradley, speaking for this court in *Thompson v. Whitman*, 18 Wall. 457, 462, 21 L. ed. 897, 899, said that *Mills v. Duryee* had never been departed from "where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story who pronounced the judgment in *Mills v. Duryee*, in his commentary on the Constitution, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it, or the right of the state itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'"

The conclusiveness of the judgment relied upon in *Thompson v. Whitman* depended upon the locality of a certain seizure by the authorities of New Jersey under an act regulating the fisheries of that state. The question *was whether a record finding of [136] jurisdictional facts could be contradicted. The holding of the court was that the jurisdiction could be assailed by evidence of facts contradicting those found to exist by the record pleaded as an estoppel. That case has since been accepted as determining that the binding effect of a judgment of one state, when pleaded as an estoppel in the courts of another, is open to challenge by assailing an officer's return of service, or the authority of one who assumed to accept service, or to enter an appearance, even though the judgment includes a finding of the facts necessary to confer jurisdiction. It would seem to follow that the Massachusetts court had the legal right to inquire, not only whether Bigelow was a party to the New York judgment in the sense that he might have appeared and defended, or appealed from it, but whether the cause of action and the relation of Bige-

low to it, or to the parties, was such that the New York court could pronounce a judgment which would bind him, or conclude the plaintiff from suing him upon the same facts. *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70; *Cooper v. Newell*, 173 U. S. 555, 556, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

Bigelow was a citizen of and domiciled in Massachusetts. He was not found within the state of New York. Indeed, the pleadings in the New York court stated that he was not sued because he did not reside within the state. A judgment rendered upon constructive service against one domiciled within the state may be a good judgment *in personam* in that state, though void when sued upon outside the state. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. In *Goldey v. Morning News*, 156 U. S. 518, 521, 39 L. ed. 517, 518, 15 Sup. Ct. Rep. 559, it is said:

"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance *or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."

See also the thorough discussion of this question in *Haddock v. Haddock*, 201 U. S. 562, 567, 573, 50 L. ed. 867, 868, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

The New York court had no jurisdiction to render a judgment *in personam* against Bigelow. He was confessedly not a party. He did not voluntarily appear. He had no legal right to appear, no right to introduce evidence, control the proceedings, nor appeal from the judgment. To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or law of New York, would be to give to the law of New York an extra-territorial effect which would operate as a denial of due process of law. Whatever the effect of that judgment as an estoppel under the law of New York, it cannot be held an estoppel in a suit in the courts of another state between the same plaintiff and a different defendant, who was not a party to the first suit. *D'Arey v. Ketchum*, 11 How. 165, 13 L. ed. 648, is clearly in point. Under a New York statute a court of that

state entered judgment against a nonresident defendant who was not served and did not appear. The judgment was entered under authority of a statute permitting judgment against joint debtors where only one was notified. The nonresident defendant was sued upon this judgment, perfectly good under the decisions of New York, in the courts of Louisiana. This court, after full consideration, held that the jurisdiction of the New York court to render a personal judgment against a nonresident was open to inquiry, and that it was not to be given the effect it plainly had under the law of New York, because that court had no jurisdiction over the person of the defendant. This case was followed in *Public Works v. Columbia College*, 17 Wall. 521, 527, 21 L. ed. 687, 691, which involved the effect of a joint judgment against five persons as joint debtors, two of whom were nonresidents, and were not served and did not appear. This judgment was held not to be evidence against the partners who had not appeared. Touching the effect of that judgment, this court said:

"It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that state without service of process upon him or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the state where rendered. Their effects are merely local. Out of the state they are nullities, not binding upon the nonresident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the state courts.

"The judgment in New York, it is true, is a joint judgment against all the partners, against those summoned by publication as well as those who were served with process or appeared; but this joint character cannot affect the question of its validity as respects those not served. The clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271, was an action in a United States court for the district of Illinois upon a New York judgment against a New York partnership. It appeared that the suit in which the judgment sued upon was obtained was against all the members of a firm, upon a joint liability. The members of the part-

nership who were residents and were actually served assumed the right to *enter the appearance of certain nonresidents who were not and could not be notified. In the action upon this joint judgment one of the defendants claimed the right to deny the jurisdiction of the New York court to pronounce a judgment against him, upon the ground that he had not been summoned, had not personally appeared, and was not concluded by an appearance entered for him by his copartners, the firm having theretofore been dissolved. The case was distinguishable from *D'Arcy v. Ketchum* and *Public Works v. Columbia College*, because the partners actually served assumed authority to enter the appearance of the nonresidents who were not served. The debt sued upon was a partnership debt. The contention was that the relation of partnership conferred upon partners, even after dissolution, the right to appear for their copartners in a suit against the firm. As a question of general law, this court held that although the judgment was valid under the laws and usage of New York, at the common law no such right existed after dissolution, and that the requirement of full faith and credit did not compel the courts of another state to give effect to the judgment as against the nonresident member of the firm who had not been served.

From these cases it is clear that the conclusive effect of a judgment *in personam*, which is to be recognized when questioned in the courts of another state, depends upon whether it is the judgment of a court which had jurisdiction over the person of the defendant sought to be bound. The estoppel here insisted upon is grounded not upon actual notice or appearance, but upon a theory as to the relation between joint tortfeasors under the laws of New York. If the Massachusetts court was of opinion that, under the general law, that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded.

140] *The binding effect of the judgment sued upon in *Hall v. Lanning*, cited above, turned upon the implied power of one member of a dissolved firm to enter the appearance of his nonresident partners in a suit upon a joint debt. Under the decisions of the New York courts such a judgment bound the members whose appearance was so entered. But this court held that full faith and credit was not denied by a determination of the power of one partner to so enter the appearance of a nonresident partner, and held that no such power existed.

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In *Bagley v. General Fire Extinguisher Co.* 212 U. S. 477, 480, 53 L. ed. 605, 613, 29 Sup. Ct. Rep. 341, the facts were these: A tenant recovered judgment against his landlord resulting from the melting of sprinkler heads in an automatic sprinkler put up in plaintiff's building by the defendant. The plaintiff gave the defendant notice to defend, which it ignored. The suit was to recover the money so paid by the landlord. It was claimed that negligence in construction was made out by the judgment rendered against the plaintiff in favor of the tenant in a court of the state of Michigan. That judgment was relied upon as estopping the defendant, who, it was claimed, had notice, and was, under its contract, bound to defend. The court said:

"The defendant was no party to that judgment, and there is nothing in the Constitution to give it any force as against strangers. If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. The ground of decision in both courts below was that there was no such estoppel, the duty and responsibility of the defendant being limited by the words that we have quoted from the contract, excluding any obligation other than those set forth. The decision, in other words, turned wholly on the construction of the contract as excluding a liability over any event that happened. Even if wrong, *it did not deny the [141 Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them, without which the defendant remained a stranger to them, in spite of the notice to defend."

In support of the contention that the full faith and credit clause gives to this judgment the effect, as an estoppel, which would be given to it in New York, counsel have cited the case of *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 643, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506, where it is said that the "local effect must be recognized everywhere." But that was said in respect of a Kansas judgment in favor of a creditor of a Kansas corporation, in a suit by the creditor in another state, against a stockholder of the Kansas corporation, to subject him to liability as a shareholder to an amount equal to his stock. But under the law of Kansas and the general law a stockholder is represented by the corporation in all actions against the corporation for corporate liabilities. The stockholder is, by the very law of corporate existence, an integral part of the corporation, and is bound by a judgment

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against it in respect of any matter within the scope of corporate powers. See *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810. In the *Farnum Case*, as in all cases of that class, there is a privity in interest and a representation in law of the stockholder by the corporation of which he is a member. The conclusiveness of such a judgment as binding each stockholder does not, however, extend to matters in which the corporation cannot be said to represent him. Thus it is said in the *Farnum Case*:

"We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, 142] in law or equity, *as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it."

There is no parallel between the relation of joint tort feorsors and that of a stockholder to his corporation. In the latter case, the stockholder, by the organic law of his corporation, is a member and represented by it so long as it keeps within its corporate powers. In the other instance one wrongdoer, when sued, does not represent those not sued, although they had co-operated in the wrong and were both liable.

The conclusion we reach is that the Massachusetts court did not deny full faith and credit to the New York judgment, and its decrees are therefore affirmed.

Mr. Justice *Hughes* took no part in the hearing or consideration of these cases.

ALEXANDER R. STALKER and Emaline Stalker, Plffs. in Err.,

v.

OREGON SHORT LINE RAILROAD COMPANY.

(See S. C. Reporter's ed. 142-154.)

Public lands — railroad land grant — relation.

The approval by the Secretary of the In-

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison*, T. & S. F. R. Co. 28 L. ed. U. S. 794. 56 L. ed.

terior of a plat of station grounds, filed conformably to the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), § 4, by a railway company seeking to secure, in advance of actual construction, the benefits of the grant made by that act of grounds adjacent to its right of way, relates back to the date of filing, so as to cut off any rights therein founded on a pre-emption claim filed pending such approval, and subsequently patented, although the register of the local land office may have failed, after a copy of the approved plat had been submitted to him, to mark the proper township plat and tract books, as required by regulations of the Land Department, so as to show the station land selected.

[For other cases, see *Public Lands*, 108-124, in *Digest Sup. Ct.* 1908.]

[No. 225.]

Argued and submitted April 24, 1912. Decided May 27, 1912.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which, on rehearing, affirmed a decree of the District Court of Ada County, in that state, in favor of plaintiff in an action by a railway company to quiet title. Affirmed.

See same case below, 14 Idaho, 362, 94 Pac. 56; on rehearing, 14 Idaho, 371, 94 Pac. 59.

The facts are stated in the opinion.

Mr. **Carl A. Davis** submitted the cause for plaintiffs in error:

A patent issued by the Land Department in the exercise of its jurisdiction cannot be collaterally attacked.

Minter v. Crommelin, 18 How. 87, 15 L. ed. 279; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; *Doe ex dem. Patterson v. Winn*, 11 Wheat. 380, 6 L. ed. 500; *Gonzales v. Atlantic & P. R. Co.* 1 Land Dec. 361; *Gilbert v. St. Joseph & D. R. Co.* 1 Land Dec. 465.

Under these decisions, even if respondent's claim had been noted on the records of the local land office, it would still be necessary, as against a patentee of the same lands, that respondent show title, either by reservation in the patent, or by proof of actual possession and appropriation of the property prior to final proof by the entryman.

Respondent's claim has been conclusively determined by the Land Department of the United States.

Atlantic & P. R. Co. v. Forrester, 1 Land Dec. 475; *Atlantic & P. R. Co. v. Buckman*, 3 Land Dec. 276; *Re Sturm*, 5 Land Dec. 295; *Brady v. Southern P. R. Co.* 5 Land Dec. 407; *Iverson v. St. Paul, M. & M.*

R. Co. 5 Land Dec. 586; *Brady v. Southern P. R. Co.* 5 Land Dec. 658; *Northern P. R. Co. v. Dow*, 8 Land Dec. 389; *Randolph v. Northern P. R. Co.* 9 Land Dec. 417.

A railroad that fails to respond to the settler's notice of intention to submit final proof is bound by the record in the proceedings.

Atlantic & P. R. Co. v. Armijo, 9 Land Dec. 427.

General notice of intention to make final proof is legal notice to a railroad company, and if it fails to respond thereto it will be as effectually bound by the record as though present.

Catline v. Northern P. R. Co. 9 Land Dec. 423; *Florida R. & Nav. Co. v. Dodd*, 11 Land Dec. 91; *Northern P. R. Co. v. Harrendrup*, 11 Land Dec. 633.

The government, as a landowner, offers its land for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; publication of notice is process bringing all adverse claimants into court, and if no adverse claims are present, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land.

Wight v. Dubois, 21 Fed. 695.

Mr. Maxwell Evarts argued the cause, and, with Mr. P. L. Williams, filed a brief for defendant in error:

The right of the defendant in error to assert its title is not barred by the issue of the patent or by the proceedings in the Land Department.

Randolph v. Northern P. R. Co. 9 Land Dec. 417.

The position of the defendant in error, by reason of its failure to appear upon the final proof in the pre-emption proceedings, can be no worse than if it had appeared and contested and its claim had been overruled by the Department. The findings and decisions of the Department are not conclusive, even after the issue of patent, except upon questions of fact. The decision of the Department upon undisputed facts, that one person is entitled to a patent, is reviewable by the courts as a proposition of law.

Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 61, 40 L. ed. 71, 76, 15 Sup. Ct. Rep. 1020; *Thayer v. Spratt*, 189 U. S. 346, 350, 47 L. ed. 845, 847, 23 Sup. Ct. Rep. 576; *Greenmeyer v. Coate*, 212 U. S. 434, 445, 53 L. ed. 587, 591, 29 Sup. Ct. Rep. 345; *Whitcomb v. White*, 214 U. S. 15, 53 L. ed. 889, 29 Sup. Ct. Rep. 599.

Where lands have been previously disposed of, or appropriated, or reserved from sale or location, or otherwise segregated from the public domain, the Department has no jurisdiction to transfer them, and any attempted conveyance by patent is inoperative and void.

Davis v. Wieboldt, 139 U. S. 507, 529, 35 L. ed. 238, 246, 11 Sup. Ct. Rep. 628; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Burfening v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; *Johnson v. Drew*, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Simmons v. Wagner*, 101 U. S. 260, 25 L. ed. 910.

The issue of the patent to Reed is not at all inconsistent with the recognition by the Department and Reed at that time of the existing rights acquired by the railway company.

Rio Grande Western R. Co. v. Stringham, — Utah, —, 110 Pac. 868.

The railway company did all it was required to do by the act of Congress or regulations of the Department of the Interior to perfect its title, and its rights were not prejudiced by the failure of the local land officer to note the appropriation of station grounds upon his office plats.

Goist v. Bottum, 5 Land Dec. 643; *Re Chase*, 1 Land Dec. 81; *Pomeroy v. Wright*, 2 Land Dec. 164; *Cole v. Markley*, 2 Land Dec. 847; *Postle v. Strickler*, 3 Land Dec. 42; *Hawkins v. Lamm*, 9 Land Dec. 18; *Re Young*, 9 Land Dec. 32; *Baird v. Chapman*, 10 Land Dec. 210; *Richardson v. Moore*, 10 Land Dec. 415; *Yates v. Glafcke*, 10 Land Dec. 673; *Linville v. Clearwaters*, 11 Land Dec. 356; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Lytle v. Arkansas*, 9 How. 314, 333, 13 L. ed. 153, 160.

The regulation of the Secretary of the Interior, requiring a notation upon the plats in the land office, does not have the force or effect of a recording act.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; *Northern P. R. Co. v. Ely*, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; *Northern P. R. Co. v. Hasse*, 197 U. S. 9, 49 L. ed. 642, 25 Sup. Ct. Rep. 305.

When a grantee has duly deposited for record a valid instrument at the proper time, in the proper office, and with the proper officer, he has performed his whole duty; and subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not properly

spread the instrument on the record book, or fails to record it all.

Steam Stone Cutter Co. v. Sears, 23 Blatchf. 194, 23 Fed. 314; *Hudson v. Randolph*, 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 216; *Seibold v. Rogers*, 110 Ala. 438, 18 So. 312; *Oats v. Walls*, 28 Ark. 244; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Kiser v. Heuston*, 38 Ill. 252; *Hayden v. Peirce*, 165 Mass. 359, 43 N. E. 119; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; *Farabee v. McKerrihan*, 172 Pa. 234, 51 Am. St. Rep. 734, 33 Atl. 583; *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238; *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Armstrong v. Austin*, 45 S. C. 69, 29 L.R.A. 772, 22 S. E. 763.

Upon approval of the map by the Secretary of the Interior, the title of the railway company was perfect, and related back to the date on which the map was filed.

Noble v. Union River Logging R. Co. 147 U. S. 165, 176, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271; *Jamestown & N. R. Co. v. Jones*, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 387, 55 L. ed. 258, 261, 31 Sup. Ct. Rep. 300; *Dakota C. R. Co. v. Downey*, 8 Land Dec. 119; *Re St. Paul, M. & M. R. Co.* 26 Land Dec. 181; *Re Pope*, 28 Land Dec. 402; *Cathcart v. Minnesota & M. R. Co.* 34 Land Dec. 619, 625; *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.

It is not pleaded or proved that the plaintiffs in error or their predecessors in interest were bona fide purchasers.

Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641; *Boone v. Chiles*, 10 Pet. 211, 9 L. ed. 400; *Smith v. Orton*, 131 U. S. LXXVIII Appx. and 18 L. ed. 62; *McDonald v. Belding*, 145 U. S. 492, 498, 36 L. ed. 788, 790, 12 Sup. Ct. Rep. 892; *Johnson v. Georgia Loan & T. Co.* 72 C. C. A. 639, 141 Fed. 593; *Trice v. Comstock*, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620.

Messrs. Maxwell Evarts and A. A. Hoehling, Jr., also filed a brief for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

This was an action brought by the railroad company under a statute of the state of Idaho to quiet title to four certain lots in the town of Meridian, Idaho. The judgment in the trial court for the railroad company was affirmed in the supreme court of the state.

144] *The defendant in error, as successor in title to the Idaho Central Railway Company, claims that the property in question

is a part of the station grounds granted to its predecessor under the act of Congress of March 3, 1875 [18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568], which grant in part conflicts with the pre-emption entry made by one Joseph G. Reed, under whom the plaintiffs in error claim. The lands in question had been surveyed and were open for entry long prior to the initiation of either of the claims here involved. The conflicting rights arose in this way: The Idaho Central Railway was duly qualified under the act of Congress of 1875 to acquire a right of way and station grounds. In June, 1887, its directors formerly adopted a route between Nampa and Boise City which corresponded precisely with the route upon which the railroad was later constructed. This adoption was followed up by the filing of the profile maps, which were approved by the Secretary of the Interior on February 17, 1888, and sent back to the proper land office at Boise City. These maps did not include grounds for station purposes. By September 1, 1888, the railroad was constructed along the route first adopted, and at that date was in actual operation. On September 12, 1888, the company filed in duplicate with the register of the land office at Boise City, a plat of ground adjacent to its right of way, desired for station purposes, which selection included the lots here in controversy. This plat was received by the Secretary of the Interior on September 20, 1888, and approved on December 15, 1888. A copy was then transmitted to the register at Boise City. That official received it, but failed and neglected to "note the same upon the plats in the said land office," as it was his duty to do, and it is now stipulated that it has since been lost or mislaid and cannot be found. A blue print of the original map of the station grounds as selected by the plaintiff, with its certificates and indorsements, was stipulated into the record.

*The plaintiffs in error claim through [145] Joseph G. Reed, a qualified entryman, who, on October 18, 1888, filed a pre-emption claim upon a quarter section adjacent to the railroad right of way. Later he made final proofs, and, on August 4, 1891, a patent issued. This pre-emption included about 12 acres of the ground which the railroad company had theretofore selected for station purposes. There is no evidence of occupation of the portion here involved, and no plea of innocent purchaser, for value, without notice. The question was decided by the state court upon the rights resulting from the facts stated.

The case must turn upon the interpretation of the act of Congress of March 3,

1875, 18 Stat. at L. p. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568. The relevant sections are the 1st and 4th, which are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

"Sec. 4. That any railroad company desiring to secure the benefits of this act **146** shall, within twelve months after the location of any section of twenty miles or its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The uniform construction of this act has been that it is a grant "*in presenti* of lands to be thereafter identified." *Jamestown & N. R. Co. v. Jones*, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568. In that case the question was whether the right of way became definitely located by the actual construction of the railroad, or only upon the filing of a map of location, which was much later. The conclusion was that, by the actual construction of the railroad, the boundaries of the grant were fixed by the rule of the statute, which granted a strip 100 feet wide on each side of the center of

the track. That had been the construction of the act by the Interior Department, and was followed by the court below. Mr. Justice McKenna, for this court, said: "The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or, in advance of construction, by filing a map [of its road] as provided in § 4. Actual construction of the road is certainly unmistakable evidence and notice of appropriation." It was therefore held that an entry made after construction, but before filing a map of location, was subject to the prior right of the railroad.

Possibly station grounds might also have been secured *by the actual marking[**147** of the boundaries and the construction of station houses, side tracks, etc. This we need not decide. But the 4th section of the act provides a method for securing the benefits of the act in advance of actual construction.

Prior to the initiation of any right here involved, the Land Department put in force certain regulations to be followed by railroad companies desiring to secure the benefits of a grant in advance of actual construction, as provided by the 4th section of the act. One of these required that upon the location of any section, not exceeding 20 miles in length, the company should file with the register of the land district in which the land lay "a map for the approval of the Secretary of the Interior, showing the termini of such portion and its route over the public lands," etc. Another of these departmental regulations provided that "if the company desires to avail itself of the provisions of the law which grants the use of ground adjacent to the right of way for station buildings . . . it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the ground desired." These regulations require that "a copy" of the approved map of "definite location," and of the "approved plat of ground selected by a company, under the act in question, for station purposes," shall be transmitted to the register of the land office where the land lies. Upon the receipt of the map of alignment, the land office is required "to mark upon the township plats the line of the route of the road as laid down on the map," and to note in pencil on the tract books opposite the tract of public land cut by said lines of railroad, "that the same is disposed of subject to the right of way," etc., and to write upon the face of any certificate disposing of said lands, after the filing of such approved map of location, "that it is

allowed subject to the right of way." A 148]like duty is *put upon the register when an approved station ground plat is received.

The plat of the station grounds selected by the railroad company in this case was filed in the local land office on September 12, 1888, and reached the Secretary of the Interior on September 20, 1888. Both dates are antecedent to the filing of the pre-emption claim. But the selection pended in the office of the Secretary of the Interior until December 15, 1888, on which date it was approved. While thus pending the pre-emption right of Reed was initiated.

There can be no doubt that the provisions of the 4th section, for securing in advance of construction the benefits of the act, have application to the station grounds, as well as to the right of way proper. The "benefits" to be secured cover one as well as the other. The prerequisite for securing either right, in advance, is the filing of a map of location, whether it be for a right of way or for station grounds. But until approved the appropriation stands suspended.

The act of 1875 confers upon the railroad company the "right to take" from the public lands adjacent to its right of way, ground for station purposes. This "right to take" in advance of construction is subject to the approval of the Secretary of the Interior. When, therefore, the railroad company has exercised its "right to take" a particular tract for station purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking, as of the time when the right was asserted by the filing of the plat and survey. When he acts and for the government consents, by approving the plat, his approval operates to give effect to the grant, the land upon which it operates being thereby definitely determined. Therefore it is that a claim 149]by another, initiated pending his *conclusion, is cut off, by giving effect, to the approval as of the date when his action was invoked. The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by states to which a grant has been made subject to location. In both classes of cases, it has

been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300, and we can add nothing to the conclusiveness of that case.

But it is said that the doctrine of relation does not apply to the benefits to be acquired under the 4th section of the act of March 3, 1875, because a railroad desiring a right of way in advance of construction must do three specific things: first, make a definite location of its route; second, file a profile map of its line with the register of the land office for the district; and third, obtain the approval of that map by the Secretary of the Interior; and that the act makes each of these things a prerequisite to the acquirement of any right, by expressly declaring that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

In *Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty*, 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291, the question was whether a homestead application filed *after[150 the railroad company had surveyed and staked out its route across the quarter section claimed, but before the road had been constructed or its map of location filed, was entitled to preference over the right later secured by the approval of a map of alignment, following the route which had been staked. The claim was that the approval by the Secretary of the Interior of the map of location related in date to the date when the route was staked out, and thus cut out the homestead claim. This court held that the mere surveying and staking of a route was not such actual possession and appropriation as to give effect to the grant and bring the case under the authority of *Jamestown & N. R. Co. v. Jones*, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568.

The distinction and essential difference between a mere staking out of a route, which, being the act of the company alone, is changeable at its will, and actual construction, which necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given, is very obvious, and was carefully pointed out in the opinion of the court in the case referred to.

Another point was involved and decided in the Doughty Case; namely, that the approval of the map of alignment by the Secretary of the Interior would not relate to the date of the surveying and staking out of the route. This was manifestly so, since that survey and staking were subject to change at any time before the permanent line was located by the filing of a map of such locations for the approval of the Secretary of the Interior. Therefore it is that the doctrine of relation has always been applied in reference to the date when the official action of the Department was invoked to confirm the location thus permanently settled. These points were conclusive against the railroad company and were the only questions for decision. The case was therefore rightly decided.

But that case does not control this. Here we are required to say whether a pre-emptor whose claim was *initiated while the Secretary of the Interior had under consideration the approval of a map of station grounds thereby obtained a right to be preferred. True, this approval did not occur until after the rights of the plaintiffs in error had been initiated; but the patent to the pre-emptor did not issue until long after that approval. Upon what principle can it be held that the grant, which, under any view of the case, is prior in date to the patent under which plaintiffs in error claim, is subordinate in right as to the overlap? Neither should the case of *Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty*, be regarded as construing the 4th section of the act as holding that, pending the approval of a map of final location, any right may be initiated which will be superior to the title which vests upon such approval. No such question was involved in that case. What is said in the opinion about the grant of a right of way being dependent upon the doing of three things,—location of road, filing profile of it in the land office, and the approval thereof by the Secretary of the Interior,—and that “*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way,” refers to the nonvesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises *as between parties*, growing out of priority of application.

Any construction of the 4th section of the act of 1875 which would permit rights initiated while the Secretary of the Interior was considering the approval of a map of location of a right of way over public lands, or a plat of survey of depot grounds, to prevail over rights resulting from the prior commencement of proceed-

ings for the acquisition of title, would be in conflict with the settled practice of the Land Department and the repeated rulings of this court under other acts. *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

Any other conclusion would lead to great confusion and *tend to defeat the purpose of the 4th section by inviting interveners to initiate rights made desirable by the disclosure of the land most available to the railroad company, and rights presumably hurtful to the railroad enterprise; which Congress intended to encourage and promote.

The principle applicable is fully discussed in *Shepley v. Cowan*, cited above, where, after discussing certain prior cases, the court said:

“But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.”

The initiatory act, to which the final act of approval relates, is the filing with the Secretary of the Interior of the map of definite location. The mere surveying and staking of a route is the tentative act of the railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, rightly precludes the creation of a later right, and gives to the company, as prior in time, priority in right. The foundation for this doctrine of relation is so fully stated and so thoroughly vindicated by the opinion in *Weyerhaeuser v. Hoyt*, cited above, that we need say nothing more.

It is next said that the register did not, after a copy of the approved map of station grounds had been transmitted *to him, mark the proper township plat and tract books, as required by the regulations of the Land Department, so as to show the station land selected. This notation on the books of the local land office is for the purpose of giving notice to future enterers. But this was not required to be done until

the receipt in the land office of the approved plat of station grounds. That approval did not occur until December 15, 1888. Reed filed his right of pre-emption October 18, 1888,—a date antecedent to any possible notation. He could not, therefore, have been misled, but, on the other hand, had the constructive notice which came from the then pending proceedings before the Secretary of the Interior. But aside from this, there are two answers to the contention: First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the plat could not operate to defeat the grant; and, secondly, the railroad company, having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend. If the taking effect of the grant had been made to depend upon his properly marking the plat books, there would be no room for the doctrine of relation to the initiatory step of filing the plat of selection. As that is not the case, his neglect to do something not vital to the vesting of title will not defeat the title so vested.

When the plat of station grounds was approved by the Land Department, the grounds so selected were segregated from the public lands, and it was the duty of the Land Department to withdraw the land so granted from the market. If a subordinate failed to make the proper notation by which this withdrawal would have been recorded, it was not the fault of the railroad company. In *Van 154*] **Wyck v. Knevals*, 106 U. S. 360, 367, 27 L. ed. 201, 203, 1 Sup. Ct. Rep. 336, this court said of the effect of the approval of a map of definite location:

"No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land officers."

We therefore conclude that the subsequent issue of a patent to the land entered by Reed was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but

in so far as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title.

Certain other questions have been touched upon in the briefs. None of them need special notice.

We find no error in the judgment of the Idaho court, and it is therefore affirmed.

*CHICAGO & ALTON RAILROAD[155
COMPANY, Plff. in Err.,

v.

NATHANIEL T. KIRBY.

(See S. C. Reporter's ed. 155-166.)

Carriers — discrimination — special service.

1. An undue and unreasonable preference forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), §§ 3, 6, and the act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309), is accorded a shipper by a special agreement by which a carrier undertakes to expedite a carload shipment of horses over its own lines so that it will reach the point of connection with the next carrier in time to be carried by a special fast stock train leaving that point the next morning, the shipper being charged the regular established joint through rates, which made no provision for such special service.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Carriers — discrimination — breach of illegal contract.

2. A shipper cannot recover damages for a breach of the carrier's special agreement by which, contrary to the act of February 4, 1887, §§ 3, 6, and the act of February 19, 1903, it undertook, for the regular established joint through rate, to expedite a carload shipment of horses over its own lines so that it would reach the point of connection with the next carrier in time to be carried by a special fast stock train, although the shipper did not see or know that the established rates and schedules made no provision for such special service.

[For other cases, see Carriers, III. e; Contracts IV. g, in Digest Sup. Ct. 1908.]

[No. 226.]

NOTE.—On the right of carrier to discriminate with respect to special or unusual service—see note to *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 12 L.R.A.(N.S.) 506.

As to the right of a carrier at common law to discriminate between passengers or shippers—see note to *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L.R.A. 105.

As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations—see note to *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 94 C. C. A. 230.

Argued April 25, 1912. Decided May 27, 1912.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the Appellate Court for the Third District, which affirmed a judgment of the Circuit Court of Sangamon County, in that state, in favor of plaintiff in an action of assumpsit. Reversed and remanded for further proceedings.

See same case below, 242 Ill. 418, 90 N. E. 252.

The facts are stated in the opinion.

Messrs. **Garrard B. Winston** and **William Patten** argued the cause, and, with Mr. **Silas H. Strawn**, filed a brief for plaintiff in error:

Whatever may have been the law prior to the passage of the interstate commerce act as to the right of a common carrier to make special contracts with special members of the public for different privileges or facilities or rates for the transportation of the same commodity, since the new act has governed interstate transportation, no such right now exists.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 392, 50 L. ed. 515, 521, 522, 26 Sup. Ct. Rep. 272.

Which contract is valid? The special contract of guaranty with Kirby, or the contract open to the public in general with his competitor?

Armour Packing Co. v. United States, 209 U. S. 56, 80, 81, 52 L. ed. 681, 694, 695, 28 Sup. Ct. Rep. 428.

The interstate commerce act and its amendments seeks to provide a complete code for the government of carrier and shipper in their relations to each other with respect to tariffs and rates, all aimed at the purpose of enforcing an absolute equality between shippers, and preventing the granting of any privilege to the shipper which may affect the value of the services performed.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 439, 51 L. ed. 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The facility and service of specially expedited transportation, or transportation by a particular connection or train, is such that it requires publication to be lawful.

Barnes, Interstate Transp. § 415; *Elliot, Railroads*, 2d ed. § 1684; *Shiel v. Illinois C. R. Co.* 12 Inters. Com. Rep. 211; *Diamond Mills v. Boston & M. R. Co.* 9 Inters. Com. Rep. 311; *St. Louis Hay & Grain Co. v. Mobile & O. R. Co.* 11 Inters. Com. Rep. 90; *Re Mobile & O. R. Co.* 9 Inters. Com. Rep. 373, 380; *Re Unlawful*

Rates, 8 Inters. Com. Rep. 121; *Commercial Club v. Northern P. R. Co.* 13 Inters. Com. Rep. 288; *Victor Fuel Co. v. Atehison, T. & S. F. R. Co.* 14 Inters. Com. Rep. 119, *Kansas City Hay Co. v. St. Louis & S. F. R. Co.* 14 Inters. Com. Rep. 631; *C. C. Folmer & Co. v. Great Northern R. Co.* 15 Inters. Com. Rep. 33; *National Lumber Co. v. San Pedro, L. A. & S. L. R. Co.* 15 Inters. Com. Rep. 434; *Barrett Mfg. Co. v. Central R. Co.* 17 Inters. Com. Rep. 464; *Armour Car Lines v. Southern P. R. Co.* 17 Inters. Com. Rep. 461; *Beale & W. Railroad Rate Regulation*, § 748.

Amendments of the act after the cause of action arose may be looked to as a means of justifying the judicial construction of the act before amendment.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 447, 51 L. ed. 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The rate sheet, standing alone, does not constitute the schedule of rates required by the law, but is only a part of it; the other part being the official classification referred to in it, and filed with it; and the two must be read together as component parts of the schedule of rates.

Mannheim Ins. Co. v. Erie & W. Transp. Co. 72 Minn. 357, 75 N. W. 602.

The classification sheet is binding on both carrier and shipper.

Smith v. Great Northern R. Co. 15 N. D. 195, 107 N. W. 56.

The elements of classification are those that affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper. So the elements must necessarily be important which impose a great degree of care on the carrier.

Beale & W. Railroad Rate Regulation, § 586.

Then, too, the risk of loss or damage and the liability for the same are matters which the carrier may take into consideration in fixing its rate. The risk of loss or damage by breach of a special contract for specially rapid service would legitimately increase the rate, and therefore the special service should not be performed at the tariff rate for common-law service.

Millinery Jobbers' Asso. v. American Exp. Co. 20 Inters. Com. Rep. 498.

All contracts entered into with common carriers are presumed to be governed by the classification in force at the time of the shipment. Whether such classification is just or unjust, it is nevertheless binding both upon the common carrier and the shipper, so long as the same remains in force. The tariff thus fixed must govern regardless of any contract for a greater or less rate.

Smith v. Great Northern R. Co. supra.

If the rate is duly published, and thus called to the attention of shippers and consignees, they cannot depend for the lawful rate or charge on what may be quoted by the carrier's agent, but must be guided by the published tariffs themselves.

Suffern H. & Co. v. Indiana, D. & W. R. Co. 7 Inters. Com. Rep. 255; *Southern R. Co. v. Harrison*, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552, overruling *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289; *Kinnavey v. Terminal R. Asso.* 81 Fed. 802; *Baltimore & O. R. Co. v. Hamburger*, 155 Fed. 849.

Where the rate sheet states that the rates are subject to an official classification filed with the Commission, which specifically states in detail the rates under a form of bill of lading, called uniform bill of lading, limiting the common-law liability, and stating that rates on property not shipped subject to the uniform bill are a specified percentage higher than the reduced rates under the uniform bill, the schedule was sufficient to inform shippers that the rates given were for carriage with limited liability.

Mannheim Ins. Co. v. Erie & W. Transp. Co. 72 Minn. 357, 75 N. W. 602; *Church v. Minneapolis & St. L. R. Co.* 14 S. D. 443, 85 N. W. 1001.

Kirby was presumed to know, upon proof of the due filing and publication of the schedules, that they were in existence, open for his inspection, and that his contract must be and was made in accordance therewith, and the rate of 65 cents being quoted and accepted by him, he was presumed to know that he could legally receive therefor only the service permitted by and set forth in the schedules, and not a special service.

16 Am. & Eng. Enc. Law, 2d ed. 161; *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 690, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Texas & P. R. Co. v. Abilete Cotton Oil Co.* 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Armour Packing Co. v. United States*, 209 U. S. 56, 72, 80, 81, 52 L. ed. 681, 691, 694, 695, 28 Sup. Ct. Rep. 428; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 476-478, 55 L. ed. 297, 301, 302, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

It goes without saying that a contract to perform an additional and special service for Kirby for the regular schedule rate is a discrimination in his favor as completely as if he were given the regular

schedule service for a lower rate than the tariff rate, or for a different compensation.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

No action can be maintained in which the plaintiff, to make out his case, must necessarily invoke aid from an illegal demand or contract.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 548, 549, 48 L. ed. 679, 685, 686, 22 Sup. Ct. Rep. 431; *Chesapeake & O. R. Co. v. Maysville Brick Co.* 132 Ky. 643, 116 S. W. 1183; *Gerber v. Wabash R. Co.* 63 Mo. App. 145; *Raleigh & G. R. Co. v. Swanson*, 102 Ga. 754, 39 L.R.A. 275, 28 S. E. 601; *Baltimore & O. R. Co. v. Hamburger*, 155 Fed. 849; *Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995.

This judgment which was rendered for a loss suffered by reason of the breach of an alleged unlawful contract for a special service, not provided for, but, on the contrary, prohibited by the published tariff in force at the time of the transaction, cannot be affirmed without opening the door to fraud and evasion of the purposes of the act.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 478, 55 L. ed. 297, 301, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

Mr. Albert Salzenstein argued the cause, and, with Mr. James M. Graham, filed a brief for defendant in error:

There was no unlawful discrimination under the interstate commerce act.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; *Foster v. Cleveland, C. C. & St. L. R. Co.* 56 Fed. 434; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37, affirmed in 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 493, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 165, 42 L. ed. 414, 422, 18 Sup. Ct. Rep. 45; *Southern P. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 554, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330; *Interstate Commerce Commission v. Chicago G. W. R.*

Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 975; Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003. See also 2 Hutchinson, Carr. 3d ed. § 538.

If the contract had violated the interstate commerce act, the right to recover damages occasioned by the neglect and failure of the railroad to notify the Michigan Central in reasonable time to provide for the connection would still exist.

Insurance Co's. v. Carrier Co's. 91 Tenn. 538, 19 S. W. 755; Central R. Co. v. Sims, 169 Ala. 295, 53 So. 826; Merchant's Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 377, 38 L. ed. 201, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

That this case was decided before the amendments to the interstate commerce act, which are now in existence, and which prohibit the shipper from doing anything or imposes a penalty on him, can make no difference in a case where the shipper is innocent of any wrongful intent and does not knowingly violate the law, but relies upon the statement of the carrier.

Standard Oil Co. v. United States, 90 C. C. A. 364, 164 Fed. 376; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

In the famous case of the Standard Oil Company it was held by the court of appeals that the Standard Oil Company could not be held guilty of a violation of the act unless it had actual knowledge of a preferential rate.

Standard Oil Co. v. United States, 90 C. C. A. 364, 164 Fed. 376.

The general rule that an illegal contract is void and unenforceable is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.

Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 551; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; First Nat. Bank v. Stewart, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778; Union Nat. Bank v. Matthews, 98 U. S.

621, 25 L. ed. 188; Fackler v. Ford, 24 How. 322, 16 L. ed. 690; Harris v. Runnels, 12 How. 79, 13 L. ed. 901; People ex rel. Power v. Rose, 219 Ill. 63, 76 N. E. 42; Bea v. People, 101 Ill. App. 132; Pangborn v. Westlake, 36 Iowa, 546; Wenninger v. Mitchell, 139 Mo. App. 420, 122 S. W. 1130; Hobbs v. Boatright, 195 Mo. 693, 5 L.R.A.(N.S.) 906, 113 Am. St. Rep. 709, 93 S. W. 934; Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343; Michener v. Watts, — Ind. —, 36 L.R.A.(N.S.) 142, 96 N. E. 127; Brady v. Central Western R. Co. 88 Neb. 840, 130 N. W. 575; 9 Cyc. 550, 552.

Where the parties to a contract against public policy or otherwise illegal are not *in pari delicto*, or equally guilty, which may not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him.

Kirby v. Chicago & A. R. Co. 242 Ill. 432, 90 N. E. 252; 9 Cyc. 551.

Mr. Justice Lurton delivered the opinion of the court:

Action in assumpsit to recover damages for the breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York city. There was a jury, verdict and judgment, which was affirmed by the supreme court of Illinois. The facts essential to be here stated are these: Kirby was engaged in developing high-grade horses, and desired to send a carload to be sold at a public sale to be held in Madison Square Garden, New York city. Several routes were available, and the published livestock rates for carload shipments were the same by each route. It was, however, desirable to send them by the route which would insure their arrival in the shortest time after delivery to the carrier.

The declaration in substance avers that the plaintiff in error, knowing the anxiety, of the shipper for quick transportation, and that the horses were to enter the horse sale to be held late in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of \$170.60, over its own rails from Springfield to Joliet, Illinois, and there deliver so that it would be carried by a fast stock train known as the "Horse Special," over the M. C. Railroad, through to New York. Said horse special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the 24th;

but that the company did not promptly carry and deliver the same to the said **163]**fast stock train on *the morning of the 25th, as it had guaranteed to do, having failed to make connection with that train; and, that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York forty-eight hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages aggregating several thousand dollars.

The plaintiff in error pleaded the general issue and under this presented certain defenses which we shall pass by, as not constituting questions of law or fact open to review upon a writ of error to a state court.

The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet, to be carried through to New York by the Horse Special, leaving Joliet on the 25th of January.

That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York.

By the 3d section of the original act of 1887 (24 Stat. at L. p. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), it is made unlawful to give any undue or unreasonable "preference or advantage" to any particular person, or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." By the 6th section of the same act it is required that the car-**164]**riers subject to the act shall *print and keep for public inspection schedules showing the rates, charges, and classifications, "and any rules or regulations which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this

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section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

By the act of February 19, 1903, known as the Elkins act, amending the act of 1887 (32 Stat. at L. p. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309), it is made "unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised."

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the *action had been for the common-law **165** carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be

denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage, in that it is not one open to all others in the same situation.

In *Armour Packing Co. v. United States*, 209 U. S. 57, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428, Mr. Justice Day, dealing with a violation of the act by carrying out a contract for a rate after the rate had been changed by publication of a higher rate, said:

"The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

166] *The broad purpose of the commerce act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed out in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272, and in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, as to need no reiteration.

That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for and advantage not open to others. *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

The claim that the defendant in error may recover upon the carrier contract, stripped of the illegality, under *Merchants' Cotton Press & Storage Co. v. Insurance*

Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise.

For the error in not holding the special contract invalid under the interstate commerce act, the judgment must be reversed and the case remanded for such further proceedings as are not inconsistent with this opinion.

*CHESTER S. JORDAN, Plff. in Err., **[167]**
v.

COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 167-177.)

Constitutional law — due process of law — procedure — burden of proof.

One convicted of crime in a state court is not denied due process of law because, on the motion for a new trial, based upon the suggestion of the insanity of a juror, the state, conformably to the local law, was only required to establish the sanity of the juror by a fair preponderance of the evidence, and not beyond a reasonable doubt. [For other cases, see *Constitutional Law*, 774-778, 799-803, in *Digest Sup. Ct.* 1908.]

[No. 519.]

Argued April 16, 1912. Decided May 27, 1912.

IN ERROR to the Superior Court of the Commonwealth of Massachusetts to review a conviction of murder affirmed by the Supreme Judicial Court of that state. Affirmed.

See same case below in *Supreme Judicial Court*, 207 Mass. 259, 93 N. E. 809.

The facts are stated in the opinion.

Messrs. **Arthur Thad Smith** and **Harvey H. Pratt** argued the cause, and, with Messrs. **Charles W. Bartlett** and **Jeremiah S. Sullivan**, filed a brief for plaintiff in error:

By the terms of the due process clause of the 14th Amendment to the Constitution of the United States, a state is prohibited from depriving any person of life, liberty,

NOTE.—On burden of proof as to sanity — see note to *State v. Scott*, 36 L.R.A. 726.
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or property without due process of law. The duty of seeing to it in the first instance that due process of law is observed in the trial of the citizen devolves necessarily upon the state. The conduct of the courts and the procedure therein is placed exclusively in the power of the state, and to the state is intrusted the duty of seeing to it that the constitutional rights of citizens are retained for them.

Allen v. Georgia, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 235, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Thompson v. Utah, 170 U. S. 343, 350, 355, 42 L. ed. 1061, 1066, 1068, 18 Sup. Ct. Rep. 620; Hill v. People, 16 Mich. 357; State v. Cartwright, 20 W. Va. 45; State v. Prescott, 7 N. H. 292.

Upon the *voir dire* it is well settled that if the prisoner challenges a juror, even for a disability extrinsic of his mental qualifications, all that it is necessary for him to do is to introduce evidence that is sufficient to create a reasonable doubt in the mind of the court. Having done that, it is the duty of the government to show beyond a reasonable doubt that the juror is a proper one.

Holt v. People, 13 Mich. 226.

If it appears that a situation exists in which there is any possibility that the jurors were not mentally in condition to perform their duties, the verdict must, as a matter of law, be set aside, as it is not consistent with the underlying principles of justice and of constitutional rights that there should be the slightest suspicion that the prisoner has not had a fair and impartial trial at the hands of a tribunal unquestionably competent mentally to hear him.

Ryan v. Harrow, 27 Iowa, 494, 1 Am. Rep. 302; Leighton v. Sargent, 31 N. H. 137, 64 Am. Dec. 328; State v. Greer, 22 W. Va. 825; Kellogg v. Wilder, 15 Johns. 455; State v. Baldy, 17 Iowa, 39; Gregg v. McDaniel, 4 Harr. (Del.) 367; State v. Bullard, 16 N. H. 139; People v. Ransom, 7 Wend. 417; Com. v. Roby, 12 Pick. 512; Hogshead v. State, 6 Humph. 59.

Even in those cases where it has been held that the mere presence of intoxicating liquor in the jury room is not sufficient, but that it must appear that the jurors have partaken of it, the courts are agreed on the proposition as laid down by Bronson, J., in Wilson v. Abrahams, 1 Hill, 207, that "where there is reason to suspect that he (the juror) has drunk so much . . . as to unfit him for the proper discharge of his duty, the verdict ought not to stand."

Where there has been an improper separation of the jury during the trial, the prisoner, if found guilty, is entitled to the benefit of the presumption that the irregularity has been hurtful to him, and the onus is on the state to show beyond a reasonable doubt that the defendant has sustained no injury on account of the separation.

State v. Robinson, 20 W. Va. 751, 43 Am. Rep. 799; Monroe v. State, 5 Ga. 145; State v. Prescott, 7 N. H. 287; Jumpertz v. People, 21 Ill. 411; Maher v. State, 3 Minn. 447, Gil. 329; McLain v. State, 10 Yerg. 241, 31 Am. Dec. 573; Woods v. State, 43 Miss. 364; State v. Evans, 21 La. Ann. 321; Organ v. State, 26 Miss. 78; State v. Dolling, 37 Wis. 396.

The same principle is the basis of the practically unanimous holding of the courts of this country, including this court, that due process of law is not observed if a defendant in a capital case be tried before a less than the constitutional number of jurors, even though the defendant himself consent to such procedure.

Hill v. People, 16 Mich. 358; Thompson v. Utah, 170 U. S. 343, 349, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620.

According to the position taken by the supreme judicial court of Massachusetts, if the state furnishes at the outset a proper tribunal consisting of twelve qualified jurors, and some time during the trial, through sickness or death, it ceases to be a constitutional tribunal, in that it consists of less than twelve men, it would not be the duty of the state to interest itself in the slightest in that situation; but it would be for the defendant to assume the onus of showing that he was being deprived of his constitutional rights, and if he did not do so the trial would proceed, the verdict be rendered, and a judgment of death pronounced, based upon that verdict. It is respectfully submitted that the unbroken line of authorities in this country holds that as soon as such a situation arises, at the suggestion of the prisoner or anyone else, even though the state has at the outset furnished a competent and constitutional tribunal, it is the duty of the state, of its own motion, whether the defendant acquiesces affirmatively or does nothing to stop the proceeding, to undo what has been done.

Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; Hopt v. Utah, 110 U. S. 574, 590, 28 L. ed. 262, 268, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Cancemi v. People, 18 N. Y. 128; Dickinson v. United States, 86 C. C. A. 625, 159 Fed. 801; Hill v. People, 16 Mich. 351.

Mr. James M. Swift, Attorney General of Massachusetts, argued the cause. and.

with Mr. Walter A. Powers, Assistant Attorney General, filed a brief for defendant in error:

The words "due process of law" do not prescribe particular rules or forms of procedure for state trials.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Howard v. Kentucky*, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 31, 25 L. ed. 989, 992; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620.

As to the mode of procedure in a trial court of a state, the phrase "due process of law" requires only that the conduct of the case be in accordance with the regular procedure of the state, and that such procedure shall not deprive the accused of a fundamental right.

Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. ed. 678, 679; *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; *Howard v. Kentucky*, 200 U. S. 164, 173, 50 L. ed. 421, 425, 20 Sup. Ct. Rep. 189.

If the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525.

Given a court of justice which has jurisdiction and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made, with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with.

Twining v. New Jersey, 211 U. S. 78, 110, 53 L. ed. 97, 110, 29 Sup. Ct. Rep. 14.

The state may regulate the number of challenges in criminal cases (*Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350); it may prescribe the qualifications of jurymen in criminal cases (*Re Shibuya Jugiro*, 140 U. S. 291, 35 L. ed. 510, 11 Sup. Ct. Rep. 770); it may prescribe the number of jurors in criminal cases (*Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494); and if it is within the power of the state to say both the number and the qualifications

of jurors in a criminal case, it may well prescribe that eleven jurors and one who qualifies by a fair preponderance of the evidence as to his sanity shall constitute the trial jury.

In the Federal courts the denial of a new trial is not assignable as error.

Pickett v. United States, 216 U. S. 456, 54 L. ed. 566, 30 Sup. Ct. Rep. 265; *Bucklin v. United States*, 159 U. S. 682, 40 L. ed. 305, 16 Sup. Ct. Rep. 182.

There is no rule of the common law which prescribes that, in a capital case, unless it be proved beyond a reasonable doubt that the juror was sane, a new trial shall be granted.

4 Bl. Com. 375, 376; *Rex v. Mawbey*, 6 T. R. 638, 3 Revised Rep. 282; *Com. v. Green*, 17 Mass. 533; *Com. v. Roby*, 12 Pick. 496; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Scott*, 8 N. C. (1 Hawks) 24; *Surles v. State*, 89 Ga. 167, 15 S. E. 38; *Wall v. State*, 126 Ga. 549, 55 S. E. 484; *Burik v. Dundee Woolen Co.* 66 N. J. L. 420, 49 Atl. 442; *Hogshead v. State*, 6 Humph. 59.

Mr. Justice Lurton delivered the opinion of the court:

The plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death, and the judgment was affirmed by the supreme judicial court of the commonwealth of Massachusetts [173 sets]. The case is brought here upon a single question; namely, that the plaintiff in error has been denied due process of law under the 14th Amendment, because he was tried by a jury which included one Willis A. White, concerning whose sanity it is said there existed reasonable doubt.

The jury had been selected in the usual way, and White had been accepted without knowledge by the state or the defendant of any question concerning his mental fitness. It was impaneled on April 20, 1909. On May 4 it was charged, and on the same day returned a verdict. On May 10, a motion for a new trial was made, based upon the suggestion by counsel for the prisoner that the juror White, during the hearing and at the time the verdict was agreed upon, was insane and incompetent to participate as a juror. The motion was heard by two of the trial justices of the superior court, and much oral evidence bearing upon the sanity of the juror was introduced, all of which has been preserved by a bill of exceptions. At the conclusion of the evidence the prisoner presented no less than seventy-two requests for rulings and findings, made part of the record. The court found and ruled as follows:

"We find by a fair preponderance of all

the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion.

"Having found the above fact, we deem it unnecessary to consider the requests for rulings." [207 Mass. 274, 93 N. E. 809.]

The numerous requests for rulings and special findings all relate to the burden of proof and the rules for the weighing of evidence upon the issues presented.

The supreme judicial court, after a consideration of the evidence upon which this finding was based, ruled that it could not be said that there was not evidence warranting the conclusion of the trial judges.

We shall assume that both the trial court and the supreme judicial court have sustained the verdict of the jury because they were of opinion that it was not essential that the sanity of the juror under the circumstances of this case should be established by more than a fair preponderance of the evidence. The insistence is that thereby the constitutional guaranty of due process of law, found in the 14th Amendment, has been violated.

That the procedure in this case was in conformity with the Constitution and law of Massachusetts is determined by the judgment and opinion of the supreme judicial court.

Subject to the requirement of due process of law, the states are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. "Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, . . . this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law." *Twining v. New Jersey*, 211 U. S. 78, 111, 53 L. ed. 77, 111, 29 Sup. Ct. Rep. 14.

In *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525, it is said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court 56 L. ed.

would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must [175 have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366, it appeared that a deaf person was tried and convicted of murder. It was claimed that he had been denied due process of law because he had not heard a word of the evidence, and that the evidence should have been repeated to him through an ear trumpet, although it was not clear that he could have been made to understand by that means. After saying that the state court had jurisdiction of the person and of the subject-matter, this court said:

"The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the 14th Amendment to the Federal Constitution. That Amendment, it has been said by this court, 'did not radically change the whole theory of the relations of the state and Federal governments to each other and of both governments to the people.' *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77.

"We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was *compos mentis*. No claim to the contrary is made. He knew he was being tried on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court."

In *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620, it was said:

"It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had suf-

ficient notice, and adequate opportunity has been afforded him to defend. *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the state not justified by the demands of justice, nor recognized by any definition of due process.

In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed, the requirement of due process does not deprive a state of the power to dispense with jury trial altogether. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.

Touching the power of the states over their procedure for the administration of their police power, Mr. Justice Moody, in *Twining v. New Jersey*, cited above, said: **177** "The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

The proceeding here in question was in absolute conformity to the Massachusetts law of criminal procedure, and no fundamental principle of justice was violated by a determination of the mental capacity of the juror by a preponderance of the evidence. Neither is there any established rule of the common law inconsistent with the practice adopted in this case. There are many decisions in accord with the Massachusetts view of the law, among them being: *State v. Scott*, 8 N. C. (1 Hawks) 24; *Burik v. Dundee Woolen Co.* 66 N. J.

L. 420, 49 Atl. 442; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Surles v. State*, 89 Ga. 167, 15 S. E. 38.

In *Hogshead v. State*, 6 Humph. 59, the supreme court of Tennessee held that the trial court erred in not granting a new trial when it appeared "probable" that a juror was insane. But in Tennessee the denial of a new trial is assignable as error and reversible upon writ of error.

Our conclusion is that the plaintiff in error has not been denied due process of law, and the judgment is affirmed.

Mr. Justice Pitney took no part in the hearing or consideration of this case.

*NATIONAL BANK OF NEWPORT, [178
New York, Appt.,
v.

NATIONAL HERKIMER COUNTY BANK,
of Little Falls.

(See S. C. Reporter's ed. 178-187.)

Bankruptcy — voidable preference — indirect transfer.

1. To constitute a preference voidable under the bankrupt act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), § 60, as amended by the act of February 5, 1903 (32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1314), it is not necessary that the transfer of the insolvent's property be made directly to the creditor. It may be made to another, for his benefit.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

Bankruptcy — voidable preference — depleting estate.

2. A creditor of a bankrupt cannot be charged with receiving a voidable preference by transfer, within the meaning of the bankrupt act of July 1, 1898, § 60, as amended by the act of February 5, 1903, unless he takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

Bankruptcy — set-off — purchase of claim by creditor.

3. An indorser of a bankrupt's note is prevented, by the bankrupt act of July 1, 1898, § 68b, from using such note as a set-off or counterclaim to his own indebtedness to the bankrupt, where, knowing the maker's insolvency, he took up the note with that intent within four months prior to the adjudication in bankruptcy.

[For other cases, see Bankruptcy, X., in Digest Sup. Ct. 1908.]

NOTE.—On set-off in bankruptcy cases—see note to *Morgan v. Wordell*, 55 L.R.A. 33.

Bankruptcy — voidable preference — payment by indorser.

4. A bank discounting a note on the indorsement of the payee, who took the avails for his own use, and demanding and receiving as collateral upon renewal specific property of the payee, having already been given a general pledge of the payee's property to secure this and other indebtedness, is not chargeable with receiving a preference voidable under the bankrupt act of July 1, 1898, § 60, where the payee, within four months of the maker's adjudication in bankruptcy, paid the note before maturity with his own funds and received back the collateral, charging the amount so paid to the maker, to which he was indebted in a larger sum on open account, and receiving a corresponding credit on the maker's books.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

[No. 172.]

Argued February 28 and 29, 1912. Decided May 27, 1912.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which, reversing a decree of the District Court for the Northern District of New York in favor of complainant in a suit by the trustee in bankruptcy to recover the amount of an alleged preference, remanded the cause with instructions to dismiss the bill. Affirmed.

See same case below, 97 C. C. A. 155, 172 Fed. 529.

The facts are stated in the opinion.

Mr. **Henry J. Cookinham** argued the cause and filed a brief for appellant:

Any payment, out of the ordinary course of business, is presumptive evidence of the intent of the insolvent to give a preference.

Graham v. Stark, 3 Ben. 520, Fed. Cas. No. 5,676; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. ed. 489; *Hardy v. Gray*, 75 C. C. A. 562, 144 Fed. 922; *Dokken v. Page*, 77 C. C. A. 674, 147 Fed. 438; *Re Gesas*, 77 C. C. A. 291, 146 Fed. 734.

It was the intent of Congress to declare voidable any transfer of property that benefited one creditor to the detriment of others, provided it was made within four months of the filing of the petition, and providing the creditor receiving the benefit knew, or had reasonable cause to believe, a preference was intended, no matter by what subterfuge it was effected.

Re Sanderson, 149 Fed. 273; *Hackney v. Raymond Bros. Clarke Co.* 10 Am. Bankr. Rep. 213, 68 Neb. 624, 94 N. W. 822; *Re Beerman*, 112 Fed. 663; *Western Tie & Timber Co. v. Brown*, 64 C. C. A. 256, 129 Fed. 728; *Benjamin v. Chandler*, 142 Fed. 217.

56 L. ed.

The rule is that it is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinarily prudent man to believe that a preference was intended are sufficient. In this case, however, the creditor had actual knowledge that the Newport Knitting Company was insolvent at the time of the payment.

Sundheim v. Ridge Ave. Bank, 138 Fed. 951; *Re Hines*, 144 Fed. 543; *Re Virginia Hardwood Mfg. Co.* 139 Fed. 209; *Parker v. Black*, 143 Fed. 560; *Webb v. Sachs*, 4 Sawy. 158, Fed. Cas. No. 17,325; *Coder v. McPherson*, 82 C. C. A. 99, 152 Fed. 951.

The facts seems to bring this case under the rule frequently laid down by the courts as to what will be considered knowledge or reasonable cause to believe the debtor insolvent and that a preference is intended.

Thomas v. Adelman, 136 Fed. 973; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. ed. 407; *Merchants' Nat. Bank v. Cook*, 95 U. S. 342, 24 L. ed. 412; *Rogers v. Palmer*, 102 U. S. 263, 26 L. ed. 164; *Sage v. Wyncoop*, 104 U. S. 319, 26 L. ed. 740; *Re Eggert*, 43 C. C. A. 1, 102 Fed. 735; *Sundheim v. Ridge Ave. Bank*, 138 Fed. 951; *Re Hines*, 144 Fed. 543; *Re Virginia Hardwood Mfg. Co.* 139 Fed. 209; *Crooks v. People's Nat. Bank*, 72 App. Div. 331, 76 N. Y. Supp. 92, 495, affirmed in 177 N. Y. 68, 69 N. E. 228.

Mr. **Myron G. Bronner** argued the cause and filed a brief for appellee:

When the defendant received the money on this note from the Titus Sheard Company it had no reasonable cause to believe that the payment was intended as a preference within the provisions of the bankruptcy law.

Pirie v. Chicago Title & T. Co. 182 U. S. 446, 45 L. ed. 1176, 21 Sup. Ct. Rep. 906; *Keith v. Gettysburg Nat. Bank*, 23 Pa. Super. Ct. 14; *Deland v. Miller & C. Bank*, 119 Iowa, 368, 93 N. W. 304; *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999; *Buchanan v. Smith*, 16 Wall. 277, 21 L. ed. 280; *Crittenden v. Barton*, 5 Am. Bankr. Rep. 775; *Re Eggert*, 102 Fed. 735; *Re Eggert*, 98 Fed. 843; *Re Jacobs*, 39 C. C. A. 647, 99 Fed. 539; *Wetstein v. Franciscus*, 67 C. C. A. 62, 133 Fed. 900; *Suffel v. McCartney Nat. Bank*, 127 Wis. 208, 115 Am. St. Rep. 1004, 106 N. W. 837, 16 Am. Bankr. Rep. 259; *Hackney v. Raymond Bros. Clarke Co.* 10 Am. Bankr. Rep. 213, 68 Neb. 624, 94 N. W. 822; *Re Andrews*, 75 C. C. A. 562, 144 Fed. 922; *Off v. Hakes*, 73 C. C. A. 464, 142 Fed. 364; *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. ed. 971; *Barbour v. Priest*, 103 U. S. 297, 26 L. ed. 480; *Stucky v. Masonic Sav. Bank*, 108 U.

S. 74, 75, 27 L. ed. 640, 641, 2 Sup. Ct. Rep. 219; Cannon v. James M. Bell Co. 34 Misc. 734, 70 N. Y. Supp. 1024; Pearsall v. Nassau Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11; Toof v. Martin, 13 Wall. 40, 20 L. ed. 481; Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; Perry v. Booth, 67 App. Div. 235, 73 N. Y. Supp. 216.

If it had appeared that the Newport Knitting Company had actually placed with the Titus Sheard Company, the full amount represented by the note in question, to the defendant as the holder, the defendant could, notwithstanding, under the facts in this case, have proved the note in the full amount against the bankrupt's estate.

Re Wyly, 116 Fed. 38.

If the plaintiff were suing as the trustee in bankruptcy of the Titus Sheard Company, and not of the Newport Knitting Company, and all the elements necessary for a recovery by the plaintiff had been proved, except the one below referred to, he could not succeed, because the transaction creating the preference did not take place within four months of the filing of the petition; it clearly appearing, without dispute, that the accounts receivable, which were assigned by the Titus Sheard Company as security for the note, were assigned to the defendant on the 22d day of August, which was more than four months before the filing of the petition.

Sabin v. Camp, 98 Fed. 974; Re Little, 110 Fed. 621.

Again, to put the matter in another light, if we assume that the Titus Sheard Company, was the bankrupt, and that the defendant held its note for \$5,000, the same as in this case, and that the plaintiff was suing as its trustee to recover the amount paid on the note as a preference, same as now, he could not succeed, because the defendant would not be a "creditor" of the Titus Sheard Company, within the meaning of the bankruptcy law, for the reason that its debt or claim was not "provable" in bankruptcy because secured, and, consequently, the payment of the same by the Titus Sheard Company, and the redemption of the collateral pledged as security for the same, was entirely legal, even though the defendant actually knew that the Titus Sheard Company was entirely insolvent at the time of such payment.

Richardson v. Shaw, 16 Am. Bankr. Rep. 842; Re Little, 110 Fed. 621; Young v. Upson, 115 Fed. 192; Re West Norfolk Lumber Co. 112 Fed. 759.

The plaintiff cannot claim that the knowledge of Titus Sheard, who was a director of the defendant, of any facts which, if brought to the defendant itself, would have

made it reasonable to believe that the payment was intended as a preference, was chargeable to the defendant, because said Sheard was in no way acting for the bank, but entirely in behalf of his own business and interest.

Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; New York v. Tenth Nat. Bank, 111 N. Y. 457, 18 N. E. 618; Constant v. University of Rochester, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; Holden v. New York & E. Bank, 72 N. Y. 294; Fulton Bank v. New York & S. Canal Co. 4 Paige, 127, and note: First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 292, 19 Am. Rep. 181; Getman v. Second Nat. Bank, 23 Hun, 503; Bank of United States v. Davis, 2 Hill, 463; Crooks v. People's Nat. Bank, 72 App. Div. 331, 76 N. Y. Supp. 92, 495.

Whatever knowledge Sheard had obtained of the insolvency of the Newport Knitting Company, it was plainly not obtained in any transaction in which he was operating for the defendant by reason of the fact that he was one of the directors.

Bank of United States v. Davis, 2 Hill, 463; Casco Nat. Bank v. Clark, 139 N. Y. 313, 36 Am. St. Rep. 705, 34 N. E. 908.

There are other cases which tend to sustain the transaction.

Upson v. Mt. Morris Bank, 103 App. Div. 371, 92 N. Y. Supp. 1101; Re New, 116 Fed. 116; North v. Taylor, 61 App. Div. 255, 70 N. Y. Supp. 339.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought in the district court of the United States for the northern district of New York by Charles B. Mason, as trustee in bankruptcy of the Newport Knitting Company, to recover the amount of an alleged preference. Decree for the complainant was reversed by the circuit court of appeals, which remanded the cause with instruction to dismiss the bill. 97 C. C. A. 155, 172 Fed. 529. Subsequently, the trustee assigned the claim in suit to the National Bank of Newport, New York, which was substituted as complainant and brought this appeal.

The bankrupt, the Newport Knitting Company, was organized in 1900, by Titus Sheard and his associates, and was engaged in the manufacture of knit goods at Newport, New York. Proceedings for its voluntary dissolution were begun in October, 1903, and on December 30, 1903, a petition in bankruptcy was filed against it. It was adjudged a bankrupt on January 23, 1904.

Several of the officers and directors of this company were also officers and directors of

a corporation known as the Titus Sheard Company, which manufactured knit goods at Little Falls. Titus Sheard was the leading spirit in both corporations; in each his son-in-law was the secretary and his nephew the general manager. The books of the Newport Knitting Company were kept at the office of the Titus Sheard Company. It does not appear that either company held stock in the other, nor is it shown to what extent the same persons had a stock interest in both. And upon the record the conclusion must be that, while the management of the two concerns was largely in the same hands, they were distinct organizations, conducting separate businesses.

The Titus Sheard Company had a deposit account and discounted its paper with the defendant, the National Herkimer County Bank of Little Falls, of which Sheard was a director. The Newport Knitting Company was not a customer of the defendant bank, but kept its account with the National Bank of Newport.

The transaction which is alleged to constitute a preference was as follows: On January 7, 1901, the Newport Knitting Company gave its note for \$5,773.05, at four months, to the Titus Sheard Company, to pay for machinery and supplies. The Titus Sheard Company indorsed the note and had it discounted by the defendant bank, receiving the avails for its own use. The note was reduced by part payment to \$5,000, and for this sum it was renewed every four months with like indorsement, the last renewal of this sort being on May 11, 1903.

In August, 1903, the defendant bank held a large amount of paper made or indorsed by the Titus Sheard Company, and insisted upon security. Thereupon the Titus Sheard Company submitted to the bank a statement of its affairs, *and on August 11, 1903, executed an instrument, also signed by Mr. Sheard and certain other officers individually, by which, after reciting the determination to liquidate its business, they purported to pledge its "mill property, all the machinery in the same, and the warehouse, together with all our assets of our company, and also the individual properties, as per list hereto attached, to secure the National Herkimer County Bank for all notes of ours which they now hold, or may hereafter hold, and for all paper indorsed by us, now held by the bank, or that may be held by it in the future." This agreement evidently contemplated that the Titus Sheard Company should continue in possession of its property and should have charge of the winding up of its affairs, on the understanding expressed, which was, in substance, that the property should be speedily converted into

money, that bills payable held by creditors other than the bank should be renewed so far as possible, and that "all surplus moneys, as fast as collected, not required to pay the outstanding notes held by other creditors," should be applied in payment of the indebtedness to the bank. It was declared to be the intention to dispose of the property so that all the indebtedness should be paid before January 1, 1904.

On August 22, 1903, there was substituted for the above-mentioned note of the Newport Knitting Company, indorsed by the Titus Sheard Company and held by the bank, a new three months' note of the Newport Knitting Company for the same amount, similarly indorsed; and the Titus Sheard Company secured this note by the delivery to the bank of specific assignments of its bills receivable, amounting to \$6,300. On September 26, 1903, before maturity, the Titus Sheard Company paid to the bank the amount of this note, less accrued interest, \$4,953.33, and took up the note and collateral. This payment was made by the Titus Sheard Company, acting in its own behalf, by a check drawn against the funds to its credit in the bank. The amount [183 so paid was then charged by that company to the Newport Knitting Company, to which it was indebted on open account in a larger sum; and on the books of the Newport Knitting Company a corresponding credit was given to the Titus Sheard Company. So far as appears, this charge of the sum paid on the note against the amount owing to the Newport Knitting Company was not known to the bank.

It is insisted that this transaction amounted to a preference of the bank by the Newport Knitting Company. It is said that "the bankrupt parted with property to the amount of the note, and the bank received it and was benefited to that amount," to the detriment of the other creditors of the Newport Knitting Company, then insolvent; or, as the district court put it, that "a short cut was taken by common consent, and the check was passed to the bank and the amount charged to the Knitting Company, so that it, in fact, paid the note."

The pertinent provisions of the bankruptcy act as they stood at the time the transaction occurred were as follows:

"Sec. 60. Preferred Creditors.—a. A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer

will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. . . .

"b. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." [32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1314.]

184] *To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A "transfer" includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Sec. 1 (25) [30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. 1901, p. 3420]. It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The "accounts receivable" of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account,—the same to constitute a payment in whole or part of the latter's debt,—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with

receiving a preference by transfer. *Western Tie & Timber Co. v. *Brown*, 196 U. S. [185 502, 509, 49 L. ed. 571, 574, 25 Sup. Ct. Rep. 339; *Rector v. City Deposit Bank Co.* 200 U. S. 405, 419, 50 L. ed. 527, 532, 26 Sup. Ct. Rep. 289. "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate." *New York County Nat. Bank v. Massey*, 192 U. S. 138, 147, 48 L. ed. 380, 384, 24 Sup. Ct. Rep. 199.

Here, the payment to the bank did not proceed from the bankrupt, the *Newport Knitting Company*. The *Titus Sheard Company* had a standing quite apart from its relation to the *Newport Knitting Company* as a debtor in the account. In the transaction with the bank, the *Titus Sheard Company* acted on its own behalf. As the holder of the original note, that company had indorsed it to the bank, taking for its own benefit the proceeds of the discount. Its obligation as indorser was continued by the renewals, and to secure the bank on the last renewal it had deposited its own collateral. It took up the note with its own funds and received back the security. Neither directly nor indirectly was this payment to the bank made by the *Newport Knitting Company*, and the property of that company was not thereby depleted.

The fact, then, is not, as it is contended, that "the bankrupt parted with property to the amount of the note, and the bank received it," but rather that the bankrupt parted with nothing, and the bank received the money of the indorser, and redelivered to the indorser the paper and collateral. When the *Titus Sheard Company* took up the note, it was credited with the amount of the payment in its account with the *Newport Knitting Company*. But the question, in the circumstances disclosed, of the right of the *Titus Sheard Company* to a set-off against its indebtedness on the account, is distinct from the question whether the bank received a preference. *Western Tie & Timber Co. v. Brown*, *supra*. It would be only by the allowance of such a set-off that the bankrupt estate would be diminished. And, as was said by the circuit *court of ap-[186 peals, "if the *Sheard Company*, knowing the *Newport Company* to be insolvent, acquired the note with a view to using it as a set-off or counterclaim against its debt, it could not legally do so. Bankruptcy Law, § 68b." The amount of the indebtedness of the *Titus Sheard Company* could still be collected by the trustee.

It is urged that, by virtue of the instrument already mentioned, which was executed by the Titus Sheard Company on August 11, 1903, all the assets of that company had been assigned to the bank, and hence, that the security placed with the bank on the last renewal of the note was already held under this instrument, and continued to be so held after the note was taken up, despite the surrender of the specific assignments. It is said further that, as a result of the execution of this instrument, the bank "stepped into the place of the Sheard Company," and knew the condition of the account with the Newport Knitting Company and the charge that was made to it.

The argument attributes to the instrument undue importance and an effect which it did not accomplish. It was far from being an adequate legal security. Apparently, the Titus Sheard Company was left in the possession of the property, and its officers continued its management with freedom to sell, to collect accounts, to pay outstanding notes held by others than the bank (so far as they could not be renewed), and generally to liquidate the business in accordance with the expressed intention to convert the assets into money as speedily as possible, and thus to meet all the obligations to the bank. To this end, the company and its officers were to "work faithfully," and the surplus moneys as fast as realized were to be devoted to the payment of the indebtedness. It was natural that the bank should require security for the note of a more definite and satisfactory character; that is, proper collateral. And when the bank received the specific collateral deposited by [187] the Titus Sheard Company on the *renewal, the bank obtained a control over it which otherwise it did not possess, and this control is surrendered on the redelivery. In view of the effort that was being made to reduce the obligation of the company held by the bank, it cannot be thought surprising that the note with the collateral was taken up before maturity. It was not shown that the bank had nothing to do with the credit to the Titus Sheard Company in its account with the Newport Knitting Company. Nor does it appear that the bank knew of the condition of this account, or had any reason to believe that it was proposed to set off the payment against an indebtedness to the bankrupt.

The bank dealt with the Titus Sheard Company as the indorser of the paper; and the trustee failed to establish any right to recover the moneys it received.

Decree affirmed

56 L. ed.

M. ANDERSON

v.

PACIFIC COAST STEAMSHIP COMPANY,
Claimant of the Steamship "Queen," etc.
(No. 641.)

N. JORDAN

v.

PACIFIC COAST COMPANY, Claimant of
the Steamship "Umatilla," etc. (No.
642.)

(See S. C. Reporter's ed. 187-205.)

Statutes — revision and amendment — construction.

1. An intention to alter the scope and purpose of an existing law cannot be imputed to Congress because in the Revised Statutes it placed in two separate sections portions of what was a single section of the original act.

[For other cases, see Statutes, 410-424, in Digest Sup. Ct. 1908.]

Pilots — state regulation — Federal regulation — compulsory pilotage.

2. Coastwise seagoing steam vessels sailing under register, whether employing Federal pilots or not, are not exempted from the liability for pilotage fees created by Cal. Pol. Code, §§ 2432, 2466, 2468, upon proper tender of resident bar pilot service when entering or leaving the port of San Francisco, by the act of February 28, 1871 (16 Stat. at L. 440, chap. 100), § 51, re-enacted as U. S. Rev. Stat. §§ 4401, 4444, U. S. Comp. Stat. 1901, pp. 3016, 3037, which provides that "every coastwise seagoing steam vessel subject to the navigation laws of the United States and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats," and prohibits the states from imposing upon pilots of steam vessels "herein provided for" any obligation to procure an additional license, or any regulation which will impede them "in the performance of their duties as required by this act," or levying any pilot charges upon any "steamer piloted as herein provided," with a proviso that nothing therein shall be construed to annul or affect any state regulation requiring vessels entering or leaving port "other than coastwise steam vessels" to take a state pilot.

[For other cases, see Pilots, 3-24, in Digest Sup. Ct. 1908.]

[Nos. 641 and 642.]

Argued February 21, 1912. Decided May 27, 1912.

NOTE.—On liability of vessel or owner for compulsory pilotage fees—see note to Clayton v. Hebb, 39 L.R.A. 177.

As to the effect on state pilotage laws of congressional prohibition against discrimination—see note to Olsen v. Smith, 49 L. ed. U. S. 224.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit, presenting questions as to whether coastwise registered seagoing steam vessels are exempt from state pilotage regulation. Answered in the negative.

Statement by Mr. Justice Hughes:

The certificate in these cases is as follows:

"The libels in the above cases involve the question of the power of a state to make pilotage regulations for certain classes of registered seagoing steam vessels when entering and leaving harbors within the confines of the state.

"The steamers 'Queen' and 'Umatilla' were regularly sailing under register, and were either on a voyage from the port of San Francisco, in the state of California, to a United States port on Puget sound, or 189] from a United States port on Puget sound to said port of San Francisco; but in either such case said vessels did, while *en route* between said ports of the United States, stop at the port of Victoria, British Columbia, to and from which port of Victoria she did then carry and did then and there deliver and receive both passengers, mail, and freight. Both vessels sailed direct to Victoria from San Francisco and direct to San Francisco from Victoria. At least ninety (90) per cent of passengers and cargo was carried between the United States ports, and the parties stipulated that the voyage for which the vessels cleared was between Puget sound ports of the United States and San Francisco, with the right to stop and trade *en route* at Victoria. The stop at Victoria on each occasion was for about an hour. The officers of each vessel had Federal pilot's licenses, and each vessel was in fact piloted in entering and leaving the port of San Francisco by such an officer. Each of the vessels was tendered pilotage services—the 'Umatilla' on leaving port and the 'Queen' on entering—by a resident bar pilot of the port of San Francisco, duly commissioned, and acting under the law of the state of California. In each case the tender was declined. The ships refused to pay the pilotage fees imposed by the following sections of the Political Code of the state of California:

"2468. Pilotage and half pilotage.—All vessels sailing under an enrolment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States, shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under

a register between the port of San Francisco and any other port of the United States, shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this Code.'

"2466. Rates of pilotage at San Francisco.—The following shall be the rates of pilotage into and out of the harbor of [190 San Francisco: All vessels under five hundred (500) tons three (\$3) dollars per foot draught; all vessels over five hundred (500) tons three (\$3) dollars per foot draught and three (3c.) cents per ton for each and every ton, registered measurement; and every vessel spoken, inward or outward bound, except as hereinafter provided, shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a Union Jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward-bound vessels are not spoken until inside of the bar, the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage except where a pilot is actually employed.'

"2432. Vessel, owner, etc., liable for pilotage.—All vessels, their tackle, apparel, and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction.'

"On February 28, 1871 [16 Stat. at L. 440, chap. 100], Congress enacted an act for the better protection of persons on vessels propelled in whole or in part by steam, etc., § 51 of which is pertinent to these cases. This section was in 1873 re-enacted in §§ 4401 and 4444 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3016, 3037). The portions of the section and its subsequent codification on which the court's questions are based are printed in parallel columns as follows:

<p>"An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam."</p>	<p>"Revised Statutes, Title 52, 'Regulation of Steam Vessels.'"</p>
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<p>"Section 51. And be it further enacted that . . . every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under</p>	<p>"Rev. Stat. § 4401. . . . and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under</p>
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the high seas, be un-register, shall, when under way, except on der the control and direction of pilots licensed by the inspectors of steamboats. . . . Nor shall any pilot charges be levied by any such [state] authority upon any steamer piloted as herein provided. . . . Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state.'

"(The above in a single paragraph.)

"The pilots, appellants here, libeled the vessels in the United States district court for the northern district of California. The two cases were consolidated for trial 192]in *the district court. It was contended that there was a conflict between the Federal and the state law as to the control of the vessels for purposes of bar pilotage. The libellants relied upon the state law giving the resident state bar pilotage control of the vessels in question when entering or leaving port. The district court held that the Federal law excluded these vessels from state control, and the libels were dismissed.

"On appeal to this court it has become apparent that the decision of the two cases involves a question of conflict of jurisdiction between the state and the Federal government as to the pilotage of all steam vessels touching at both foreign and domestic ports on the one voyage, and also as to the pilotage of the large number of registered steam vessels now engaged in traffic between ports of the Atlantic and the Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec and the Isthmus of Panama and around South America. The decision will also affect the very large number of steam ves-

inspectors of steamboats.'

"Rev. Stat. § 4444. . . . nor shall any pilot charges be levied by any such [state] authority upon any steamer piloted as provided by this title Nothing in this title shall be construed to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state.'

sels which may reasonably be expected to sail between American ports on the Atlantic and the Pacific oceans, *via* the Panama canal.

"In determining the intent of Congress in passing the act of February 28, 1871, the court had under consideration the following statutes: the act of August 7, 1789 [1 Stat. at L. 54, chap. 9], codified in § 4235 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2903), recognizing and adopting the pilotage regulations of the various states so far as bar and entrance pilotage is concerned; § 9, paragraphs 9 and 10 of the steamship act of August 30, 1852, creating a certain class of Federal pilots (10 Stat. at L. 67, chap. 106, re-enacted in chapter 100, §§ 18 and 14 of the act of February 28, 1871 [codified in Revised Statutes, §§ 4442 and 4438, U. S. Comp. Stat. 1901, pp. 3037, 3034]; act of May 27, 1848, [9 Stat. at L. 232, chap. 48] [codified in Revised Statutes, § 3126, U. S. Comp. Stat. 1901, p. 2036]], permitting registered vessels sailing between ports of the United States to trade with foreign ports; § 20 of the act of February 18, 1793 (1 *Stat. at L. 313, [193 chap. 8, codified in Revised Statutes, § 4361, U. S. Comp. Stat. 1901, p. 2980), providing for the regulation and duties of officers on registered vessels as to the carriage of foreign goods and distilled liquors and the making of manifests.

"The members of the court are unable to agree as to the interpretation of the cited portions of § 51 of the act of February 28, 1871, codified in Revised Statutes, § 4401 and 4444, and for this reason, and because of the importance of the interests affected, both governmental and commercial, the circuit court of appeals for the ninth circuit certify the following questions to the United States Supreme Court, and request its instructions upon them:

"1. Are coastwise seagoing steam vessels, sailing under register, and having officers with Federal pilot's licenses, free from any liability for pilotage fees created by §§ 2468, 2466, and 2432 of the Political Code of the state of California, upon the proper tender of services of resident bar pilots of the state pilotage establishment, when entering or leaving the port of San Francisco, by virtue of § 51 of the act of February 28, 1871, entitled, 'An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by steam,' as re-enacted of date December 1, 1873, in §§ 4401 and 4444 of Revised Statutes?

"2. Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise seagoing

steam vessels sailing under register, whose officers have Federal pilot's licenses, from any liability for pilotage fees created by §§ 2468, 2466, and 2432 of the Political Code of the state of California, upon the proper tender of services of resident bar pilots of the state pilotage establishment, when entering or leaving the port of San Francisco, state of California, under the rule of construction laid down in the last sentence of § 51 of the act of February 28, 1871, entitled, 'An Act to Provide 194]*for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' and as re-enacted in § 4444 of the Revised Statutes?

"3. Did Congress intend to classify with the 'coastwise vessels' referred to in the last proviso of § 51 of the act of February 28, 1871, entitled, 'An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' and re-enacted in § 4444 of the Revised Statutes, registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage?"

"4. Did Congress, in enacting the last proviso of § 51 of the act of February 28, 1871, re-enacted in § 4444 of the Revised Statutes, intent to exempt registered steam vessels whose officers have Federal pilot's licenses, from any liability for pilotage fees created by §§ 2468, 2466, and 2432 of the Political Code of the state of California, upon proper tender of services of resident bar pilots of the state pilotage establishment, on entering or leaving the port of San Francisco on regular voyages, on which they steamed to Victoria, British Columbia, and carried cargo, mail, and passengers direct thereto and direct therefrom; when, after leaving Victoria, British Columbia, on the outward voyage, they steamed to Puget sound ports of the state of Washington, for which they had originally cleared, and returned therefrom to Victoria, British Columbia; when the stop at Victoria, British Columbia, is for about an hour on each occasion; when at least ninety (90) per cent of the passenger and cargo traffic for the outward and inward voyages is between the port of San Francisco and the ports of Washington; and when the traffic with the foreign port may be deemed *en route* between the domestic ports?"

Mr. William Denman argued the cause and filed a brief for appellants, Anderson and Jordan:

The intent of the legislation must be determined by the original act rather than the codification.

Logan v. United States, 144 U. S. 263, 1050

302, 36 L. ed. 429, 442, 12 Sup. Ct. Rep. 617.

The Federal government had not established any system of residential bar pilotage in 1871, and has not since that time.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 456, 17 L. ed. 805, 806.

Under American shipping law, our vessels are classified into two great classes, "registered" vessels, which alone may engage in the foreign trade, and "enrolled and licensed" vessels, which are confined to coastwise domestic voyages or the fisheries.

Parsons, Shipping, p. 31.

The plain intent of the statute, the logic of the situation, viewed both from the standpoint of the history of the pilotage laws and of the necessities of navigation in 1871, and the decision, are all in accord. The state pilots have control of all registered vessels sailing coastwise.

Joslyn v. Nickerson, 1 Fed. 133; Murray v. Clark, 4 Daly, 473, affirmed in 58 N. Y. 684; Sprague v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; Huus v. New York & P. R. S. S. Co. 182 U. S. 392, 45 L. ed. 1146, 21 Sup. Ct. Rep. 827; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52.

This court must regard the executive construction of the act.

United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; United States v. Finnell, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633.

Mr. Graham Sumner argued the cause, and, with Messrs. George W. Towle, Thomas Thacher, Thomas D. Thacher, and Leland B. Duer, filed a brief for the Pacific Coast Steamship Company and the Pacific Coast Company:

Effect must be given to all provisions of a statute if such a construction is consistent with the general purposes of the act, and the provisions are not necessarily conflicting. One provision should not be construed to defeat or destroy another, but rather to explain and support it. If the same words or expressions occur in different parts of a statute, they must, as a general rule, be taken to mean the same thing.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; Bernier v. Bernier, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244; United States v. Hill, 123 U. S. 681, 31 L. ed. 275, 8 Sup. Ct. Rep. 308; Re Jackson, 40 Fed. 372.

The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extended to cases

not intended by the legislature to be brought within its purview. Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall clearly within its terms. A proviso carves special exceptions out of the enacting clause, and those who set up any such exceptions must establish them as being within the reason thereof.

United States v. Dickson, 15 Pet. 141, 165, 10 L. ed. 689, 698; *Ryan v. Carter*, 93 U. S. 78, 83, 23 L. ed. 807, 809; *Minis v. United States*, 15 Pet. 423, 445, 10 L. ed. 791, 799; *Schma, R. & D. R. Co. v. United States*, 139 U. S. 566, 35 L. ed. 268, 11 Sup. Ct. Rep. 638; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 181, 32 L. ed. 380, 9 Sup. Ct. Rep. 47.

A proviso is most frequently intended to restrain the enacting clause and to except something which would otherwise have been within it. As a corollary, it is held that the general language in the enacting clause should be so construed that it would cover the matters contained in the proviso, if the enacting clause had stood alone.

Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 541, 34 L. ed. 531, 536, 10 Sup. Ct. Rep. 1037; *Wayman v. Southard*, 10 Wheat. 1, 30, 6 L. ed. 253, 259.

It is also held that when a new statute is enacted which covers the same subject-matter as an old statute, but expressly repeals the old statute, it should be construed as continuing the old statute with such amendments, modifications, or changes as may appear in the new statute, and that the new statute should be construed to change or modify the old statute only in so far as such changes or modifications are clearly indicated.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; *McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. ed. 269, 272, 4 Sup. Ct. Rep. 142; *United States v. Ryder*, 110 U. S. 729, 740, 28 L. ed. 308, 312, 4 Sup. Ct. Rep. 196.

If the new statute is ambiguous, the court is authorized to refer to the original statutes, from which the new section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply.

The Conqueror, 166 U. S. 110, 122, 41 L. ed. 937, 943, 17 Sup. Ct. Rep. 510; *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631; *Meyer v. Western Car. Co.* 102 U. S. 1, 11, 26 L. ed. 59, 60; *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

It would have been simple for Congress in 1871, or when codifying the laws into 56 L. ed.

the Revised Statutes, to say, if it had intended or desired to do so, that all steam vessels sailing under license should be under the control and direction of Federal pilots, except when on the high seas, and that all other vessels should be subject to such pilotage regulations as the several states might adopt. The failure to accomplish a simple thing in a simple manner indicates clearly that it was not intended.

Ryan v. Carter, 93 U. S. 78, 83, 23 L. ed. 807, 809; *United States v. Ryder*, 110 U. S. 739, 28 L. ed. 311, 4 Sup. Ct. Rep. 196; *United States v. Chase*, 135 U. S. 259, 34 L. ed. 119, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court:

When the Constitution of the United States was adopted, each state had its own regulations of pilotage. While this subject was embraced within the grant of the power "to regulate commerce with foreign nations and among the several states" (art. 1, § 8), Congress did not supersede the state legislation, but by the act of August 7, 1789, chap. 9, § 4 (1 Stat. at L. 53, 54, Rev. Stat. § 4235, U. S. Comp. Stat. 1901, p. 2903), it was enacted that "all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." This was "a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exercise its power, it should be left to the legislation of the states;" and it has long been established by the decisions of this court that, although state laws concerning pilotage are regulations of commerce, they fall within that class of powers which may be exercised by the states until Congress shall see fit to act. *Cooley v. Port Wardens*, 12 How. 299, 319, 321, 13 L. ed. 996, 1004, 1005; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 459, 17 L. ed. 805, 807; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. ed. 624, 625; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Olsen v. Smith*, 195 U. S. 332, 341, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52. In 1837 (5 Stat. at L. 153, chap. 22, U. S. Comp. Stat. 1901, p. 2903), it was provided that a master of a vessel entering or leaving a port situate upon waters which are the boundary between two states

might employ a pilot licensed by either state. There was no other Federal legislation upon the subject of pilots until 1852; 196]*and thus "for more than sixty years" it was "acted on by the states, and the systems of some of them created and of others essentially modified during that period." *Cooley v. Port Wardens*, supra, p. 321.

The act of August 30, 1852, chap. 106 (10 Stat. at L. 61), contained provisions for the licensing of pilots of steam vessels (§ 9, Ninth, id. 67). In *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 459, 17 L. ed. 805, 807, it was contended that the statute of the state of California of May 20, 1861, providing for port pilots at San Francisco, was in conflict with this act; but the court took the contrary view, holding that the Federal law did not relate to port pilots. The court said (pp. 460, 461): "The act of 1852 was intended, as its title indicates, to provide greater security than then existed for the lives of passengers on board of vessels propelled in whole or part by steam. . . . The act contains few provisions relating to pilots; Indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were the subjects of just praise for their skill, energy, and efficiency. The clauses respecting pilots in the act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors."

In 1866, Congress passed a more comprehensive statute, embracing port pilotage (act of July 25, 1866, chap. 234, 14 Stat. at L. 227). After defining the vessels subject to the navigation laws of the United States, it enacted (§ 9) that "every seagoing steam vessel," so subject, should, "when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only 197]excepted." In the following *year, however, this section was amended by the addition of a proviso that the act should not be construed to "annul or affect any regulation established by the existing law of any state, requiring vessels entering or leaving a port in such state" to take a state pilot (act of February 25, 1867, chap. 83, 14 Stat. at L. 411). The existing state

laws respecting port pilotage again became operative. *Sturgis v. Spofford*, 45 N. Y. 446, 451; *Henderson v. Spofford*, 59 N. Y. 131, 133.

The acts of 1852 and 1866 were repealed by the act of February 28, 1871, chap. 100 (16 Stat. at L. 440), the provisions of which were re-enacted in title 52 of the Revised Statutes. This act prescribes general regulations with respect to the licensing of pilots of steam vessels (§§ 14, 18; Rev. Stat. 4438, 4442, U. S. Comp. Stat. 1901, pp. 3034, 3037), similar to those of the act of 1852. The requirements as to the port pilotage of coastwise seagoing steam vessels were set forth in § 51, to which reference is made in the questions propounded in the certificate. This section was as follows:

Sec. 51. And be it further enacted, That all coastwise seagoing vessels, and vessel[s] navigating the Great Lakes, shall be subject to the navigation laws of the United States when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this act; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. And no state or municipal government shall impose upon pilots of steam vessels herein provided for any obligation to procure a state or other license in addition to that issued by the United States, nor other *regulation which[198 will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the state where the same is performed: Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state."

These provisions were incorporated in §§ 4401 and 4444 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3016, 3037),

199]which are still in force.† The *charge of arrangement which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. *United States v. Ryder*, 110 U. S. 729, 740, 28 L. ed. 308, 312, 4 Sup. Ct. Rep. 196; *United States v. LeBris*, 121 U. S. 278, 280, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *Logan v. United States*, 144 U. S. 263, 302, 36 L. ed. 429, 442, 12 Sup. Ct. Rep. 617, *United States v. Mason*, 218 U. S. 517, 525, 54 L. ed. 1133, 1136, 31 Sup. Ct. Rep. 28.

It will be observed that the requirement of § 51 of the act of 1871 (Rev. Stat. § 4401), as to the piloting of coastwise seagoing steam vessels, is limited and explicit. It is that "every coastwise seagoing steam vessel subject to the navigation laws of the United States and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." This covers port pilotage, for it relates to such vessels "when under way, except on the high seas;" and it applies only to those "*not sailing under register*."

American vessels are of two classes: those registered, and those enrolled and licensed. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout

the legislation of Congress on the subject, and the word 'register' is invariably used in reference to the one class, and 'enrolment' in reference to the other." *The Mohawk (United States v. Leetzel)* 3 Wall. 566, 571, 18 L. ed. 67, 68. See *Huus v. New York & P. R. S. S. Co.* 182 U. S. 392, 395, 45 L. ed. 1146, 1150, 21 Sup. Ct. Rep. 827. The act of December 31, 1792 (1 Stat. at L. 287, chap. 1, U. S. Comp. Stat. 1901, p. 2803), applicable exclusively to vessels engaged in foreign commerce and to their *registry, and the [200 act of February 18, 1793 (1 Stat. at L. 305, chap. 8, U. S. Comp. Stat. 1901, p. 2959), relating to vessels engaged in the coasting trade and fisheries, and to their enrolment, constituted the basis for the regulations of the two classes. The latter act contained a provision (§ 20, id. 313; Rev. Stat. § 4361, U. S. Comp. Stat. 1901, p. 2980) that any registered vessel when employed in going from one district in the United States to any other district should "be subject (except as to the payment of fees) to the same regulations, provisions, penalties, and forfeitures" as those prescribed in the case of vessels licensed for carrying on the coasting trade. This, however, had no reference to pilotage, for Congress had not made regulations upon that subject. In 1848 (act of May 27, 1848, 9 Stat. at L. 232, chap. 48, Rev. Stat. § 3126, U. S. Comp. Stat. 1901, p. 2036) it was provided that any vessel, "on being duly registered," might engage in trade between ports of the United States, "with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters and mails."

Thus, at the time of the passage of the act of 1871, there were coastwise seagoing steam vessels sailing under register and having this privilege of touching at foreign

†Sec. 4401. All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this title; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.

Sec. 4444. No state or municipal government shall impose upon pilots of steam

vessels any obligation to procure a state or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this title; nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the state where the same is performed. Nothing in this title shall be construed to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state.

ports, and also coastwise seagoing steam vessels, which were enrolled and licensed, not sailing under register. It was with respect to the vessels of the latter sort that Congress imposed the requirement of § 51 to use Federal pilots. The reason for the distinction may be found in the fact that the registered vessels, under the conditions of trade then existing, would presumably be engaged in the longer voyages, touching at foreign ports where Federal pilots would not avail, and at domestic ports, for all of which the ship's pilot might not hold a Federal license; and, as Congress did not create local Federal establishments for port pilotage, it was evidently deemed unwise to compel registered vessels in entering and leaving ports to be under the control of Federal pilots. Certainly the distinction was made; and 201]*the necessary effect of the limitation of the requirement was to exempt the coastwise seagoing steam vessels which did sail under register, from its terms.

As these registered vessels were free from this Federal regulation, they would be under no compulsion whatever as to port pilotage save by virtue of the operation of state laws. And it is an inevitable conclusion, on considering the prior history of pilotage regulations in this country and the policy which has been maintained with respect to the exercise of state authority, that, as Congress did not see fit to require Federal pilots, it left the regulation of port pilotage as to such vessels to the states.

It is contended, however, that although the employment of Federal pilots was not made compulsory for coastwise seagoing steam vessels sailing under register in entering and leaving ports, still they had an option to use such pilots, and if in fact such a vessel was piloted by a Federal pilot, she could not be required to take a state pilot. The argument is based on the following provisions of § 51 (now found in Rev. Stat. § 4444):

"And no state or municipal government shall impose upon pilots of steam vessels herein provided for any obligation to procure a state or other license in addition to that issued by the United States, nor other regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, . . ."

This language gives no support to the contention. Wherever the regulations of the statute applied, they were absolute. The "pilots of steam vessels herein provided for" were those whom, under the provisions of

the statute, the vessels described were bound to use. It was upon the pilots, whose use was made compulsory by the Federal law, that "no state or municipal government" was to impose any obligation to procure a state or other *license,[202 or any regulation which would impede them "in the performance of their duties, as required by this act." The "steamer piloted as herein provided" was the steamer required to be so piloted, and it was upon such steamer that no pilot charges were to be levied by state authority. The same construction must be given to these provisions as re-enacted in § 4444 of the Revised Statutes, where the words "piloted as provided by this title" take the place of the words "piloted as herein provided." The Federal requirement as to port pilotage of coastwise seagoing steam vessels was applicable only to those "not sailing under register;" as to those which sailed under register, there were no port pilots provided for, and the regulation of pilotage in the case of such vessels entering and leaving the state ports was left to the states. The fact that a vessel of this sort had on board a pilot holding a Federal license when the services of such a pilot were not required by the Federal law did not oust the state of the power to compel the use of a state pilot.

Nor was the proviso in § 51 of the act of 1871 (now the last sentence of Rev. Stat. § 4444) a restriction of this state authority. This proviso was as follows:

"Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state."

Manifestly, this did not enlarge the scope of the requirement as to Federal pilotage contained in the preceding portion of the section. The words "other than coastwise steam vessels" did not mean that the state could not require port pilots for coastwise seagoing steam vessels sailing under register. For this would be to impute to Congress the intent to withdraw from the state the power to *act in the cases[203 omitted from Federal regulation. Even on the construction of the statute for which the appellees contend, it is conceded that "a coastwise steam vessel sailing under register, which is not piloted by a Federal pilot, may be compelled by the state to take a state pilot when entering or leaving port." And if in any case the vessel might be forced to take a pilot under the state law, it would necessarily follow that it is not

excluded by the proviso from the operation of that law. The natural interpretation of the proviso is that it was intended to prevent misapprehension as to interference with local rules,—to declare the continued efficacy of those rules when not in conflict with the Federal authority,—and not to introduce an independent limitation of state power over port pilotage with respect to registered steam vessels, where the Federal control had not been asserted. The enacting clause and the proviso are to be read together “with a view to carry into effect the whole purpose of the law.” *White v. United States*, 191 U. S. 545, 551, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 171. So read, the words “other than coastwise steam vessels” must be deemed to refer to those “not sailing under register,” to which the requirement of Federal pilots applied. The same meaning must be ascribed to this clause as it now appears in § 4444 of the Revised Statutes, taken, as it must be, in connection with § 4401.

The statute was thus construed in *Murray v. Clark* (1873) 4 Daly, 468, affirmed in 58 N. Y. 684, where a steamer sailing under register between New York and New Orleans, and touching at a foreign port, as was her privilege, was held to be subject to the law of the state of New York as to pilotage in entering the port of New York, although at the time she was under the control of her master, who was a pilot licensed by the Federal inspectors. In *Joslyn v. Nickerson* (1880) 1 Fed. 133, while it was held that a libel for pilotage could not be sustained, for the reason that the law 204] of Massachusetts, *in question, was not by its terms applicable, Judge Lowell said (page 135): “This statute” (referring to the Federal act of 1866) “has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. Stat. § 4401. *Murray v. Clark*, supra. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. Stat. § 4444.” In *Sprague v. Thompson*, 118 U. S. 90, 96, 30 L. ed. 115, 117, 6 Sup. Ct. Rep. 988, where a claim for pilotage under the law of Georgia was disallowed, the steamer “was a coastwise seagoing steam vessel,” and “was not sailing under register.” In *Huus v. New York & P. R. S. S. Co.* 182 U. S. 392, 394, 45 L. ed. 1146, 1149, 21 Sup. Ct. Rep. 827, after quoting from §§ 4401 and 4444 of the Revised Statutes, the court said: “The general object of these provisions seems to be to license pilots upon steam vessels engaged in the coastwise or interior commerce of the country, 56 L. ed.

and at the same time, to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce.” The steamer was enrolled and licensed for the coasting trade under the laws of the United States, and was engaged in trade between Porto Rico and New York after the treaty of cession. It was held that she was not within the pilotage laws of New York.

The provisions of the Political Code of the state of California, set forth in the certificate, do not apply to coastwise seagoing steam vessels “not sailing under register,” and are not in conflict with the statutes of the United States. Their enforcement is simply a recognition of the limits which Congress has thus far set to the exercise of the unquestioned Federal power. The criterion is not whether the stops of registered vessels at foreign ports may be deemed *en route* between domestic ports, and is not to be found in the length of such stops or in the relative amount of foreign trade. The statute made the distinction, *in the light of the well-known conditions of trade which existed at the time of its enactment, between coastwise seagoing steam vessels, not sailing under register, and those which did sail under register. Whether or not it is wise to establish Federal rules as to port pilotage for the registered vessels exempted from this regulation is a question for Congress to determine.

We conclude that each one of the questions certified should be answered in the negative.

It is so ordered.†

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.,
v.

M. J. BRAY et al.

(S. C. Reporter's ed. 205-219.)

Appeal — from circuit court of appeals — injunction cases — final decree.

1. A decree of a Federal circuit court of appeals which, on the appeal authorized by the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 7, as amended by the act of April 14, 1906 (34 Stat. at L. 116, chap. 1627), to review interlocutory decrees of a circuit court granting an injunction, reversed such a decree and directed both that the injunction be dissolved and the bill dis-

†Petition for writs of certiorari to bring up the whole record in these cases denied May 27, 1912.

NOTE.—On practice and procedure governing the transfer of causes to the Federal

missed, is a final decree, and appealable to the Federal Supreme Court under § 6 of the former act, where the jurisdiction of the circuit court was invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under an act of Congress, and the requisite jurisdictional amount was involved. [For other cases, see Appeal and Error, I. d; III. d, 2, in Digest Sup. Ct. 1908.]

Appeal — in injunction case — time.

2. The thirty-day limitation prescribed by the act of March 3, 1891, § 7, for appeals in injunction cases, applies only to appeals thereunder to the circuit courts of appeals.

[For other cases, see Appeal and Error, IV. d, in Digest Sup. Ct. 1908.]

Bankruptcy — exclusive jurisdiction.

3. The exclusiveness of the jurisdiction of the bankruptcy court of proceedings in bankruptcy precludes the maintenance in a Federal circuit court— even with the express leave of the bankruptcy court—of a plenary suit in equity brought by the surety for a bankrupt public contractor, involving collateral and extraneous matters with which the creditors of the bankrupt have no concern, but having for its primary purpose the control over the distribution of a fund in the trustee's possession admittedly belonging to the bankrupt's estate, and the determination to what extent and in what order the several creditors shall participate therein.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 111.]

Argued December 15, 1911. Decided May 27, 1912.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which, reversing a decree of the Circuit Court for the Northern District of West Virginia in a suit involving the distribution of a fund belonging to a bankrupt's estate, directed the dissolution of an interlocutory injunction and the dismissal of the bill. Affirmed.

See same case below, 96 C. C. A. 9, 170 Fed. 689.

The facts are stated in the opinion.

Mr. B. M. Ambler argued the cause, and, with Messrs. W. W. Van Winkle and M. G. Ambler, filed a brief for appellant:

The Supreme Court has jurisdiction of a controversy involving the rights and liabilities on a Federal contractor's statutory bond.

Henningsen v. United States Fidelity &

G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Hardaway v. National Surety Co. 211 U. S. 552, 53 L. ed. 321, 29 Sup. Ct. Rep. 202.

The limitation on this appeal is one year.

Allen v. Southern P. R. Co. 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; Holt v. Indiana Mfg. Co. 176 U. S. 70, 44 L. ed. 375, 20 Sup. Ct. Rep. 272.

The circuit court has jurisdiction to decree a lien upon property within its district as in a local action.

Dick v. Foraker, 155 U. S. 410, 39 L. ed. 203, 15 Sup. Ct. Rep. 124; Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92.

The circuit court is not without jurisdiction because the property is a fund under administration of another court.

Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92.

The bill is within § 23a of the bankrupt law.

Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668; Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911, 27 Sup. Ct. Rep. 596.

The lien exists.

Ingersoll v. Coram, 211 U. S. 335, 368, 53 L. ed. 208, 229, 29 Sup. Ct. Rep. 92; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Hardaway v. National Surety Co. 211 U. S. 552, 53 L. ed. 321, 29 Sup. Ct. Rep. 202.

A motion to dismiss an appeal from a final decree of a circuit court of appeals is denied where the suit arises upon a bond conditioned according to the act of Congress of August 13, 1894, for the protection of persons furnishing material and labor for the construction of public works.

Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389.

Mr. William M. Hall argued the cause, and, with Messrs. J. A. Dupuy and L. T. Michener, filed a brief for appellees:

The district court has exclusive jurisdiction.

Bray v. United States Fidelity & G. Co. 96 C. C. A. 9, 170 Fed. 689; Wabash R. Co. v. Adelbert College, 208 U. S. 609, 52 L. ed. 642, 28 Sup. Ct. Rep. 425; Shields v. Coleman, 157 U. S. 169, 39 L. ed. 660, 15

Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

As to conflict of jurisdiction between Federal and state courts—see notes to Louisville Trust Co. v. Cincinnati, 22 C. C. A.

356; and J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

On concurrent jurisdiction of Federal and state courts—see notes to Copp v. Louisville & N. R. Co. 12 L.R.A. 725; and Smith v. M'Iver, 6 L. ed. U. S. 152.

Sup. Ct. Rep. 570; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749.

This so-called question of jurisdiction does not involve a question of the jurisdiction of the circuit court as a Federal tribunal.

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119.

Whether a suit is one that arises under the Constitution or laws or treaties of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or law, or a treaty of the United States, or sustained by the opposite construction, and that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the Constitution, or some law, or treaty of the United States, then the case is one arising under the Constitution, law, or treaty; otherwise the jurisdiction cannot be maintained on this ground.

Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Starin v. New York*, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Joy v. St. Louis*, 122 Fed. 528; *Minnesota v. Duluth & I. R. Co.* 87 Fed. 497; *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 151; *Sawyer v. Concordia*, 4 Woods, 273, 12 Fed. 754; *Dowell v. Griswold*, 5 Sawy. 39, Fed. Cas. No. 4,041.

The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on a mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should

depend upon the construction and application of the Constitution.

New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit.

Newburyport Water Co. v. Newburyport, 193 U. S. 576, 48 L. ed. 799, 24 Sup. Ct. Rep. 553.

Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States.

Cooke v. Avery, 147 U. S. 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28.

The pendency in the state court of an action *in personam* which involves no claim to or lien upon specific property in the possession of, or under the dominion of, a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it.

Stanton v. Embrey, 93 U. S. 548, 554, 23 L. ed. 983, 984; *Standley v. Roberts*, 8 C. C. A. 314, 19 U. S. App. 407, 59 Fed. 844; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 58, 132 Fed. 948; *Merritt v. American Steel-Barge Co.* 24 C. C. A. 535, 49 U. S. App. 85, 79 Fed. 233; *Green v. Underwood*, 30 C. C. A. 164, 57 U. S. App. 535, 86 Fed. 429; *Hughes v. Green*, 28 C. C. A. 539, 56 U. S. App. 56, 84 Fed. 835; *Hubinger v. Central Trust Co.* 36 C. C. A. 496, 94 Fed. 790; *Ogden City v. Weaver*, 47 C. C. A. 492, 108 Fed. 568; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 324, 119 Fed. 680; *Ball v. Tompkins*, 41 Fed. 490; *Guardian Trust Co. v. Kansas City Southern R. Co.* 76 C. C. A. 618, 146 Fed. 340, 28 L.R.A.(N.S.) 620, 96 C. C. A. 285, 171 Fed. 43.

The power of the circuit court under § 8 of the act of 1875, relating to liens on property, is not denied, but it is contended that

there is no property within the district upon which the circuit court has, under that act, power to adjudicate, and therefore the complainants have not by their bill made out a case properly cognizable in the circuit court.

Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *Building & L. Asso. v. Price*, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

Or, to put the matter in another light, where it does not appear from any facts stated that there is a disputed construction of the law of the United States under which the complainant claims, and the contest is about the facts only, the Federal question is not presented.

Austin v. Gagan, 5 L.R.A. 476, 39 Fed. 626; *Theurkauf v. Ireland*, 27 Fed. 769; *Murray v. Bluebird Min. Co.* 45 Fed. 385; *California Oil & Gas Co. v. Miller*, 96 Fed. 17.

Mr. V. B. Archer also argued the cause and filed a brief for the Second National Bank of Parkersburg and Farmers & Mechanics National Bank:

On an appeal from an interlocutory order granting or continuing an injunction, the appellate court may direct the dismissal of the bill, where it is found to be without equity to support it.

Worth Mfg. Co. v. Bingham, 54 C. C. A. 119, 116 Fed. 785; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

The district court alone was clothed with power and authority to distribute the funds in its control,—the alleged object of the bill in this cause.

Mr. Justice Van Devanter delivered the opinion of the court:

This appeal brings up for review a decree of the circuit court of appeals for the fourth circuit, reversing a decree of the circuit court for the northern district of West Virginia in a suit in equity which was intended, *inter alia*, to affect a fund of \$26,000 in the hands of the trustee of a bankrupt's estate then in the course of administration in the district court of that district. The decree reversed was an interlocutory one granting an injunction, but the decree of reversal was final, for it directed not only the dissolution of the injunction, but also the dismissal of the bill.

The complainant, the United States Fidelity & Guaranty Company, is a Maryland corporation; three of the defendants, the Second National Bank of Parkersburg, the Farmers & Mechanics National Bank of

the same place, and the Nicolette Lumber Company, are citizens of West Virginia, resident in the district in which the suit was brought; seven of them, Jacob Eichel and Laura Eichel, his wife, the City National Bank of Evansville, the First National Bank of Evansville, the Citizens National Bank of Evansville, the First National Bank of Rockport, and the Farmers Bank of Rockport, are citizens and residents of Indiana; another, the Riter-Conley Company, is a Pennsylvania corporation; and M. J. Bray, the trustee of the bankrupt's estate, who was sued in that capacity and also as an individual, is a citizen and resident of Indiana. The bankrupt, the Evansville Contract Company, was an Indiana corporation. Of course, the national banks are Federal corporations, but their citizenship and places of residence are, for jurisdictional purposes, as just stated. Act August 13, 1888, 25 Stat. at L. 433, chap. 866, § 4, U. S. Comp. Stat. 1901, p. 508.

The jurisdiction of the circuit court was invoked on the ground of diversity of citizenship, and on the further ground that the case was one arising under the act of Congress of August 13, 1894, 28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523, amended February 24, 1905, 33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1911, p. 1071; and the right to bring the suit in that district against the defendants who were not resident therein was rested upon § 8 of the act of March 3, 1875, 18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513, on the theory that the suit was one to enforce a lien and claim upon personal property within the district, that is, upon the fund in the hands of the trustee, which he then had on deposit in the two Parkersburg banks. Section 23a of the bankruptcy act was also relied upon as sustaining the jurisdiction.

The case made by the bill and its exhibits was this: About 1902 the Evansville Contract Company, which will be spoken of as the contractor and as the bankrupt, entered into four several contracts with the United States *for the construction of certain [208 river improvements, one in South Carolina, two in the western district of Pennsylvania, and another in the northern district of West Virginia. Each contract contained, among others, provisions that a designated percentage of the moneys earned thereunder should be retained by the government until the completion of the contract, and that, in case of default by the contractor, the government should have the right to take possession of the work and plant and prosecute the work to completion. The complainant, the United States Fidelity & Guaranty Company, which will be spoken of as the surety com-

pany, became the surety on the bonds given by the contractor for its performance of the contracts. Each bond, conformably to the act of August 13, 1894, supra, was conditioned that the contractor should fully perform the contract according to its terms, and should promptly make full payment to all persons supplying it with labor or materials for the prosecution of the work named in the contract. As an inducement to the execution of each bond the contractor agreed with the surety company as follows:

" . . . and it does hereby bind itself, its successors and assigns, to indemnify the said the United States Fidelity & Guaranty Company against all loss, costs, damages, charges, and expenses whatever, resulting from any of its acts, default, or neglect that said the United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof. And it does further agree, in the event of its being unable to complete or carry on the aforementioned contract, to assign, and does hereby assign, such plant as it may own or have upon said work, to the said the United States Fidelity & Guaranty Company, under the aforesaid obligation, together with vouchers or other evidence of payment, of all costs and expense whatever incurred by said the 209]United States *Fidelity & Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against it, its successors and assigns, of the fact and extent of its liability under said obligation to the said the United States Fidelity & Guaranty Company. And it does further agree, in the event of any breach or default on its part in any of the provisions of the contract hereinbefore mentioned, that the United States Fidelity & Guaranty Company as surety upon the aforesaid bond shall be subrogated to all its rights and properties as principal in said contract, and that deferred payments and any and all moneys and properties that may be due and payable to it at the time of such breach or default, or that may thereafter become due and payable to it on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity & Guaranty Company under the bond above mentioned."

The contractor partially performed each contract, but became embarrassed, and in February, 1904, on the petition of creditors, was adjudged a bankrupt by the district court for the northern district of West Virginia, which appointed three trustees of its estate, M. J. Bray being one. The trustees took charge of its property, and, by an order of the referee having the approval of the creditors were authorized to complete the

contracts, to borrow \$75,000 on trustee's certificates, which were to be a first lien on the property and moneys of the estate, to pay the annual premiums accruing to the surety company, and to save it harmless from any liability on the bonds, to collect from the government the contract price and all retained percentages, and to employ Jacob Eichel, who had been the president of the contractor, to assist in completing the contracts and looking after the interests of the creditors. At first the surety company was disposed to object to such an order, but the seven banks before mentioned, *which were unsecured creditors hav-[210 ing claims aggregating \$115,000, overcame its objection and secured its express consent to the order by executing to it a bond in the sum of \$75,000, whereby they undertook to indemnify and hold it harmless from all liability accrued or to accrue by reason of its suretyship. The terms of this bond were such that the liability of the banks thereunder was to be several, not joint, and was to be confined to specified proportions of its penalty.

Thereafter the trustees carried all the contracts to completion, received from the government the entire contract price and the retained percentages, sold the bankrupt's property, paid all the certificates issued under the order before mentioned, and on December 19, 1905, had on hand a balance of \$36,602.96, subject to allowances and costs of administration yet undetermined. The completion of the contracts was undertaken in the expectation of all concerned that a profit to the estate would result therefrom, but the expectation was not realized. In March, 1906, M. J. Bray became the sole trustee; and on September 21, 1907, when the bill was filed, the net amount remaining in the trustee's hands, after deducting the allowances and costs of administration, was about \$27,600, of which \$26,000 was held on deposit in equal amounts in the two Parkersburg banks.

The total liabilities of the contractor at the time it was adjudged a bankrupt were about \$200,000, and of these \$42,164.89 were allowed by the referee, November 19, 1904, as preferred claims for labor and materials furnished the bankrupt in the prosecution of the work under the contracts. Most of the claims allowed as preferred were purchased, at much less than their face value, from the original claimants, by Philip W. Frey, who was counsel for the trustees. His purchases were principally in advance of the allowance, but in some instances were made thereafter. The allowance, however, was in the names of the *original[211 claimants. Later Frey assigned these claims to Laura Eichel, wife of Jacob Eich-

el, the cost to her being \$27,037.39, although the face value was \$35,663.82. She acquired them with money obtained from Bray under an arrangement whereby both were to share in the profits realized upon their ultimate payment. These transactions, it is alleged, were in pursuance of a wrongful conspiracy between Bray, Frey, and Jacob Eichel, were in violation of their fiduciary relations to the estate, and were had with the purpose of making Bray the real but secret owner, the name of Laura Eichel being used as a mere cover; and it is also alleged that some of these claims are excessive and unjust, that others are not for labor or materials, and that Bray, Frey, and Jacob Eichel wrongfully procured or acquiesced in their allowance as preferred claims so that Bray and his associates might profit thereby.

In February, 1906, after it became evident that the net proceeds of the estate would not be sufficient to pay the preferred claims for labor and materials, the surety company filed in the cause in bankruptcy a petition asserting, *inter alia*, a lien upon the funds in the hands of the trustees, and a right to have the same applied to the payment of the claims for labor and materials upon which recourse could be had against it as the contractor's surety, and praying that such lien and right be respected and enforced, that the court would ascertain what claims were for labor and materials, and would direct that the funds remaining be applied to them. The trustees demurred to this petition and the demurrer was overruled. Bray, on becoming the sole trustee, answered, evidence was taken, and the matter is still pending before the referee.

In March, 1907, separate actions were commenced against the surety company in the common pleas court of Allegheny county, Pennsylvania, in the name of the United States, for the use of Laura Eichel, on the 212]claims *assigned to her as before stated; and in August, 1907, like actions were commenced on these claims in the circuit court of the United States for the western district of Pennsylvania. Both sets of actions are still pending, and it is alleged that they were brought at the instance of Bray and were really for his use and benefit. These actions were not confined to claims arising under the contracts which were to be performed in that district, but included claims arising under the other contracts which were to be performed elsewhere.

Substantially all the claims against the bankrupt's estate, save those of the defendants the Riter-Conley Company, and the Nicolette Lumber Company, each of which

has a preferred claim for labor or materials, have been acquired and are now held by Bray and the two Eichels, or one or more of them, and these parties are endeavoring, as is alleged, to compel the surety company, to pay claims that are unjust, and to divert the funds in the hands of the trustee from the payment of just claims for labor and materials to the payment of general claims as to which recourse cannot be had to the bond of the contractor. The seven banks which gave the indemnity bond to the surety company are no longer creditors of the bankrupt's estate, their claims being now held by Bray or one or both of the Eichels.

By the bill the surety company asserts (1) that under the indemnity agreements made with it by the contractor, under the contracts with the government and the bonds given pursuant to the act of August 13, 1894, *supra*, for their performance, and under the equitable doctrine of subrogation, it has a lien on the fund remaining in the hands of the trustee, is entitled to have that fund applied to the payment of just claims for labor and materials as to which recourse can be had against it as a surety, and is entitled to every right and remedy which the government or those who furnish the labor and materials *would have[213 against such fund; (2) that Bray and the Eichels are not entitled to be paid on any claim held by them, or any of them, more than the sum actually paid therefor; and (3) that the surety company is entitled to have these matters, as also its liability as a surety and the liability of the several indemnitor banks on their bond to it, litigated and determined in one comprehensive suit.

The prayer of the bill is that an accounting be had to ascertain the several amounts justly due for labor and materials furnished the contractor in respect of each of the contracts with the government; that the surety company's liability on each of the bonds be fixed and apportioned as to each party in interest; that the fund in the hands of the trustee be declared subject to a lien for the payment of all just claims for such labor and materials, and the net amount of the fund be applied on such claims; that no claim held by Bray or either of the Eichels be paid in an amount in excess of the sum actually expended for it; that each of the indemnitor banks be held liable to the surety company according to the terms of their bond to it, and the amount of the liability of each bank be fixed and payment thereof directed; that Bray and the Eichels be enjoined from maintaining any of the actions theretofore begun against the surety company, and from instituting any other like

action against it; and that it be granted such other relief as may be appropriate to the occasion.

Before the bill was filed, the district court having charge of the estate of the bankrupt entered an order granting leave to the surety company to begin the suit in the circuit court.

In the circuit court all the defendants save the Riter-Conley Company challenged in various ways the jurisdiction of that court, but an interlocutory decree was entered overruling the objections to the jurisdiction and enjoining Bray and the Eichels, until the further order of the court, from prosecuting and maintaining any of **214**]the *actions against the surety company then pending in the courts, Federal and state, in Pennsylvania, and from beginning any other like action against it. All the defendants, save the Riter-Conley Company and the Niolette Lumber Company, appealed to the circuit court of appeals, which reversed the interlocutory decree and directed that the injunction be dissolved and the bill dismissed, without prejudice, upon the ground that the circuit court was without jurisdiction to entertain it. 96 C. C. A. 9, 170 Fed. 689. The case is here on the appeal of the surety company.

In the Federal courts an appeal, as a general rule, lies only from a final decree. But § 7 of the act of March 3, 1891, 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488, as amended April 14, 1906, 34 Stat. at L. 116, chap. 1627, establishes an exception by providing for an appeal to the circuit court of appeals from an interlocutory decree granting or continuing an injunction or appointing a receiver. It was under this section that the appeal to that court was taken, and on that appeal the court was authorized to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and, if there was to direct a final decree dismissing the bill. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Mast. F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Ex parte National Enameling & Stamping Co.* 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404. In the exercise of this authority the circuit court of appeals reached the conclusion that the suit could not be maintained in the circuit court, and directed both that the injunction be dissolved and that the bill be dismissed. That was a final decree, and as the juris-

isdiction of the circuit court had been invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under the act of Congress, *whereunder the bonds upon **215** which the complainant was surety were given, a further appeal to this court was rightly allowed under § 6 of the act of March 3, 1891, supra, the amount in controversy being in excess of \$1,000, exclusive of costs. *Henningsen v. United States Fidelity & G. Co.* 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; *Howard v. United States*, 184 U. S. 676, 680, 46 L. ed. 754, 757, 22 Sup. Ct. Rep. 543. The time prescribed in that section for taking such an appeal is one year, and this appeal was taken within that time. The thirty-day limitation in § 7 applies only to appeals thereunder to the circuit court of appeals. These views make it necessary to deny a motion to dismiss by which the appellees challenge the jurisdiction of this court.

An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, supra. The real controversy is over the merits of some of those claims, the right of the present holders to assert them for their full amount, and the priority to be accorded them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by *the present plenary bill in equity it **216** is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what priority shall be accorded to them. The circuit of appeals holds that this cannot be done consistently with the bankruptcy act, and the correctness of its holding is the principal question presented by this appeal.

We are not here concerned with a suit

by a trustee to recover property in the possession of another who claims it adversely, nor with a suit against a trustee to recover property in his possession, claimed by another, and therefore the jurisdictional questions incident to suits of that character need not be considered. But we are concerned with a suit against a trustee, the purpose of which is to control the distribution of a fund in his possession, admittedly belonging to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein.

Section 2 of the bankruptcy act invests courts of bankruptcy "with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in *bankruptcy proceedings*, . . . to

(2) "Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(6) "Bring in and substitute additional persons or parties in *proceedings in bankruptcy* when necessary for the complete determination of a matter in controversy;

(7) "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(13) "Enforce obedience by bankrupts, **217**]officers, and *other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(15) "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." [30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491.]

And the section concludes by saying: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 23a provides: "The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as *distinguished from proceedings in bankruptcy*, between trustees as such and *adverse claimants*, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants."

And § 57k reads: "Claims which have been allowed may be reconsidered for cause, and reallocated or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed."

We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.

*The allegations of the bill, other[**218** than those relating to the actions brought against the complainant in Pennsylvania, and to its contingent claim against the indemnitor banks, are intended to invoke (1) a reconsideration and modification of the referee's order of November 19, 1904, allowing certain claims as preferred claims for labor and materials, (2) a determination of the right of the present holders of those claims to have them rated and paid at their face value, (3) an inquiry into the charge that the trustee and others who were employed to assist him in the management of the estate have been speculating in claims against it, and procuring or acquiescing in their improper allowance and classification, and (4) a direction that the just claims for labor and materials be accorded a preference in the distribution. These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the exclusive jurisdiction of the court of bankruptcy. A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

Of the fact that the suit was begun in the circuit court with the express leave of the

court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal.

The portions of the bill seeking an ad-219]judication of the *contingent liability of the indemnitor banks to the complainant, and an injunction against the prosecution of the actions against it in Pennsylvania, and against the institution of other like actions, must fall with the rest of the bill. They were brought into it in a secondary and dependent way, and could not then have been made the subjects of a separate bill in that jurisdiction. Further discussion of them is therefore unnecessary.

The decree of the Circuit Court of Appeals is affirmed.

UNITED STATES, Appt.,
v.

COLORADO ANTHRACITE COMPANY.

(See S. C. Reporter's ed. 219-227.)

Mines — coal-land entry — repayment of purchase price.

1. One who makes an entry of coal lands avowedly for his own use and benefit is "the person who made such entry," within the meaning of the act of June 16, 1880 (21 Stat. at L. 287, chap. 244, U. S. Comp. Stat. 1901, p. 1416), § 2, providing for the repayment of the purchase price in case of subsequent cancelation, although he made the entry at the instance of a corporation, with its money and for its benefit.

Mines — coal-land entry — assigns — repayment of purchase price.

2. The corporate grantee in a quitclaim deed to public coal land, executed by a person who, having then no interest therein, afterwards made an entry avowedly for his sole use and benefit, but actually at the instance of the corporation, with its money and for its benefit, is his "assign" within the meaning of the act of June 16, 1880, § 2, providing for the repayment of the purchase price in case of subsequent cancelation of the entry "to the person who made such entry, or to his heirs or assigns."

Mines — coal-land entry — repayment of purchase price — fraud.

3. The right to the repayment of the purchase price of public coal lands, given by the act of June 16, 1880, § 2, where the entry is subsequently canceled because "erroneously allowed," does not extend to cases where the entry was fraudulently procured.

NOTE.—On location of mining claim—see note to Dwinnell v. Dyer, 7 L.R.A.(N.S.) 763.

56 L. ed.

Mines — coal lands — fraud — entry for another's benefit.

4. An entry of coal lands, made avowedly for the sole use and benefit of the entryman, but which, on a contested hearing, was shown to have been made at the instance of a corporation, and with its money and for its benefit, cannot, for this reason, be deemed to have been fraudulently procured, in contravention of U. S. Rev. Stat. §§ 2347-2352, U. S. Comp. Stat. 1901, pp. 1440, 1441, which forbids the acquisition of such lands in excess of the quantities prescribed, where there is nothing to show any effort through this or like entries to evade the restrictions in respect of quantity.

[For other cases, see Mines, I. a, in Digest Sup. Ct. 1908.]

[No. 227.]

Argued April 25, 1912. Decided May 27, 1912.

APPEAL from the Court of Claims to review a judgment for the repayment of the purchase price of public coal lands, where the entry was subsequently canceled. Affirmed.

See same case below, 45 Ct. Cl. 614.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause and filed a brief for appellant.

Mr. Charles A. Keigwin argued the cause, and, with Mr. E. W. Spalding, filed a brief for appellee:

Rights are assignable under the land laws where assignment is not restricted by express statute.

Thredgill v. Pintard, 12 How. 24, 13 L. ed. 877; Maxwell v. Moore, 22 How. 185, 16 L. ed. 251; French v. Spencer, 21 How. 228, 16 L. ed. 97; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759.

Claims under the mining laws are assignable.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183.

Rights under the coal land statutes are assignable if assignment is made to qualified entrymen.

Kerr v. Utah-Wyoming Improv. Co. 2 Land Dec. 727; United States v. Trinidad Coal & Coking Co. 37 Fed. 180.

In the following cases the question was not of the assignability of rights, but of conspiracy to evade the restrictions:

United States v. Munday, 222 U. S. 175, ante, 149, 32 Sup. Ct. Rep. 53; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29

Sup. Ct. Rep. 123; *United States v. Trinidad Coal & Coking Co.* 137 U. S. 161, 34 L. ed. 640, 11 Sup. Ct. Rep. 57.

The requirement by the Department of affidavits where affidavits are not required by statute is illegal.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512.

For a definition of assignee, under the act of June 16, 1880, see:

Re Emert, 14 Land Dec. 101; *United States v. Commonwealth Title Ins. & T. Co.* 193 U. S. 651, 48 L. ed. 830, 24 Sup. Ct. Rep. 546.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action, under the act of June 16, 1880 (21 Stat. at L. 287, chap. 244, U. S. Comp. Stat. 1901, p. 1416), § 2, for [221]the repayment of the purchase *price paid to the government for 160 acres of public coal lands, the entry of which was subsequently canceled. The plaintiff prevailed in the court of claims (45 Ct. Cl. 614) and the government has appealed, claiming that, on the findings, the judgment should have been in its favor.

Briefly stated, the material facts shown by the findings are as follows: One Stoiber, who claimed a preference right of entry under Rev. Stat. § 2348, U. S. Comp. Stat. 1901, p. 1440, filed in the proper local land office the requisite declaratory statement, and thereafter made application to enter the land. Accompanying the application was an affidavit, made by his agent, stating that Stoiber was making the entry for his own use and benefit, and not directly or indirectly for another. Other applications for the same land resulted in a contest proceeding before the local land office, and after the hearing therein the register and receiver sustained Stoiber's application, accepted the purchase price of the land, which was \$3,200, and issued to him the usual duplicate receipt. This, in the nomenclature of the public land laws, was the allowance of an entry. The other parties to the contest appealed to the Commissioner of the General Land Office, who, upon the same evidence that was submitted to the local office, ruled that Stoiber's application ought not to have been sustained; that his entry had been erroneously allowed and could not be confirmed, and therefore that it must be canceled. That decision was affirmed by the Secretary of the Interior, and the entry was canceled accordingly. In filing the declaratory statement and making the entry Stoiber was not seeking to acquire the land for himself, but for the Colorado Anthracite

Company, the plaintiff here, to which he already had given a quitclaim deed. This was not denied or concealed at the hearing in the contest, but, on the contrary, was admitted and was affirmatively shown by the testimony of the witnesses for Stoiber, including the agent who made the affidavit before mentioned. The purchase price paid at the time of the *entry, which was after the [222] hearing, was furnished by the company because the entry was being made for its benefit. No conveyance of the land was made by Stoiber other than the quitclaim deed just mentioned, and the purchase money so paid was covered into the Treasury and is still held by the government. After the cancellation of the entry the company applied to the Secretary of the Interior for repayment to it of the purchase price, and Stoiber and the company executed a relinquishment of all claims to the land and surrendered the duplicate receipt; but the application was denied on the theory that the company was not an assign of the entryman within the meaning of the act. Stoiber then applied to the Secretary for repayment, and, the application being refused, brought suit in the court of claims, which gave judgment for the government on the ground that the purchase price had been paid by the company, and not by Stoiber. 41 Ct. Cl. 269, 275. Thereupon the company brought the present suit, with the result before stated.

As reasons for asking a reversal of the judgment the government contends that the facts as found disclose, first, that the company is not an assign within the meaning of the act, and, second, that the entry was procured fraudulently, in contravention of the coal-land laws, and therefore that repayment cannot be allowed.

The act of 1880, in § 2, provides that where, from any cause, an entry of public land "has been erroneously allowed and cannot be confirmed," and is duly canceled by the Commissioner of the General Land Office, "the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land."

As we think Stoiber is the person who made the entry in *the sense of this [223] act, even although he made it for the benefit of the company, and paid the purchase price with money furnished by it, we come at once to the question whether, on the findings, the company is his assign within the meaning of the act. It is said that the an-

swer must be in the negative, because there was no conveyance of the land from him to the company while the entry was in force, that is, after its allowance and before its cancellation. By the decisions of this court in *Hoffield v. United States*, 186 U. S. 273, 46 L. ed. 1160, 22 Sup. Ct. Rep. 927, and *United States v. Commonwealth Title Ins. & T. Co.* 193 U. S. 651, 48 L. ed. 830, 24 Sup. Ct. Rep. 546, it is settled that an assign, within the meaning of the act, is one who becomes invested with the entryman's right in the land through some voluntary act of his; and it must be conceded that, generally speaking, a mere quitclaim deed passes only such interest as the grantor possesses at the time, and does not reach an after-acquired title. But here there was something more than a mere quitclaim deed, executed in advance of the acquisition of any interest by the entryman. The entry was made at the instance of the company, with its money and for its benefit, and, unless the coal-land law forbade it, the entryman, by his voluntary action in that regard, became a trustee for the company, and charged with an obligation to convey the land to it. *Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994; *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. ed. 1091, 1094, 11 Sup. Ct. Rep. 417; *Smithsonian Inst. v. Meech*, 169 U. S. 398, 406, 42 L. ed. 793, 797, 18 Sup. Ct. Rep. 396. Not only so, but equity, which usually looks upon that as done which ought to have been done, would regard such a conveyance as actually made, and therefore treat the company as an assign. We speak of the view which equity would take of the matter, because it is manifest that the act of 1880 proceeds upon equitable principles and is intended to be administered accordingly. Like other highly remedial statutes, it should be interpreted with appropriate regard to the spirit which prompted it. And, when it is so interpreted, we think the term "assigns" in-
224]cludes *one in the company's situation, if only the arrangement between it and Stoiber was not forbidden by law.

We are thus brought to the question whether the facts found disclose that Stoiber and the company were engaged in an effort to acquire the land fraudulently, in contravention of the coal-land law, Rev. Stat. §§ 2347-2352, U. S. Comp. Stat. 1901, pp. 1440, 1441. If they were, the company is not entitled to repayment, first, because it then would not be entitled to invoke the equitable maxim before stated, without the aid of which it could not be deemed an assign within the meaning of the act, and, second, because the right to repayment is restricted by the act to instances in which the entry has been "erroneously allowed,"—
56 L. ed.

an expression which denotes some mistake or error on the part of the land officers whereby an entry is allowed when it should be disallowed, and not some fraud or false pretense practised on them whereby an applicant appears to be entitled to the allowance of an entry when in truth he is not. Of this expression it is said, correctly, we think, in the regulations of the Land Department adopted under § 4 of the act soon after its enactment and ever since in force:

"This cannot be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be 'erroneously allowed.' But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was 'erroneously allowed;' and in such case repayment would not be authorized."

While the coal-land law does not expressly prohibit an entry by one person for the benefit of another, it does limit the quantity of land that may be acquired thereunder by one person to 160 acres, and the quantity that may be acquired by an association of persons to 320 acres, *and, in excep-
225]tional instances, 640 acres; and it declares that its sections "shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions." These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly, by entries in their own names, or indirectly, by entries made for their benefit in the names of others. And so, one person cannot lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit, but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law. *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; *United States v. Keitel*. 211 U. S. 370,

53 L. ed. 230, 29 Sup. Ct. Rep. 123; *United States v. Forrester*, 211 U. S. 399, 53 L. ed. 245, 29 Sup. Ct. Rep. 132; *United States v. Munday*, 222 U. S. 175, ante, 149, 32 Sup. Ct. Rep. 53. But there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person or association where he or it is fully qualified to make the entry in his or its own name, and is not seeking to evade the restrictions in respect of quantity.

A corporation is an association of persons within the meaning of the law (*United States v. Trinidad Coal & Coking Co.*, supra), and therefore the company here, which was a Colorado corporation, lawfully could have made the entry in question in its own name, unless it or some member of it had had the benefit of the coal-land law, 226]or *was seeking, through this land and other like entries, to acquire coal land in excess of the quantity prescribed. In other words, the fact that the entry was made in the name of Stoiber for the benefit of the company does not, without more, establish that it was forbidden or fraudulent. There is no finding that the company or any member of it had had the benefit of the law or was seeking to acquire more than this 160 acres. So, for aught that appears, there was no legal obstacle to the entry being made in the company's name, and the fact that it was not may have been due to matters not affecting its validity or integrity. We do not overlook the finding that the application was accompanied by an affidavit stating that Stoiber was making the entry for his own use and benefit, and not directly or indirectly for another. Of course, the other findings show that that statement was untrue. Had it remained uncorrected, it probably would have deceived the officers of the land office and prevented any inquiry into the qualifications of the company. But, according to the findings, it did not remain uncorrected, and could not have deceived the officers, for, at the hearing in the contest which preceded the allowance of the entry, it was admitted and shown that Stoiber was not seeking to acquire the land for himself, but for the company, to which he already had given a quitclaim deed. The statement in the affidavit therefore became harmless, for it was upon the evidence given in the contest that the entry was allowed. It follows that upon the findings it cannot be said that the arrangement between Stoiber and the company was forbidden by law, or that the entry was fraudulently procured.

But it is said that an affirmative finding that the entry was not fraudulently procured is essential to sustain the judgment. To this we cannot agree. Fraud is not pre-

sumed, and one who bases a right or defense upon it should allege and prove it. The government's answer *contains no[227 allegation of fraud, and the silence of the findings may rightly be taken as showing that none was proved. The findings fully respond to the issues presented by the pleadings, and, we think, sustain the judgment. Judgment affirmed.

JOHN OLUF JOHANNESSEN, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 227-243.)

Judgment — conclusiveness — naturalization.

1. A certificate of naturalization procured from a competent court *ex parte* in the ordinary way does not have any such conclusive effect as against the public as prevents its cancellation in the independent proceeding authorized by Congress in the act of June 29, 1906 (34 Stat. at L. 596, 601, chap. 3592, U. S. Comp. Stat. Supp. 1909, pp. 97, 485), § 15, on the ground that it was fraudulently and illegally procured by perjured testimony.

[For other cases, see Judgment, III. j. 4, in Digest Sup. Ct. 1908.]

Constitutional law — exercise of judicial power.

2. Congress did not unconstitutionally exercise judicial power by enacting the provisions of the act of June 29, 1906, § 15, under which certificates of naturalization theretofore issued *ex parte* in the ordinary way may be impeached where fraudulently and illegally procured by perjured testimony.

[For other cases, see Constitutional Law, II. a, 2, in Digest Sup. Ct. 1908.]

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L.R.A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L.R.A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 577; *Morrill v. Morrill*, 11 L.R.A. 155; *Shores v. Hooper*, 11 L.R.A. 308; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to what laws are *ex post facto*—see notes to *State v. Cooler*, 3 L.R.A. 181; *Anderson v. O'Donnell*, 1 L.R.A. 632; *Calder v. Bull*, 1 L. ed. U. S. 648; *Sturges v. Crowinshield*, 4 L. ed. U. S. 529; *Re Medley*, 33 L. ed. U. S. 835; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; and *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

As to character and kinds of judgments and orders within the rule forbidding collateral attack for fraud not affecting the jurisdiction—see note to *Clark v. Southern Can Co.* 36 L.R.A. (N.S.) 980.

Aliens — naturalization — impeaching certificate.

3. Naturalization certificates, whether issued prior or subsequent to the enactment of the act of June 29, 1906, are, by the express provisions of § 15 of that act, made liable to impeachment, where fraudulently and illegally procured.

[Naturalization, see Aliens, VII., in Digest Sup. Ct. 1908.]

Constitutional law — ex post facto laws — impeaching naturalization certificate.

4. The retrospective features of the provisions of the act of June 29, 1906, § 15, authorizing the impeachment of naturalization certificates where fraudulently or illegally procured, do not invalidate that section under U. S. Const. art. 1, § 9, prohibiting *ex post facto* laws.

[For other cases, see Constitutional Law, IV. f, in Digest Sup. Ct. 1908.]

[No. 230.]

Submitted April 22, 1912. Decided May 27, 1912.

APPEAL from the District Court of the United States for the Northern District of California to review a decree canceling a naturalization certificate on the ground that it was fraudulently and illegally procured. Affirmed.

The facts are stated in the opinion.

Messrs. **Edward J. McCutchen** and **Samuel Knight** submitted the cause for appellant:

A decree of naturalization is a judgment of a court; and therefore subject to all the rules of law regarding judgments as such.

Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; 2 Black, Judgm. § 804; *McCarthy v. Marsh*, 5 N. Y. 263; *The Acorn*, 2 Abb. (U. S.) 434, Fed. Cas. No. 29; *Charles Green's Son v. Salas*, 31 Fed. 106; *Re Bodek*, 63 Fed. 813; *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140; *Ex parte Knowles*, 5 Cal. 300; *Tinn v. United States Dist. Atty.* 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; *Re Christern*, 11 Jones & S. 523; *Re Clark*, 18 Barb. 444; *United States v. Gleason*, 78 Fed. 396, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778.

A court of equity will not set aside a judgment on the ground that it is founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 56 L. ed.

Sup. Ct. Rep. 10; *Hilton v. Guyott*, 42 Fed. 252, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *United States v. Gleason*, 78 Fed. 396, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778.

The act of 1906, under which it is sought to cancel defendant's certificate of citizenship, operates as an *ex post facto* law, and is therefore within the prohibition of § 9 of article 1 of the Constitution of the United States.

Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *Conn. v. Edwards*, 9 Dana, 447; *United States v. Starr*, Hempst. 469, Fed. Cas. No. 16,379; *Green v. Shumway*, 39 N. Y. 418.

If the act of June 29, 1906, authorizes the impeachment of the judgment of a co-ordinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional, as an exercise of judicial power by the legislature.

Wieland v. Shilloek, 24 Minn. 345; *Roche v. Waters*, 72 Md. 264, 7 L.R.A. 533, 19 Atl. 535; *Re Handley*, 15 Utah, 212, 62 Am. St. Rep. 926, 49 Pac. 829; *Cooley, Const. Lim.* 6th ed. 111; 1 Black, Judgm. 298; *Atkinson v. Dunlap*, 50 Me. 111; *United States v. Aakervik*, 180 Fed. 137; *Davis v. Menasha*, 21 Wis. 492; *State ex rel. Flint v. Flint*, 61 Minn. 539, 63 N. W. 1113.

A statute should be construed to have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; *Cooley, Const. Lim.* 529; 8 Cyc. 1022; 28 Am. & Eng. Enc. Law, 693.

Assistant Attorney General **Harr** submitted the cause for appellee:

The contention that if, as in the present case, a court was induced to naturalize an alien by a misrepresentation of the facts as to his residence, Congress has no authority to authorize a judicial proceeding for the cancellation of his certificate of naturalization so obtained, is manifestly untenable.

United States v. Spohrer, 175 Fed. 442; *Re McCoppin*, 5 Sawy. 632, Fed. Cas. No. 8,713; *United States v. Norsch*, 42 Fed. 417; *United States v. Nisbet*, 168 Fed. 1005; *United States v. Mansour*, 170 Fed. 671; *United States v. Simon*, 170 Fed. 680; *United States v. Meyer*, 170 Fed. 983; *United States v. Luria*, 184 Fed. 643; 3 Moore, International Law Dig. p. 500; *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140; *United States v. Dolla*, 100 C. C. A. 521, 177 Fed. 101, 21 Ann. Cas. 665.

The doctrine announced in *United States v. Throckmorton*, 96 U. S. 61, 25 L. ed. 93, is inapplicable, because, as this court later pointed out, that doctrine has reference only to proceedings *inter partes*, and has no application to *ex parte* proceedings by which a grant is obtained from the government.

Moffat v. United States, 112 U. S. 24, 32, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10; *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; *Hilton v. Guyot*, 159 U. S. 207, 40 L. ed. 123, 16 Sup. Ct. Rep. 139; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 240, 42 L. ed. 144, 154, 17 Sup. Ct. Rep. 809.

It has been held to be within the power of Congress, in respect to the Indian tribes, to authorize judgments of citizenship rendered by territorial courts to be set aside and the matter inquired into *de novo*. (*Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.) It is not perceived why the power of Congress with respect to the naturalization of aliens under the Constitution is not as plenary.

Mr. Justice Pitney delivered the opinion of the court:

This was a proceeding under § 15 of the act of June 29, 1906, chap. 3592 (34 Stat. at L. 596, 601, U. S. Comp. Stat. Supp. 1909, pp. 97, 485), instituted by the district attorney of the United States for the northern district of California, to cancel a certificate of citizenship, granted to the appellant by a state court long prior to the passage of the act referred to, on the ground that it had been fraudulently and illegally procured. The case was heard upon demurrer to an amended petition, which demurrer was overruled; and thereupon, no answer being filed, the court proceeded to make a decree setting aside and canceling the certificate. The appellant brings that decree here for review.

The facts, as set forth in the amended petition and admitted by the demurrer, are as follows: Johannessen, the appellant, is a native of Norway, and arrived in the United States for the first time in the month of December, 1888. Less than four years thereafter, and on October 6, 1892, he applied to the superior court of Jefferson county, in the state of Washington, under § 2165 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 233[1329]), to be admitted to citizenship, and procured from that court a certificate admitting him to such citizenship. This certificate was based upon the perjured testi-

mony of two witnesses, to the effect that Johannessen had resided within the limits and under the jurisdiction of the United States for five years at least, then last past. The facts were not discovered by the government until June 29, 1908, when Johannessen made a voluntary statement to the Department of Justice in the form of an affidavit, which is made a part of the amended petition, and wherein he admits that the certificate of citizenship was illegally procured, in that he had not been a resident of the United States for five years at the time it was issued.

The petition contains all necessary averments to show the jurisdiction of the district court over the present action, leaving only the merits in controversy.

The provisions of law in force at the time Johannessen thus applied for and procured admission to citizenship are contained in §§ 2165 and 2170 of the Revised Statutes, which, so far as pertinent, are as follows:

"Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

"Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the *courts above[234 specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

"Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United

States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.

"Sec. 2170. No alien shall be admitted to become a citizen who has not, for the continued term of five years next preceding his admission, resided within the United States."

The act of June 29, 1906, contains a revision of the naturalization laws, together with some additional provisions, among which are the following:

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding [235] the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absences by the laws of the state or the place where such suit is brought.

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship, and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order, it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record, and to cancel such original certificate of citizenship upon the records, and to notify the Bureau of Immigration and Naturalization of such cancellation.

"The provisions of this section shall apply not only to certificates of citizenship is-

sued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

The principal contentions in the argument for appellant are, that a decree of naturalization is a judgment of a competent court, and subject to all the rules of law regarding judgments as such; that a court of equity could not, prior to June 29, 1906, set aside or annul such a judgment *for fraud intrinsic the record, that [236] is, founded upon perjured testimony, or any matter which was actually presented and considered in giving the judgment; and that if the act of June 29, 1906, authorizes the impeachment of the pre-existing judgment of a co-ordinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

It was long ago held in this court, in a case arising upon the early acts of Congress, which submitted to courts of record the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. *Spratt v. Spratt*, 4 Pet. 393, 408, 7 L. ed. 897, 902. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. See also *Campbell v. Gordon*, 6 Cranch, 176, 3 L. ed. 190.

It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of.

The Constitution, art. 1, § 8, gives to Congress power "to establish a uniform rule of naturalization." Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship "in the following manner, and not otherwise;" § 2165 requiring proof of residence within the United States for five years at least; and § 2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding *for the naturalization [237] of an alien is, in a certain sense, a judicial proceeding, being conducted in a court of

record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the government a party nor to give any notice to its representatives.

The act of June 29, 1906, in § 11 (34 Stat. at L. 599, chap. 3592, U. S. Comp. Stat. Supp. 1909, p. 482), declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right of call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood. For present purposes we assume, however, that the government had such an interest as entitled it, even without express enactment, to raise an issue upon an alien's application for admission to the privileges of citizenship. What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us. See 2 Black, Judgm. § 534a. What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of 238]the great number of aliens thus *applying at irregular times in the various courts of record of the several states and in the Federal circuit and district courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the government of the United States or to the public, it is, of course, impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

The foundation of the doctrine of *res*

judicata, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgm. §§ 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern P. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. ed. 355, 377, 18 Sup. Ct. Rep. 18:

"That a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public. Such a certificate, including the "judgment" upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land (Rev. Stat. § 2289, etc., U. S. Comp. Stat. 1901, p. 1388), or of the exclusive right to make, use, and vend a new and useful invention (Rev. Stat. § 4883, etc. U. S. Comp. Stat. 1901, p. 3381).

Judicial review of letters patent, looking to their cancellation when issued unlawfully or through mistake, or when procured by fraud, is very ancient,—possibly antedating the establishment of the court of equity in England. 3 *Bl. Com. 47, [239 48. As pointed out by Mr. Justice Grier, speaking for this court in *United States v. Stone*, 2 Wall. 525, 535, 17 L. ed. 765, 767, the original mode was by writ of *scire facias*, the bill in equity being afterwards adopted as a more convenient remedy. In *United States v. San Jacinto Tin Co.* 125 U. S. 273, 281, 31 L. ed. 747, 750, 8 Sup. Ct. Rep. 850, previous cases were reviewed and the practice discussed. In *United States v. Beebe*, 127 U. S. 338, 342, 32 L. ed. 121, 123, 8 Sup. Ct. Rep. 1083, Mr. Justice Lamar, speaking for this court, said: "It may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the government has a direct interest, or is under an obligation respecting the relief invoked." See also *Noble v. Union River Logging R. Co.* 147 U. S. 165, 175, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271, and cases cited.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93, is not opposed in principle,

for, as pointed out in *United States v. Minor*, 114 U. S. 233, 241, 29 L. ed. 110, 113, 5 Sup. Ct. Rep. 836, the patent was issued on the confirmation of a Mexican grant after judicial proceedings, where there were pleadings and parties, and witnesses were examined on both sides, with the right to appeal. *Vance v. Burbank*, 101 U. S. 514, 519, 25 L. ed. 929, 931, was likewise a contested case in the Land Department, as the report shows.

The doctrine that a patent issued *ex parte* may be annulled for fraud has been repeatedly applied to patents for inventions. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 361, 32 L. ed. 450, 459, 9 Sup. Ct. Rep. 90; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 238, 42 L. ed. 144, 153, 17 Sup. Ct. Rep. 809.

Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat. at L. 601, chap. 3592, U. S. Comp. Stat. Supp. 1909, p. 485), provides for a proceeding in a "court having jurisdiction to naturalize aliens, in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," upon fair [240]*notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure.

The views above expressed render it unnecessary for us to go into the question whether, on general principles, and without express legislative authority, a court of equity, at the instance of the government, might set aside a certificate of citizenship or restrain its use, for fraud or the like. In *United States v. Norsch*, 42 Fed. 417, it was declared that the government could sue in a Federal court for the cancellation of a certificate that had been procured by fraud in a state court, but it was held that the facts set forth in the bill did not make out a sufficient case of fraud. In *United States v. Gleason*, 78 Fed. 396, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778, the contrary conclusion was reached upon the main question. These two cases arose prior to the act of 1906.

Since the passage of that act, the district courts have quite generally sustained the action for a cancellation of fraudulent certificates. *United States v. Nisbet*, 168 Fed. 1005; *United States v. Simon*, 170 Fed. 680; *United States v. Mansour*, 170 Fed. 671; *United States v. Meyer*, 170 Fed. 983; 56 L. ed.

United States v. Luria, 184 Fed. 643; *United States v. Spohrer*, 175 Fed. 440. In the latter case, Judge Cross used the following pertinent language (at p. 442): "An alien friend is offered, under certain conditions, the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not *he takes nothing[241 by his paper grant. Fraud cannot be substituted for facts." And again, at p. 446: "That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is in my judgment, well settled; and, if that be true of property, then by analogy and with greater reason, it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."

The contention that the act of June 29, 1906, in authorizing the impeachment of certificates of naturalization theretofore issued for fraud consisting of the introduction of perjured testimony is unconstitutional as an exercise of judicial power by the legislative department is in effect disposed of by what has been said. The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers. *Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L. ed. 665, 671; *Freeborn v. Smith*, 2 Wall. 160, 175, 17 L. ed. 922, 923; *Garrison v. New York*, 21 Wall. 196, 202, 22 L. ed. 612, 614; *Freeland v. Williams*, 131 U. S. 405, 413, 33 L. ed. 193, 196, 9 Sup. Ct. Rep. 763; *Stephens v. Cherokee Nation*, 174

U. S. 445, 478, 43 L. ed. 1041, 1053, 19 Sup. Ct. Rep. 722.

An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practised upon the court, without which the certificate of citizenship could not and would not have been **242**] issued. As was well said by *Chief Justice Parker in *Foster v. Essex Bank*, 16 Mass. 273, 8 Am. Dec. 135, "there is no such thing as a vested right to do wrong."

The remaining points taken by the appellant may be briefly disposed of. One is that the provisions of § 15 of the act of 1906 are not retrospective. This is refuted by a reading of the closing paragraph of the section. Finally, it is insisted that, if retrospective in form, the section is void, as an *ex post facto* law within the prohibition of art. 1, § 9 of the Constitution. It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. *Cooley*, Const. Lim. 6th ed. 319; *Calder v. Bull*, 3 Dall. 386, 390, 1 L. ed. 648, 650; and *Rose's Note* thereon. The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an *ex post facto* law. *Cummings v. Missouri*, 4 Wall. 277, 321, 18 L. ed. 356, 362; *Ex parte Garland*, 4 Wall. 333, 378, 18 L. ed. 366, 370. But the act under consideration inflicts no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown, the question whether one who claims the privilege of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that **243**] was never rightfully *his. Such a statute is not to be deemed an *ex post facto* law.

The decree under review should be affirmed.

R. J. DARNELL (Incorporated), Plff. in Err.,
v.

ILLINOIS CENTRAL RAILROAD COMPANY and Yazoo & Mississippi Valley Railroad Company.

(See S. C. Reporter's ed. 243-245.)

Appeal — from circuit court — jurisdiction below.

The dismissal by a Federal circuit court of an action brought by a domestic corporation to recover from nonresident railway companies the excess over a reasonable freight rate exacted by them because the declaration contained no averment that the Interstate Commerce Commission had sustained plaintiff's right to reparation does not present a question of the jurisdiction of that court as a Federal court, so as to sustain a direct appeal to the Supreme Court, since precisely the same question would have arisen for decision had the suit been pending in a state court of general authority, having jurisdiction over the defendants.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

[No. 887.]

Submitted April 1, 1912. Decided June 7, 1912.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment dismissing, for want of jurisdiction, an action brought by a domestic corporation to recover from nonresident railway companies the excess over a reasonable freight rate exacted by them. Dismissed for want of jurisdiction.

See same case below, on demurrer, 190 Fed. 656.

Mr. William A. Percy submitted the cause for plaintiff in error. Mr. Allen Hughes was on the brief:

Under § 5 of the judiciary act of 1891 the case at bar is one which most aptly illustrates an instance for the issuance of the writ of error from the Supreme Court of the United States to a circuit court.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 112 C. C. A. 637, 192 Fed. 475; *Morrisdale Coal Co. v. Pennsylvania R. Co.* 106 C. C. A. 269, 183 Fed. 929.

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333; and *B. Atman & Co. v. United States*, ante, 894.

Messrs. Charles N. Burch and Blewett Lee submitted the cause for defendants in error. Mr. H. D. Minor was on the brief:

Quasi jurisdictional questions do not go direct to this court, but to the circuit court of appeals.

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; United States v. Congress Constr. Co. 222 U. S. 199, ante, 163, 32 Sup. Ct. Rep. 44

The court, in sustaining the demurrer, applied a rule equally applicable to all state and Federal courts; to-wit, the necessity of the plaintiff showing that it had complied with the interstate commerce act, as construed in the Abilene Cotton Oil Company Case, by, in the first instance, resorting to the Commission and having its claim adjudicated.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, ante, 288, 32 Sup. Ct. Rep. 114.

This cannot be said to be a question of jurisdiction.

Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Blythe v. Hinckley, 173 U. S. 506, 43 L. ed. 785, 19 Sup. Ct. Rep. 497; Louisville Trust Co. v. Knott, 191 U. S. 233, 48 L. ed. 161, 24 Sup. Ct. Rep. 119; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; United States v. Congress Constr. Co. 222 U. S. 199, ante, 163, 32 Sup. Ct. Rep. 44.

244] *Memorandum opinion by direction of the court. By Mr. Chief Justice White:

On motion to dismiss: Plaintiff in error, a Tennessee corporation, was the plaintiff below. One of the defendants is an Illinois and the other a Mississippi corporation. The action was commenced on June 24, 1911, to recover the excess over a reasonable rate exacted by the defendants from the plaintiff for the carriage of hard-wood lumber, such excess being alleged to be 2 cents per hundred pounds on more than thirty-five million pounds of such lumber shipped by plaintiff between January 20, 1905, and August 1, 1908. It was averred that the excess of the rate exacted over what would have been a reasonable rate to the extent claimed had been determined by the Interstate Commerce Commission in a proceeding before that body by shippers of hard-wood lumber other than the plaintiff, and that in consequence of the order of the Commission, made in the proceeding referred to, a reasonable rate had been made effective by the defendants on August 1,

1908. A demurrer of both the defendants was sustained, for the reason that the declaration failed to allege that plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. The plaintiff declining to plead further, a judgment of dismissal was entered. Thereafter the court filed a certificate to the effect that the cause had been dismissed solely upon the ground of want of jurisdiction. This direct writ of error was then sued out.

The motion to dismiss must prevail. As stated in the certificate of the court below, the order of dismissal was "based solely on the ground that the declaration . . . discloses the infraction of no right arising under or out of the Federal laws or Constitution, of which this court now has jurisdiction." It is plain, from the record, that *this was but the equivalent of [245 saying that the declaration did not state a cause of action because of the failure to allege the existence of a supposed condition precedent to recovery in a court of law; viz., a finding by the Interstate Commerce Commission that a right to reparation was possessed by the plaintiff. But the right to take cognizance of a claim based upon an award of reparation made by the Commission is not confined solely to an appropriate circuit court of the United States, but is equally possessed by state courts having general jurisdiction. See amendment to § 16 of the act to regulate commerce, resulting from the act of June 18, 1910 (chap. 309, 36 Stat. at L. 554). Under these circumstances it is clear that the question of whether the plaintiff was entitled to the relief prayed, in the absence of an averment of previous action by the Interstate Commerce Commission, involved merely the determination of whether there was a cause of action stated; and hence, that under these circumstances this issue did not call in question the jurisdiction of the court below as a Federal court becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a state court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding, and does not come within the purview of the authority to directly review in certain cases, conferred upon this court by the act

of 1891. [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488]. *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; *United States v. Congress Constr. Co.* 222 U. S. 199, ante, 163, 32 Sup. Ct. Rep. 44.

Writ of error dismissed.

246]*CHARLES D. CRESWILL, George N. Stoney, George R. Hutto, et al., Plffs. in Err.,

v.

GRAND LODGE KNIGHTS OF PYTHIAS OF GEORGIA, T. H. Nickerson, D. J. Bailey, et al.

(See S. C. Reporter's ed. 246-264.)

Error to state court — Federal question — Federal authority.

1. The right of a fraternal order to the use of its corporate name, and the incidental right to use the distinctive words in such name to designate the order, and to use the appropriate insignia, emblems, etc., when invoked in virtue of the authority to incorporate conferred by the Federal general incorporation act of May 5, 1870 (16 Stat. at L. 98, chap. 80), is claimed under an authority exercised under the United States within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, Judicial Code (36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227), § 237, governing writs of error from the Federal Supreme Court to state courts.

[For other cases, see *Appeal and Error*, 1751-1797, in *Digest Sup. Ct.* 1908.]

Error to state court — Federal question — jurisdiction.

2. Whether or not the officers of the state grand lodge of a fraternal order incorporated under the Federal general incorporation act of May 5, 1870, may prosecute in the state courts an application to be made a domestic corporation is a question non-Federal in character, which cannot be reviewed by the Federal Supreme Court on writ of error to a state court.

[For other cases, see *Appeal and Error*, 1601-1644, in *Digest Sup. Ct.* 1908.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judg-

Error to state court — scope of review — facts.

3. A question of law arising out of the contention that there was no evidence whatever to support a finding of fact as the result of which a Federal right was denied is open to review in the Federal Supreme Court on writ of error to a state court, if the evidence is in the record.

[For other cases, see *Appeal and Error*, 1596-1600; 2175-2208, in *Digest Sup. Ct.* 1908.]

Laches — as bar to injunctive relief.

4. The inaction of a fraternal order during the many years in which a newer order, taking the same name, has existed in the state and has exercised its attributes and functions, is such laches as defeats the former's right to injunctive relief against the infringement of its name and the copying of its insignia and emblems.

[For other cases, see *Limitation of Actions*, 80, 81, in *Digest Sup. Ct.* 1908.]

[No. 235.]

Argued May 2 and 3, 1912. Decided June 10, 1912.

IN ERROR to the Supreme Court of the State of Georgia to review a decree which, on a second appeal, affirmed a decree of the Superior Court of Fulton County in that state, enjoining the infringement of the name of a fraternal order and the copying of its insignia and emblems. Reversed and remanded for further proceedings.

See same case below, 133 Ga. 837, 134 Am. St. Rep. 231, 67 S. E. 188, 18 Ann. Cas. 453.

The facts are stated in the opinion.

Mr. C. L. Pettigrew argued the cause, and, with Mr. Samuel A. T. Watkins, filed a brief for plaintiffs in error:

The defendants in error are not entitled to the relief sought because of their own acquiescence in the use by the plaintiffs in error of the name under which they were chartered.

Grand Lodge, A. O. U. W. v. Graham, 96 Iowa, 592, 31 L.R.A. 133, 65 N. W. 837; *Thomp. Corp.* 8192, 8196; *Burke v. Bishop*, 75 C. C. A. 666, 144 Fed. 838; *Bacon, Ben. Soc.* 1904, § 48A; *Great Hive*,

ments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

On review of questions of fact on writ of error to state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

On laches as a defense in suits for infringement of trademarks or names, or for unfair competition in trade—see notes to *Saxlehner v. Eisner & M. Co.* 45 L. ed. U. S. 60; *Taylor v. Sawyer Spindle Co.* 22 C. C. A. 211; and *Richardson v. D. M. Osborne & Co.* 36 C. C. A. 613.

L. M. v. Supreme Hive, L. M. 135 Mich. 392, 97 N. W. 779, 99 N. W. 26, 129 Mich. 324, 88 N. W. 882; *Holt v. Parsons*, 118 Ga. 895, 45 S. E. 690; *Wilkes v. Phillips*, 120 Ga. 728, 48 S. E. 113; *Reynolds & H. Estate Mortg. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Hollingshead v. American Nat. Bank*, 104 Ga. 250, 30 S. E. 728; *Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444; *Akins v. Hill*, 7 Ga. 573; *Water-Lot Co. v. Bucks*, 5 Ga. 315; *High, Inj.* 4th ed. §§ 7-10a; *Elberton v. Pearl Cotton Mills*, 123 Ga. 1, 50 S. E. 977; *Whitley v. James*, 121 Ga. 521, 49 S. E. 600; *McWhorter v. Cheney*, 121 Ga. 541, 49 S. E. 603; *Cade v. Burton*, 35 Ga. 280; *Knox v. Yoiv*, 91 Ga. 367, 17 S. E. 654; 16 Cyc. 152, 162; *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938; *Boston Rubber Shoe Co. v. Boston Rubber Co.* 149 Mass. 436, 21 N. E. 875; *Colonial Dames v. Colonial Dames*, 29 Misc. 10, 60 N. Y. Supp. 302, 173 N. Y. 586, 65 N. E. 1115; *Richards v. Mackall*, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324.

Mr. **Alton B. Parker** also argued the cause, and, with Messrs. C. L. Pettigrew and Samuel A. T. Watkins, filed a brief for plaintiffs in error.

Messrs. **Hamilton Douglas** and **John P. Ross** argued the cause and filed a brief for appellees:

There is no Federal question involved. The appellants have had such a trial as is authorized by law, and have not been deprived of property without due process of law.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442; *Bartemeyer v. Iowa*, 18 Wall. 130, 21 L. ed. 929; *Hurtado v. California*, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292.

A state may make restrictions on corporations before permitting them to do business, even though they are Federal corporations.

Noble v. Mitchell, 164 U. S. 368, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. 56 L. ed.

The Supreme Court has no jurisdiction where the Federal question is only placed on the record for the purpose of appeal.

Marsh v. Nichols, S. & Co. 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; *Boughton v. American Exch. Nat. Bank*, 104 U. S. 427, 26 L. ed. 765; *Michigan C. R. Co. v. Michigan Southern R. Co.* 19 How. 378, 15 L. ed. 689; *Fleming v. Clark*, 12 Allen, 198; *Brown v. Atwell*, 92 U. S. 327, 23 L. ed. 511.

The Federal court can consider only Federal questions, and not questions of local law.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Cornell University v. Fiske*, 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. Rep. 775; *Pollard v. Kibbe*, 14 Pet. 353, 10 L. ed. 490; *Wallace v. Parker*, 6 Pet. 680, 8 L. ed. 543; *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Eustis v. Bolles*, 150 U. S. 361, 370, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Hopkins v. McLure*, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *St. Louis, C. G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Castillo v. McConico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Myrick v. Thompson*, 99 U. S. 291, 25 L. ed. 324.

Mr. Chief Justice **White** delivered the opinion of the court:

A secret fraternal and benevolent order known as the Knights of Pythias was organized as a voluntary association in Washington, District of Columbia, in 1864. Pursuant to the authority conferred by an act of Congress approved May 5, 1870 [16 Stat. at L. 98, chap. 80], authorizing the formation of corporations in the District of Columbia, "the persons composing the [249] Supreme Lodge, the governing body of the order, became incorporated as the Supreme Lodge Knights of Pythias by filing in the proper office the certificate required by the act. Among other things required to be stated in the certificate was the name or title by which the society was to be known in law and the particular business and objects of the society. The statute provided that upon the filing of the certificate the

persons signing and acknowledging the same, and their associates and successors, "shall . . . be a body politic and corporate, by the name and style stated in the certificate; . . ." The life of the corporation thus created, it would seem, expired by limitation in 1890. On June 29, 1894 [28 Stat. at L. 96, chap. 119], however, by a special act of Congress, the Supreme Lodge was again made a corporation of the District of Columbia by the name of the Supreme Lodge Knights of Pythias, and still exists as such. Membership in the order is restricted to white males. In addition to a Grand Lodge and subordinate lodges in each state to which it has been extended, the order conducts an insurance branch known as the Endowment Rank and a military branch known as the Uniform Rank. The Grand Lodge of Georgia was instituted by the Supreme Lodge on March 20, 1871.

An order of Knights of Pythias of the same general nature as that above described, consisting of members of the colored race, was established in Mississippi on March 26, 1880. It became a corporation of the District of Columbia on or about October 10, 1889, by virtue of the general incorporation act of Congress of May 5, 1870, already referred to, under the name and style of "The Supreme Lodge Knights of Pythias, North and South America, Europe, Asia, and Africa." The order was introduced into Georgia in June, 1886, and a Grand Lodge was instituted in that state by the Supreme Lodge on December 15, 1890. The corporation of October 10, 1889, *was reincorporated December 14, 1903, under the same general law of May 5, 1870, by the name of "Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia." After such reincorporation, on January 15, 1905, the Supreme Lodge issued a new charter to the Grand Lodge of Georgia.

The Supreme Lodge of Knights of Pythias, which, as heretofore stated, was finally incorporated in 1894 by special act of Congress, the Grand Lodge of Georgia, which was subject to its jurisdiction, and the officers of such Grand Lodge, were parties complainant in an amended petition in this litigation commenced in the superior court of Fulton county, Georgia. The defendants were the officers of the Grand Lodge in Georgia of the other body, who had made application to the court in which this suit was commenced to be incorporated as a domestic corporation of Georgia under the name and style of "The Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Georgia." The peti-

tion filed in the cause recited the organization of the order of the plaintiffs substantially as heretofore stated, and the defendants were alleged to be wrongfully attempting to incorporate under a name which infringed that of plaintiffs' order, and to be unlawfully styling themselves Knights of Pythias, and to be fraudulently using the insignia, emblems, etc., of the plaintiffs' order. The averments of the petition and the amended petition as to damage sustained by the alleged unlawful acts of the defendants and their associates were stated in general terms to constitute a wrong and injury to petitioners and to the membership in Georgia, and to be a fraud upon the public. The relief prayed was, in substance, a permanent injunction enjoining the prosecution of the application for incorporation, and the use by the defendants and the members of the subordinate lodges under their jurisdiction of the name "Knights of *Pythias" and of other [251 names, insignia, emblems, etc., which would be like or a colorable imitation of those in use by the plaintiffs' order.

By their answer the defendants put the plaintiffs to proof of the material averments of the petition, set up the origin, growth, and purposes of the order of which they were members, and especially stated that it was confined to the "negro race and the Asiatic races." The incorporation of the order under the general incorporation act of Congress of 1870 was also averred, and the claim was made of lawful right to the use of the names, signs, symbols, emblems, insignia, and the other paraphernalia adopted by the corporation, and the good faith of the corporation and all concerned in the matter was averred. It was further stated that the membership of the order in the United States aggregated 80,747, and in the state of Georgia 11,805, and that there never had been an attempt to confuse the order with that of which the plaintiffs were members, and that no such confusion in fact had ever arisen or could arise, the field of operation of the orders being absolutely different. Laches of the plaintiffs was pleaded in bar of any relief, on the ground that the existence of the order and its operations had been publicly known and was matter of common knowledge for many years.

The case came on for hearing on a motion for preliminary injunction, and after hearing the evidence and argument of counsel the court denied an injunction and quashed a preliminary restraining order. The plaintiffs took the case by a bill of exceptions to the supreme court of Georgia. That court, in disposing of it, referred to the fact that the Supreme Lodge of the order represented

by plaintiffs was a corporation of the District of Columbia, and that by amendment of the petition it had been joined as a plaintiff. It further stated:

That "the defendants have been operating 252] and are *seeking to be incorporated in this state under a name which is claimed to be an infringement of the name of the plaintiff's association, and the question is involved whether and how far the plaintiff, which is a foreign corporation, might be affected by the state's granting a charter to the defendants as a domestic corporation in the name and for the purpose asked, and also whether there is a fraudulent purpose or design to so infringe."

It was next observed that "the presiding judge should have enjoined the defendants from obtaining the charter applied for, so as to preserve the status in respect thereto until, on final jury trial, all of the questions of law and fact can be fully adjudicated." The court held that error had been committed in refusing to grant an injunction as to the charter applied for, and the "ruling of the chancellor denying the injunction in other matters" was allowed "to stand until the final trial or further order of court, leaving open all the other questions for future determination." 128 Ga. 775, 58 S. E. 163. There followed a hearing of the case before the court and a jury, and evidence, both oral and documentary, was introduced. The evidence showed, without contradiction, that in addition to being incorporated as stated in the answer, the defendant order had also organized on May 24, 1905, as a fraternal beneficial association by its corporate name under the insurance laws of the District of Columbia; that the laws enacted by the order were such as were common to a fraternal body; that the rituals of the order and its emblems, flags, badges, pins, and jewelry adornment were on public sale, free to be purchased by anyone; that the membership of the order throughout the United States aggregated 300,000; that there had been collected and disbursed to the members of the order between July 1, 1906, and July 1, 1907, more than \$590,000; that the collections in Georgia during the existence of the order there aggregated \$180,232.21; that there had been 253] paid *to the widows and orphans of deceased members in Georgia \$148,680, and that the collections in Georgia aggregated \$51,000 a year, excluding the expense of burying their dead, which was \$9,000 more. After instructing the jury as to the law deemed to be applicable, and observing that the case was of a character wherein the law provided that questions might be propounded, to be answered by the jury, such answers to stand as their verdict, the 56 L. ed.

court submitted fourteen questions to be answered by the jury. The questions, with the answers given, are copied in the margin.†

†(Questions and Verdict.)

Georgia, Fulton county:

(1) Is the proposed corporate name of the defendants an infringement on the name of the plaintiff's association?

Yes.

(2) If it is such an infringement, would it affect or injure plaintiff in any property right? If so, what?

Yes, in name.

(3) If so, is there any fraudulent purpose or design to (in?) so infringing?

Yes, there is.

(4) Are any of the emblems or insignia of defendants the same as any of those used by plaintiffs, and if so, does such use injure plaintiff in any property right?

Yes.

(5) Has the plaintiff acquiesced in the use by defendants of the name and insignia, etc., and if so, how long?

No.

(6) Is it true that since the organization of the order represented by petitioners and its introduction into the state of Georgia, it has been called the Order of Knights of Pythias, and that its members have been known as Knights of Pythias or Pythian Knights, indifferently?

Yes.

(7) Is it true that "Pythias" is the distinctive word in the name of the order represented by petitioners, which ordinarily distinguishes it from the name and style of other fraternal orders in the state of Georgia and in the United States?

Yes.

(8) Is it true that the name set forth in defendants' petition for incorporation is substantially identical with the name and style of your petitioners, the Grand Lodge Knights of Pythias of Georgia?

Yes.

(9) Is it true that the names set forth in defendants' said petition for incorporation is a colorable imitation of the name and style of your petitioner, the Grand Lodge Knights of Pythias of Georgia?

Yes.

(10) Is it true that the use by defendants and their associates of the name which they are seeking incorporation would work a fraud upon your petitioners and their associates and the public, in that the name under which defendants propose to incorporate is a colorable imitation of the name of petitioners?

Yes.

(11) Is it true that defendants cannot show any organization of any kind until 1880, and until long after the Grand Lodge Knights of Pythias of petitioners was organized in the state of Georgia?

Yes.

(12) Is it true that the use of the word "Pythias" immediately in conjunction with the words "Knights of," in the name under

254] *Subsequently a final decree was entered granting the relief prayed by the complainants. A copy of the decree is excerpted in the margin.‡

255] *Reciting that they were dissatisfied with the verdict of the jury upon the questions submitted, the defendants moved for a new trial upon the ground that the verdict 256] *was contrary to the evidence and without evidence to support it, that it was strongly and decidedly against the weight of evidence, and was contrary to law and the principles of equity. Nearly six months afterwards, by leave of court, defendants amended the motion by adding thirty-six additional grounds, attacking 257] specifically each of the *answers to the questions, charging each to be not only contrary to the evidence, but contrary to the charge of the court, and in addition

error was alleged in the charge as given and to the failure to instruct the jury as pointed out in some of the specifications of error. The omission to specifically instruct the jury that the defendants claimed *a right to their name under a charter from the District of Columbia by virtue of an act of Congress, and the answers of the jury to certain of the questions, were alleged to violate defendants' rights under the charter and to be repugnant to the due faith and credit clause of the Constitution of the United States, and the decree was alleged also to constitute a violation of the general incorporation act under which the order of which defendants were a part had been incorporated. The motion for a new trial was overruled. A bill of exceptions was soon afterwards allowed, which was certified to contain "all the evi-

which defendants and their associates are seeking incorporation, is a colorable imitation of the name of your petitioner, the Grand Lodge Knights of Pythias of Georgia?

Yes.

(13) Is it true that defendants of the "Supreme Lodge of the Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia" are wearing emblems and insignia identical in color, design, and lettering with the emblems and insignia of petitioners, the Grand Lodge Knights of Pythias of Georgia; and is it true that the wearing and use of such insignia and emblems work a fraud upon either petitioner or their associates or the public?

Yes.

(14) Have the defendants used the name "Knights of Pythias" or the letters "K. of P." without any affix or suffix thereto?

Yes.

G. W. Foote, Foreman.

May 27, 1908.

‡ (Final Decree.)

Georgia, Fulton county:

Upon considering the pleadings, evidence, and verdict in the above-stated case, it is thereupon ordered, adjudged, and decreed by the court as follows:

(1) That the defendants, Chas. D. Creswill, Geo. N. Stoney, Geo. R. Hutto, N. B. Williamson, Columbus J. Smith, Fred N. Cohen, Boss W. Warren, Geo. W. Brown, Jas. W. Davis, Edwin J. Turner, Garrett Taylor, and Lucius L. Lee, and each of them, and their associates, confederates, and successors, be and they are hereby perpetually enjoined as in said petition prayed, and especially as follows:

A. That said defendants and their associates, confederates, and successors are hereby perpetually enjoined from prosecuting their petition for incorporation, and from further proceeding to become incorporated in Fulton county, or elsewhere in the state of Georgia, under the name and style of

"The Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Georgia," or using any name or title embracing the word "Pythias" in immediate conjunction with the words "Knights of," or under any name or title in which the word "Pythias" is the distinctive and cardinal word, or under any name which is substantially identical with, or a colorable imitation of, the name of the petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia.

B. That said defendants, their associates and successors, and each of them be, and they are hereby, perpetually enjoined from further using in their voluntary organization said name of the Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Georgia, and in the conduct of its affairs, using any name embracing the word "Pythias" in immediate conjunction with the words "Knights of," or embracing said word "Pythias" as the cardinal distinctive word of the name, or any other name which is substantial identical with or in colorable imitation of the name of petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia. The said defendants, their associates and successors, and each of them, are further perpetually enjoined from instituting subordinate lodges under the name and designation of the Order of Knights of Pythias, and from further authorizing the continued existence of subordinate lodges under the jurisdiction of said voluntary organization of which defendants and their associates are members, using the name and designation of Knights of Pythias, or any name in which the word "Pythias" is the cardinal and distinctive word, or any name which is a colorable imitation of the name of petitioners, the Supreme Lodge Knights of Pythias, and the Grand Lodge Knights of Pythias of Georgia, and of subordinate lodges instituted by said petitioner's authority. And said defendants, their asso-

dence" and the material portions of the record. The case was then taken by a writ of error to the supreme court of the state, where the judgment was affirmed. 133 Ga. 837, 134 Am. St. Rep. 231, 67 S. E. 188, 18 Ann. Cas. 453. This writ of error was then prosecuted.

In the trial court, in various forms, plaintiffs in error, defendants below, invoked the right to the use of its corporate name and the incidental right to the designation "Knights of Pythias" and the use of insignia, emblems, etc., appropriate to the order. As this right or privilege was claimed in virtue of the authority to incorporate conferred by the general incorporation act of May 5, 1870, enacted by Congress, it constituted a right or privilege claimed under an authority exercised under the United States, which, being denied by

the state court, is reviewable here by virtue of the provisions of § 237 of the new Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227] § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575). *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Ferris v. Frohman*, 223 U. S. 424, 431, ante, 492, 495, 32 Sup. Ct. Rep. 263, and cases cited. The fact that corporations created by the general law of 1870 and the special act of Congress of 1894, heretofore referred to, derived their rights and powers under a law of the United States, is recognized in the following cases which were removed from state courts: *Supreme Lodge, K. P. v. Kalinski*, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; *Supreme Lodge, K. P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, and

ciates and successors, and each of them, are further perpetually enjoined from designating and calling themselves, and from authorizing their associates and members of subordinate lodges organized and existing by authority of the voluntary organization of which said defendants are members to designate and call themselves, Knights of Pythias or Pythian Knights, or any other name that is a colorable imitation thereof, and from designating their voluntary organization or its subordinate lodges by the initials K. P. or K. of P., and from using a seal which is a colorable imitation of the seal of the petitioners, the Grand Lodge Knights of Pythias of Georgia, and from using and wearing emblems and insignia, buttons, pins, rings, and watch charms which in color and design are substantially similar to or a colorable imitation of the emblems and insignia, buttons, pins, rings, and watch charms adopted, used, and worn by the members of petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia, and the members of the subordinate lodges organized by authority of said petitioners; and the said defendants, and each of them, their successors and associates, are perpetually enjoined from authorizing or permitting the further use and wearing of such emblems and insignia by members of subordinate lodges instituted by and existing under the authority of said voluntary organization of which the defendants are officers and members.

C. That said defendants and each of them, and their associates and successors, be, and they are, perpetually enjoined from using the words "Knights of Pythias" in immediate conjunction, or the word "Pythias," as the cardinal distinctive word in any name, or as a designation of any insurance, military, or other branch of the voluntary organization of which said defendants and their associates are officers and members; and from using any name, flags, emblems, and insignia that are substantially identical with, or a colorable imitation of, the name,

flags, emblems, or insignia of petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia, in any insurance and military branches of said petitioners, in connection with any society or corporation of which defendants are officers or members.

(2) In order that the voluntary organization of which the defendants are officers and members may have a reasonable time in which to select and adopt some other name and make such changes in the laws as may be necessary in obedience to this decree, and not hereby disorganize said organization which defendants are members of, or stop its said association from the prosecution of the word in which it is engaged:

It is hereby adjudged and decreed: That the injunction decreed in subsections B and C, paragraph 1 hereof, shall be in abeyance, and no penalty shall be visited upon the defendants, their associates and successors, for disobedience thereof until the 1st day of June, 1909. And that on or after said 1st day of June, 1909, this suspension of said injunction shall cease and determine, and said injunction shall be of full and final force and effect perpetually after said date, and the defendants and each of them, their associates and successors, are and shall be subject to all the pains and penalties provided for any disobedience of said injunction.

(3) That this decree shall have the force and effect of the state's writ of injunction, without issuance of such writ; provided, however, that the writ of injunction, according to the terms of this decree, shall issue out of this court, and be further served upon the defendants and their associates and successors, at any time, on motion of petitioners.

(4) That the petitioners have and recover of the defendants all of the costs in this behalf incurred, to wit: ——— dollars, to be taxed by the clerk of this court.

In open court this 10th of June, 1908.

J. T. Pendleton,

Judge C. S. A. C

Supreme Lodge, K. P. v. Beck, 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. Rep. 532.

259] *Whether or not the defendants below and their successors were entitled to prosecute in the state court the application to be made a domestic corporation of Georgia is, in our opinion, plainly a question non-Federal in character, and we therefore pass its consideration. The question, however, whether the right or privilege arising from the authority exercised under legislation of Congress was invaded by the decree complained of, so far as it forbade the use of the corporate name or a designation containing the distinctive words "Knights of Pythias" and the use of the emblems and insignia of such order, being within our competency to review, we come to the consideration of the question whether the asserted right or privilege was properly denied.

It is manifest from the record that the existence within the state of Georgia of two bodies of Knights of Pythias, controlled by corporations of the District of Columbia, and the authority exerted over the membership in that state by the governing body of each order, was not contrary to any state statute, and the supreme court of Georgia, in determining the right to relief, applied what it conceived to be the applicable principles of general law. Speaking in a general sense, it is true to say that the supreme court of Georgia deemed the case before it to be controlled by the principles of law applicable to trademarks and tradenames, and in substance held: (a) That an association whose primary object was fraternal or benevolent, first appropriating and using an arbitrary or fanciful name, acquires an exclusive right to the same; (b) that a subsequent unauthorized use by others of such name or a colorable imitation thereof would be unlawful; (c) that in the absence of laches, if, as a result of such wrongful use, injury was occasioned to the rightful owner by the unlawful appropriation and use of the name, equity would afford relief. Coming to apply these principles the court held, first, that there had been a lawful appropriation 260] of the name by the plaintiff corporation, and an unauthorized and wrongful use thereof by the defendants; indeed, that such use was made "with a fraudulent purpose and design;" second, that the unlawful appropriation had inflicted injury upon the property rights of the lawful appropriator. On this subject, the court said:

"The plaintiffs' order, while primarily fraternal and benevolent, has certain property and business attributes and activities, including the acquiring and ownership of large amounts of property, and the conduct-

ing of a department of insurance protection. Under the evidence, the element of injury is sufficiently shown."

The conclusion of the court that there had been, as a matter of fact, no such laches as should prevent a court of equity from affording relief, was thus stated:

"Taking into consideration that the subject of controversy in this case is in the nature of a tradename, and that the contest is between two secret societies whose relations to each other during the period from the appropriation of the name by one to the institution of the suit for injunction by the other was not the usual relation that one person ordinarily sustains to another, we cannot say that the finding of the jury that the plaintiffs had not acquiesced in the use of their name by defendants is not supported by the evidence. The suit was filed promptly after the defendants came out into the open, and by petition, duly published, asked the court to give legal sanction to their use of the plaintiff's name."

We do not stop to consider whether a court was right under principles of general law in applying to organizations like those here involved the rules applicable to trademarks and tradenames and unfair competition in trade, a subject as to which there is conflict in the decisions, because, under the view we take of the case, we propose, for the sake of argument only, to indulge in the hypothesis *that the conception which [261] the court entertained on the subject was correct. It is indisputable that the court was clearly right, as a matter of law, in holding that a court of equity in any event would not afford relief where there had been such laches as would cause it to be inequitable to do so. *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 35, 45 L. ed. 60, 74, 21 Sup. Ct. Rep. 7. The question, then, is, Can the decree of the court be maintained consistently with the doctrine of laches which the court expounded and which we have accepted as correct beyond all controversy? As the injury which we thus state rests upon the premises that all the propositions of law applied by the court are to be taken as correct, it follows that there is no possibility of deciding there was material error unless it is to be found in the application which the court made of the principle of law which it applied to the facts established by the evidence, all of which is in the record in connection with the findings made by the jury. While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence

whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* 223 U. S. 573, 591, ante, 556, 565, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 668, ante, 594, 604, 32 Sup. Ct. Rep. 389; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, ante, 863, 32 Sup. Ct. Rep. 535. The contentions here made bring this case under the first category, since the insistence here is that there was not any evidence [262]*justifying the findings made by the court concerning fraudulent purpose, injury to property, deception of the public, etc.

On examining the evidence we are compelled to say we do not think it has any tendency to prove an intent on the part of the defendant order by the adoption of the designation given to their body or the use of the emblems, insignia, etc., employed, to make it appear that their order and that of the complainant is one and the same, or that it tends to show that the use of the corporate name or the distinctive words "Knights of Pythias" and the emblems, etc., of that order, operated in any degree to deceive the public or to work pecuniary damage to the complainant order within or without the state of Georgia. But strong as are our convictions as to these subjects, we prefer not to rest our conclusion upon them, but rather to place the decree of reversal which we shall render, upon the application to the facts of the well-settled doctrine on the subject of laches. As we have observed, the court below, in considering the facts on that subject, made no reference to the evidence, but assumed that it must be that the findings of the jury were sustained by evidence, and indulged in the assumption that it was natural to suppose that the long-continued existence and development of the defendant order had not been interfered with by the complainant corporation because not known until the defendants came into the open by making an application to be made a domestic corporation of Georgia. The facts, however, which we have stated concerning the establishment of the order, its lodgment in Georgia, its vast expansion, its years of duration, and its volume of transactions, were not dis-

puted in any particular whatever, and therefore leave no room for any other but the legal conclusion of laches. This, we think, in the most conclusive way demonstrates the violation of the elementary principles of equity which would result from the enforcement of the injunction *which the [263] court awarded. And the conclusion just stated renders it unnecessary to point out the incompatibility between the holding, on the one hand, that there was injury to the property rights of the plaintiff corporation, and a deceit of the public arising from the existence of the defendant order and its activities, and the holding, on the other hand, that laches cannot be imputed to the plaintiff corporation as a result of its inaction during the many years in which the defendant corporation existed and exercised its attributes and functions, because the wrongs thus being publicly inflicted could not be presumed to have been known until the defendant order came out into the open by the application for incorporation under the law of the state of Georgia.

The judgment of the Supreme Court of Georgia is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes:

When a Federal right is held by a state court to have been lost by subsequent conduct that of itself involves no Federal question, I think we are not at liberty to re-examine the decision unless we can say that the state court in substance is denying the right. So it has been held or strongly intimated as to *res judicata* (*Northern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724); estoppel (*Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677); the statute of limitations (*Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733); and laches (*Moran v. Horsky*, 178 U. S. 205, 214, 215, 44 L. ed. 1038, 1041, 1042, 20 Sup. Ct. Rep. 856; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64); and the principle was recognized only the other day in *Gaar, S. & Co. v. Shannon*, 223 U. S. 468, 470, 471, ante, 510, 512, 32 Sup. Ct. Rep. 236. I do not see the distinction by which we can review the decision in the opposite case, where it is held that the right is not lost or cannot be interfered with because of laches on the other side. In a case where the state court held that there *was no defense under the [264] statute of limitations or estoppel, the writ of error was dismissed. *Carothers v. Mayer*, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106. I will content myself with

saying that I do not see how the decision can be reversed on the ground of laches.

Mr. Justice **Lurton** concurs in this view and is of opinion that the writ should be dismissed.

NORFOLK & SUBURBAN TURNPIKE COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 264-271.)

Error to state court — parties — state as defendant in error.

1. The state is properly made the defendant in error in a writ of error sued out to review the judgment of a state court sus-

pending the collection of tolls by a turnpike company until the roads were put in proper repair, although the state was not named as a party to the proceedings leading up to such judgment, where such proceedings were in reality begun and prosecuted on behalf of the state.

[For other cases, see Appeal and Error, 2477-2484, in Digest Sup. Ct. 1908.]

Error to state court — to what court directed — dismissal.

2. Hereafter, a writ of error to review an alleged judgment or decree of a court of last resort of the state, declining to allow a writ of error to, or an appeal from, a lower state court, will be dismissed unless it plainly appears on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an ap-

NOTE.—On parties to appellate proceedings in the Federal Supreme Court—see note to *Amadco v. Northern Assur. Co.* 50 L. ed. U. S. 723.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On legislative regulation of tolls, rates, and prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L.R.A. 177.

When judgment sought to be reviewed in Federal Supreme Court is that of highest state court.

A writ of error from the Supreme Court of the United States to review a judgment of a state court cannot be maintained where that court is not the highest court of the state in which a decision in the suit could be had. *Mullen v. Western Union Beef Co.* 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404; *Fisher v. Perkins* (Fisher v. Carrico) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227.

And error does not lie from the Supreme Court of the United States to review a final judgment of an inferior state court, though rendered as a necessary result of a decision by the highest court of the state, which had reversed a prior judgment of the inferior court, overruling a demurrer, and remanded the case for further proceedings according to law, as such judgment is that of the inferior court, and is reviewable in the higher state courts. *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

And this is no less true because if an

appeal had been taken from the final judgment of the inferior court to the highest court of the state, that court, according to its uniform course of decision, would have affirmed the judgment upon the non-Federal ground that its decision upon the first appeal was conclusive. *Great Western Teleg. Co. v. Burnham*, supra.

And see note to *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001, as to what judgments of state courts are final for the purpose of a writ of error from the Federal Supreme Court.

A writ of error lies from the Supreme Court of the United States to an inferior state court where that is, by reason of the amount involved, the highest court of the state to which the suit can be carried. *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

The judgment of an inferior state court is that of the highest state court in which a decision in the suit could be had where the highest state court has dismissed a writ of error or appeal for want of jurisdiction. *Lane v. Wallace*, 131 U. S. C. C. XIX., Appx., and 26 L. ed. 703; *Callan v. Bransford*, 139 U. S. 197, 35 L. ed. 144, 11 Sup. Ct. Rep. 519.

Or where leave to take the case to a higher court has been applied for and denied. *Miller v. Joseph*, 17 Wall. 655, 21 L. ed. 741; *Gregory v. McVeigh*, 23 Wall. 294, 23 L. ed. 156; *Clark v. Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215; *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399.

An inferior state court is the final court of the state where the Federal question involved can be decided, and therefore is the court to which a writ of error from

peal or writ of error was the exercise by it of jurisdiction to review the case upon the merits.

[For other cases, see Appeal and Error, 1147-1167, 2616-2634, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — property rights — collection of tolls.

3. Suspending the collection of tolls by a turnpike company, conformably to a state statute, until the roads shall be put in proper repair, does not take property without due process of law, contrary to U. S. Const., 14th Amend., because the travel does not yield a sufficient revenue to keep the roads in good order.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 962.]

the Supreme Court of the United States must be directed, where the highest state court, although discussing the Federal question in its opinion, and declaring it to be without merit, dismissed a writ of error to the inferior court solely and expressly for want of jurisdiction. *Western U. Teleg. Co. v. Hughes*, 203 U. S. 505, 51 L. ed. 294, 27 Sup. Ct. Rep. 162.

A judgment of the superior court of the city of New York, affirming a decision at a special term of the court of common pleas for the city and county of New York, is a judgment of the highest court of a state in which a decision can be had, within the meaning of § 25 of the judiciary act of 1789, where the court of appeals has dismissed an appeal therefrom for want of jurisdiction, although the case might have been carried up to that court had an appeal been taken from the special term to the general term of the court of common pleas. *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660.

And see note to *Kentucky v. Powers*, 50 L. ed. U. S. 633, as to when a writ of error may run to an inferior state court.

But the refusal by the highest court of Virginia to entertain an appeal from a final decree of an inferior state court has been held to be so far the equivalent of a judgment of affirmance as to amount to a final judgment which may be reviewed by writ of error from the Supreme Court of the United States to the highest state court. *Richmond, F & P. R. Co. v. Louisa R. Co.* 13 How. 71, 14 L. ed. 55. And it has been held immaterial that such refusal was in the form of a ruling on an application for a writ of supersedeas, which was denied on the ground that the judgment of the lower court was plainly right. *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 135. The court said: Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court over which it, by law, can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will, upon a proper proceeding, at-
56 L. ed.

Submitted April 8, 1912. Decided June 10, 1912.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment refusing a writ of error to review an order of the Circuit Court of Princess Anne County, in that state, suspending the taking of tolls by a turnpike company until the roads shall be put in proper repair. Affirmed.

The facts are stated in the opinion.

Mr. Nathaniel T. Green submitted the cause for plaintiff in error:

While financial inability is no defense to a quo warranto proceeding on account of nonuser of franchise, it is a defense to other proceedings short of that.

tach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or supersedeas, or by dismissing a writ previously allowed.

Where an appeal to a higher state court could be allowed, an application for such an allowance must have been asked for and refused, or the Supreme Court of the United States cannot take jurisdiction. *Fisher v. Perkins* (*Fisher v. Carrico*) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227; *Mullen v. Western Union Beef Co.* 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404.

Where, in accordance with the state practice, after verdict and before judgment in the inferior state court, certain exceptions were sent up to the highest state court for its opinion, and a rescript was sent down, overruling them, whereupon final judgment was entered by the lower court upon the verdict, that court was the highest court of the state in which a decision of the suit could be had. *McGuire v. Massachusetts*, 3 Wall. 382, 18 L. ed. 164.

A judgment of conviction in the superior court of Massachusetts, under which the convict is by law imprisoned and punished before a hearing can be had in the highest state court on his exceptions, was deemed in *Bryan v. Bates*, 12 Allen, 201, wherein was discussed the operation of a writ of error from the Supreme Court of the United States as a supersedeas, so far to dispose of the case that it must be considered a final judgment of the highest court in which a decision can be had, within the meaning of § 25 of the judiciary act of 1789.

An order of a judge of a state court at chambers, remanding a prisoner in a habeas corpus proceeding, cannot be regarded as a decision of a highest state "court," within U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. *McKnight v. James*, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248. The court said: "If it be due that, under the laws of Ohio, the final order of a circuit judge at chambers be the

Benton Harbor v. St. Joseph & B. H. Street R. Co. 102 Mich. 386, 26 L.R.A. 245, 47 Am. St. Rep. 553, 60 N. W. 758.

Mr. Samuel W. Williams, Attorney General of Virginia, argued the cause, and, with Mr. J. D. Hank, filed a brief for defendant in error:

The Federal question raised in this case is manifestly devoid of merit.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 597, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; Washington & C. Turnp. Co. v. Maryland, 3 Wall. 210, 214, 18 L. ed. 180, 182; Suydam v. Smith, 52 N. Y. 383; People ex rel. Penn Yan & B. Pl. Road Co. v. Martin, 56 How. Pr. 516; State, Mead, Prosecutor, v. Trenton & A. Turnp. Co. 34 N. J. L. 182; Moorestown & C. Turnp. Co. v. Holman, 63 N. J. L. 519, 43 Atl. 445; Tinton Falls Turnp. Co. v. Hance, 64 N. J. L. 480, 45 Atl. 772; Shiloh Turnp. Co. v. Bates, 80 N. J. L. 171, 76 Atl. 448; Simons v. Bustleton & S. Turnp. Co. 10 Phila. 101; King v. Lebanon & B. Turnp. Co. 17 Ky. L. Rep. 126, 30 S. W. 619; People v. Grand Rapids & W. Pl. Road Co. 67 Mich. 5, 34 N. W. 250; Williamsport & H. Turnp. Co. v. Startzman, 86 Md. 363, 38 Atl. 777; Davis v. Vernon Shell Road Co. 103 Ga. 491, 29 S. E. 475; Allen v. Smith, — Tenn. —, 47 S. W. 206; Back River Neck Turnp. Co. v. Homberg, 96 Md. 430, 54 Atl. 82; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Dent v. West Virginia, 129 U. S. 114, 123, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231;

judgment or decree of a circuit court, then it is undoubtedly reviewable by the supreme court of Ohio, which is the highest tribunal of Ohio, and is expressly given jurisdiction by statute to review the judgments and orders of the circuit court. But if this order be not a judgment or decree of a court, then it is not reviewable here, because this court, under § 709, is given authority to review only the judgment and decree of the highest court of the state. In other words, the order cannot be the order of a judge to defeat the jurisdiction in error of the supreme court of Ohio, and at the same time an order of a court to confer jurisdiction upon this court to issue a writ of error."

Nor does a so-called court order made by one of the judges of an inferior state court upon a return to a writ of habeas corpus granted by such judge and returnable before him, which recites, "Writ dismissed; prisoner remanded," constitute a final judgment or decree in a suit in the

Williams v. Newman, 93 Va. 724, 26 S. E. 19.

Mr. Chief Justice White delivered the opinion of the court:

On April 24, 1911, as authorized by the laws of Virginia, the judge of the circuit court of Princess Anne county, Virginia, of his own motion, appointed three persons, styled viewers, to examine and report upon the condition of three turnpikes, situated in the county and owned by the plaintiff in error. The viewers reported the turnpikes to be in bad condition, and made recommendations as to the work necessary to be done to put them in good order. The turnpike company appealed from the report of the viewers to the circuit court. On the hearing of the appeal various motions were made on behalf of the turnpike company, to the overruling of which exception was taken, and which will be hereafter referred to, and an order was entered as authorized by a statute, suspending the taking of tolls on the turnpikes until they were put in proper repair. The effect of the order, however, was suspended by the making of an application of the supreme court of appeals of Virginia for the allowance of an appeal and a writ of error to the order of the circuit court. The application, however, was rejected by an order reading as follows:

"In the supreme court of appeals, held at the Library Building in the city of Richmond, on Thursday, the 11th day of January, 1912.

"The petition of the Norfolk & Suburban Turnpike Company, a corporation, for a writ of error and supersedeas to a judgment or order entered by the circuit court of Princess Anne county, on the 12th day

highest court of a state in which a decision can be had, which may be reviewed on writ of error from the Supreme Court of the United States to a state court. Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284. Nor is an adjudication of insolvency in proceedings before one of the judges of an inferior state court such a judgment as is provided for in U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. Ibid.

See also cases cited in note to Schlosser v. Hemphill, 49 L. ed. U. S. 1001, respecting the essential finality of determination.

The superior court of Rhode Island was none the less the "highest court" for the purpose of review by the Supreme Court of the United States on writ of error under the judiciary act of 1789, § 25, because the legislature was by statute invested with power to re-examine the proceedings, and, if it thought proper, to order a new trial. Olney v. Arnold, 3 Dall. 308, 1 L. ed. 614.

of December, 1911, in certain proceedings, pending in said court, whereby the collection of tolls by the said petitioner on certain sections of a turnpike located in said county was suspended, having been maturely considered and the transcript of the record of the judgment or order aforesaid seen and inspected, the court being of opinion that the said judgment or order is plainly right, doth reject said petition."

A writ of error addressed to the supreme court of appeals of Virginia was then allowed by the president of that court. It was therein recited that the supreme court of appeals of Virginia had "refused a writ of error, thereby affirming said judgment of said circuit court of Princess Anne county, Virginia." The same judicial officer also approved the bond and signed the citation. The commonwealth of Virginia, however, was named as the obligee in the bond, and the citation was directed to that state as the "defendant in error." The attorney general of the state, who states in his brief that he inadvertently signed as "commonwealth's attorney of Princess Anne county," acknowledged service of the citation and entered the appearance of the commonwealth in this court 267] "without admitting *that the commonwealth of Virginia is a proper party, and reserving all rights."

Appearing for the defendant in error, the attorney general of Virginia moves to dismiss the writ of error, "because this court has no jurisdiction," or to affirm the order and judgment below "because the questions on which jurisdiction depend are so frivolous as not to need further argument."

The motion to dismiss is based upon the contention that the appearance in this court is a qualified one, and "that the appeal was improvidently awarded in this case, that the commonwealth of Virginia has nowhere in the proceedings been made a party, and is not now a proper party in this case." But although the commonwealth of Virginia was not named as a party to the proceedings initiated by the judge of the circuit court, it is not claimed that those proceedings were not in reality begun and prosecuted on behalf of the commonwealth, which in effect must have been the conclusion of the president of the supreme court of appeals of Virginia when he approved the bond and allowed the citation, as shown by the recitals in those papers to which we have heretofore referred. The grounds of the motion are therefore without merit. *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436.

But aside from the propositions on which the motion to dismiss rests and 56 L. ed.

which we have disposed of, there is an additional ground to which, on our own motion, we deem it necessary to refer; that is, the existence of a possible doubt as to our jurisdiction, begotten by the form in which the court expressed the action taken by it concerning the proceedings to review the order or judgment of the trial court. Thus, although the supreme court of appeals of Virginia denied a writ of error to the circuit court because it was of the opinion that the order of the lower court was "plainly right," it does not affirmatively appear whether, by this action, the court was merely declining *to[268 take jurisdiction of the case, or in effect was asserting jurisdiction and disposing of the case upon the merits by giving the sanction of an affirmance of the judgment of the trial court. This writ of error runs to the supreme court of appeals, and not to the trial court. In view of the ambiguity, it is unquestioned that the writ of error would have to be dismissed if we applied the ruling of the *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 366, 55 L. ed. 498, 499, 31 Sup. Ct. Rep. 399. It will be seen, however, that the court below, in acting upon the application presented to it to review the judgment of the trial court, conformed to what was held to be an exercise of jurisdiction by affirmance in *Gregory v. McVeigh*, 23 Wall. 294, 23 L. ed. 156. It is clear, therefore, that we cannot apply the rule announced in the *Crovo* Case and the one previously declared in the *Gregory* Case, because the two could not be consistently made here applicable. The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court, and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several states on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court, susceptible of being reviewed here, and the confusion which arose ultimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from

departing from the face of the record and **269]**deducing the principle of finality *by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule, as applied to a question like the one before us, is, we think, apparent by the statement which we have made concerning the rule in the Crovo Case and the previous decisions. Despite the ambiguity involved in the form in which the court below expressed its action, we do not think that ambiguity should be solved against the existence of jurisdiction, because, in our opinion, there is little or no room for doubt that when the form of expression used by the court below is read in the light of the previous rulings it becomes quite clear that the court deemed that it was exercising jurisdiction over the cause and virtually affirming the judgment, and was expressing its action in such a way as to clearly indicate that such was its intention. This is fortified by the fact that the writ of error was allowed by the presiding judge of the court. While, therefore, in this case, for the reasons stated, we entertain jurisdiction, and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur, and for the guidance of suitors in the future, we now state that from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action.

270] *Upon the merits, we are of opinion that the alleged Federal questions are so plainly wanting in merit as not to justify the retention of the cause for oral argument. The supposed Federal questions are embodied in three motions made in the circuit court. By motion No. 1 the circuit court was asked to dismiss the proceedings because, as the statute, in the event the report of the viewers was confirmed, authorized the public, until the turnpikes were put in repair, to use the same for the

purpose of travel and passage without payment of toll or other compensation, a taking of the property of the plaintiff in error for public use without just compensation was authorized, in violation of the due process clause of the 14th Amendment. Motion No. 2 embodied a request that the court should not enter judgment affirming the report of the views, because, for the same reasons specified in the first motion, the judgment would operate to deprive the plaintiff in error of its property without due process of law, in violation of the 14th Amendment. By motion No. 3 it was in effect claimed that the turnpikes in question were not profitable, that plaintiff went into possession of the roads in July, 1908, and had operated the same continuously; that no complaint had theretofore been made as to the condition of the roads; that the statute under which the proceeding was prosecuted fixed the tolls to be charged, and that substantially all the revenue derived from the tolls had been judiciously employed in keeping the roads in repair, and that they had been kept "in as good repair as possible with the revenue received therefrom." It was alleged that to enter a judgment suspending the collection of tolls under such circumstances would violate the due process clause of the 14th Amendment. The refusal of the court to hear evidence to substantiate the claim made in this motion and the overruling of the motion were duly excepted to. It nowhere appears in the record that there was even a suggestion that the *stat-[**271** ute in question invaded contract rights as to the tolls to be charged, nor was it claimed that since the acquisition by plaintiff in error of his rights therein the legislature of Virginia, in regulating the turnpikes, had altered the tolls. On the contrary, in the brief of counsel for the commonwealth the statement is made that "this statute has been a law of Virginia, with little change, since February 7, 1817," and there has been no denial of this statement. The motions below did not, therefore, amount to a claim against the rates *per se*, but simply asserted that as the travel on the turnpikes was not sufficient to cause their operation to be profitable, that is to say, to produce a sufficient revenue to enable the roads to be kept in good order, therefore the obligation imposed by the statute and voluntarily assumed ought not to be enforced. The mere statement of this proposition is sufficient to establish its entire want of merit. To suspend the taking of tolls while the roads were out of repair manifestly was not a taking of property, but was simply a method provided by statute to enforce the discharge

of the public duty respecting the safe and convenient maintenance of a public highway. In other words, as observed by the attorney general for the commonwealth, the burden of keeping the turnpikes in repair was made a condition precedent to the right to collect tolls.

Affirmed.

**272]*RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI et al., Appts.,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.**

(See S. C. Reporter's ed. 272-281.)

Appeal — from circuit court — jurisdiction below — certificate.

1. The lack of a certificate of jurisdiction is not fatal to an appeal to the Federal Supreme Court from a decree of a circuit court which necessarily decided constitutional questions expressly raised in the bill.

[For other cases, see Appeal and Error, 919-937, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — scope of review — jurisdiction below.

2. The issue of the jurisdiction of a Federal circuit court, whether certified or not, is open on an appeal to the Federal Supreme Court from a decree which necessarily decided constitutional questions raised in the bill.

[For other cases, see Appeal and Error, 4229-4237, in Digest Sup. Ct. Rep. 1908.]

Pleading — averments as to corporate citizenship — sufficiency.

3. The direct averments in the bill as to the foreign citizenship of the corporate complainant will not be held insufficient for jurisdictional purposes because of subsequent allegations from which doubt or inconsistency may argumentatively be inferred, where such statements, construed in connection with the context, have reference to the alleged impairment of the obligation of a contract, and were not addressed to the subject of citizenship, and where to hold otherwise would do violence to the very object of the bill, which was to prevent the state from enforcing, as against the corporation, a forfeiture and penalties admittedly inapplicable if it was a domestic corporation.

[For other cases, see Pleading, 407-415, in Digest Sup. Ct. 1908.]

[No. 903.]

Submitted May 13, 1912. Decided June 7, 1912.

APPPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a decree enjoining the enforcement of an anti-removal statute. Affirmed.

The facts are stated in the opinion.

Mr. Claude Clayton, Assistant Attorney General of Mississippi, and Messrs. Hannis Taylor and William D. Anderson submitted the cause for appellants:

The corporation in question is a domestic corporation of the state of Mississippi.

Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

The question of jurisdiction was certified by the terms of the final decree.

Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

As the bill has failed to aver in clear and positive terms the citizenship of the corporation, which is the real complainant, it must suffer the fate which the rules of Federal procedure prescribe in such cases.

1 Rose, Code Fed. Proc. p. 33; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; Continental L. Ins. Co. v. Rhoads, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193; Pennsylvania v. Quicksilver Min. Co. 10 Wall. 553, 19 L. ed. 998.

If a corporation comes into court alleging its incorporation in both states, it cannot maintain suit against a citizen or corporation of either state, since such a pleading is deemed to show a joinder of two plaintiffs who are citizens of two different states.

1 Rose, Code Fed. Proc. p. 26; Ohio & M. R. Co. v. Wheeler, 1 Black, 297, 17 L. ed. 133; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817.

A consolidation of two corporations works a dissolution of the original concerns and creates a new corporation, unless the legislature otherwise intends.

1 Rose, Code Fed. Proc. p. 26; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; Paducah v. East Tennessee Teleph. Co. 106 C. C. A. 333; and B. Altman & Co. v. United States, ante, 894.

On citizenship of foreign corporation for purposes of Federal jurisdiction—see notes 56 L. ed.

to Hope Ins. Co. v. Boardman, 3 L. ed. U. S. 36, and National S. S. Co. v. Tugman, 27 L. ed. U. S. 87.

As to averments of citizenship to show jurisdiction in Federal courts—see notes to Shipp v. Williams, 10 C. C. A. 261; and Mason v. Dullaghan, 27 C. C. A. 303.

Messrs. **Henry L. Stone, Gregory L. Smith, and Marcellus Green** submitted the cause for appellee. Mr. Garner Wynn Green was on the brief:

The appeal in this case should be dismissed because the jurisdiction of the circuit court is the sole question raised, and such question has not been certified by the circuit court to this court.

Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Colvin v. Jacksonville*, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634.

Jurisdiction of the circuit court did not depend exclusively upon diversity of citizenship.

Ex parte Young, 209 U. S. 143, 52 L. ed. 722, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *Minnesota v. Northern Securities Co.* 194 U. S. 65, 48 L. ed. 878, 24 Sup. Ct. Rep. 598.

Under the allegations of the bill of complaint, the Louisville & Nashville Railroad Company is not a Mississippi corporation.

Southern R. Co. v. Allison, 190 U. S. 337, 47 L. ed. 1083, 23 Sup. Ct. Rep. 713; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 295, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 561, 43 L. ed. 1085, 19 Sup. Ct. Rep. 817.

Mr. Chief Justice **White** delivered the opinion of the court:

This case is before us on a motion to dismiss or affirm. The confused state of the record requires, in order to make clear the considerations which control us in disposing of the motion, a fuller statement than otherwise would be necessary.

On August 5, 1908, a suit in equity was commenced in the chancery court of Hancock county, Mississippi, against the Louisville & Nashville Railroad Company, to compel obedience to an order of the State Railroad Commission of Mississippi, requiring the stoppage of certain interstate trains at a particular place. Upon the ground of diversity of citizenship, the railroad company removed the cause into the appropriate circuit court of the United States. Thereupon proceedings were commenced in the chancery court of Harrison county, Mississippi, against the railroad company, to enforce an act of the legislature of Mississippi, approved March 20, 1908, known as the anti-removal statute, by perpetually enjoining the company from engaging in intrastate commerce within the state of Mississippi, and by subjecting it

to large pecuniary penalties. It was specifically averred in the bill that the railroad company was a corporation organized and existing under the laws of the state of Kentucky, and that it had never been incorporated under the laws of Mississippi.

This case was then commenced on behalf of the railroad company in the court below against the railroad commission and various officials of the state of Mississippi to enjoin the commencement of any other proceeding than that pending in Harrison county, having for its object the enforcement of the forfeiture and penalty provisions of the act of 1908, which act was assailed as repugnant to the commerce clause, the contract clause, and to specified provisions of the 14th Amendment. The chancery court of Harrison county was also averred to be without jurisdiction of the suit pending before it. The complainant railroad company was alleged to be a corporation created and organized under the laws of Kentucky and a citizen of said state, having its principal place of business at Louisville, Kentucky. The defendants were alleged to be citizens of the state of Mississippi. It was further alleged that the complainant, as a corporation, as aforesaid, owned and operated as a common carrier a railroad between Cincinnati and New Orleans, passing through various counties in the state of Mississippi, and that it had been for more than twenty-five years engaged in the operation of a portion of its road so situated in Mississippi. Evidently for the purpose of laying the basis for a claim of contract right the facts concerning the construction of the road operated by the complainant in the state of Mississippi were stated in substance as follows: In 1866 the legislature, of Alabama incorporated what was known as the New Orleans, Mobile, & Chattanooga Railroad Company, and authorized it to build a railroad from Mobile to New Orleans; an act of the legislature of Mississippi, passed in 1867, which was attached as an exhibit to the bill, authorized and empowered the Alabama corporation "to exercise and enjoy its corporate power and franchise in the state of Mississippi." An act of the legislature of Louisiana authorized the same corporation to construct its road from the Mississippi state line to New Orleans; and an act of Congress approved in March, 1868, empowered the corporation in the construction of its road to build bridges over navigable waters in the state of Mississippi. There were also averments of the placing by the Alabama corporation of a mortgage upon its property and the subsequent construction of the road from Mobile to New Orleans;

a change of the name of the railroad by the legislature of Alabama to the name of the New Orleans, Mobile, & Texas Railroad; default in the payment of bonds; a foreclosure sale; the incorporation of the purchasers by the name of the New Orleans, Mobile, & Texas Railroad Company, as reorganized. It was then specifically alleged that said company "thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind 275]and *description except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and intrastate freight and passengers as aforesaid."

Proceedings contained in the transcript, to which we shall hereafter have occasion to refer, as well as the index to the transcript as filed, contained in the printed transcript, establish that a demurrer was filed to the bill of complaint, which is not in the printed record, and we do not therefore refer to the same. Nearly three years after the filing of the bill what was styled "partial demurrer to original bill" was filed in the cause. This demurrer charged, first, that the court was without jurisdiction, because on the face of the bill it was shown "that the complainant, the Louisville & Nashville Railroad Company, is a Mississippi corporation, and that the defendants are also citizens of Mississippi, and that therefore there is no diversity of citizenship between the parties to give the court jurisdiction of the cause." This claim was solely attempted to be supported by argumentative statements in the demurrer as to the effect of the averments in the bill concerning the history of the portion of the road in Mississippi, its construction by an Alabama corporation, the legal effect of the Mississippi act of 1867, authorizing the Alabama corporation to build a road in Mississippi, and the supposed operation of an act of the legislature of Mississippi of 1882 upon the purchase of the road built in that state, following the foreclosure, which, it was averred, took place in 1883, after the passage of the act of 1882, instead of in October, 1881, as averred in the bill. As an additional and independent ground of demurrer, it was claimed that the suit should be dismissed because "at the time the suit in the case of State v. Louisville & N. R. Co. was filed in the chancery court of Hancock county, Mississippi, there was no Federal question on the face of the bill which authorized its removal under 276]*the Constitution and laws of the United States, and said suit is made an

exhibit to this demurrer for the purpose of considering the same."

On the day the "partial demurrer" was filed an answer was filed, which was divided into numbered paragraphs corresponding to the numbered paragraphs of the bill. The citizenship of the plaintiff was neither admitted nor denied, and we think it suffices from the view we take of the case to say that the answer, in one mode or another, dealt mainly with the averments of the bill respecting the history of the organization of the New Orleans, Mobile, & Chattanooga Railroad Company, the construction of the road in Mississippi, the sale under foreclosure, the purchase, etc. A few days afterwards a general replication was filed, and on the same day a stipulation was entered into between counsel in the first paragraph of which it was provided as follows:

"That this cause may be submitted and heard at the May term, 1911, of said court at Jackson, and that the time for taking proof under the rules is waived, and that said cause may be heard on the original bill, partial demurrer, and partial demurrer and replication by the court, and that setting the cause for hearing under this agreement shall not operate to admit the allegations of the answer."

The foregoing was followed, in the next paragraph of the stipulation, by a provision for a hearing of the cause "upon the bill and answer and replication upon the testimony theretofore taken by affidavits . . . and any other evidence that may be offered orally by either side on the hearing," and various specified printed charters and statutes which were enumerated and which concerned facts alleged in the bill and answer were stipulated to be admitted in evidence.

While it is certain that on or before October 24, 1911, the court entered a final decree in favor of the complainant, perpetually enjoining the enforcement of the Mississippi *statute complained of, the[277 exact form of that decree is not disclosed, for although there is a paper in the record which in one aspect apparently states the terms of the decree, in another aspect it is uncertain whether the paper referred to is anything but a motion made by the defendants for the modification of the decree. Be this as it may, the record leaves no doubt that on October 28, on the motion of the defendants, a new and changed form of final decree was entered, which was deemed to conform to the stipulation for submission. In this new decree it was first recited that the case had been submitted to and considered by the court primarily upon the partial demurrer, and that, on

such demurrer being overruled, the defendant had elected to stand thereon, and had not excepted to the final decree on the merits. There was a recital in the concluding paragraph of the decree that a direct appeal to this court was allowed, notwithstanding the objection of the complainant.

In the printed transcript there is a paper styled "Specifications of Error," which is undated and uncertified, but which we will assume was filed at the time the appeal was allowed. This paper is confined to a reiteration of the contentions as to want of jurisdiction of the court below as stated in the partial demurrer, adding the following:

"And because the bill shows on its face that the Federal court is without jurisdiction, and could not hear and determine the issues raised by the said bill of complaint because the Louisville & Nashville Railroad is a Mississippi corporation, and the act of 1908, which prevents the removal of causes of foreign corporations to the Federal court, had no reference and application to the said Louisville & Nashville Railroad Company, which is a domestic corporation; and because the act of 1908, referred to in said bill of complaint, enacted by the Mississippi legislature, is unconstitutional and void, and in contravention of the Federal Constitution." 278] *The appellee moves to dismiss or affirm, and in the brief of counsel the ground for the motion to dismiss is thus stated:

"The appeal in this case should be dismissed because the jurisdiction of the circuit court is the sole question raised, and such question has not been certified by the circuit court to this court."

The appellants, while concurring that jurisdiction is the sole question involved, insist that that question is adequately presented by the action of the court, or sufficiently appears upon the face of the record, to give power to review, and, meeting the motion to affirm, it is insisted that the court below erred in holding that there was a sufficient averment of diversity of citizenship in the bill to give jurisdiction as a Federal court, and that even if this were not the case, the court erred in taking jurisdiction because the subject-matter of the controversy, prior to the institution of the suit below, as shown by the bill, was involved in and pending before a state court as the result of the action brought against the railroad company to enforce the Mississippi statute. The appellee, replying to these contentions, and reiterating that the jurisdictional question was the sole question presented, yet proceeds to

urge that even if the view be taken that the court below was wrong in deciding that adequate diversity of citizenship was alleged, nevertheless the judgment should be affirmed because of the existence of the constitutional question concerning the repugnancy of the Mississippi statute to the Constitution of the United States, as to which the decision of the court was clearly right and not objected to. It becomes at once apparent when the contentions of the parties are thus summed up that the propositions urged on both sides are conflicting and irreconcilable one with the other, since both in effect insist that the sole question on which the direct appeal may rest is one of jurisdiction, and yet, at the same time, urge that the jurisdictional *question[279 is not the sole question because of the existence of one involving the construction of the Constitution of the United States. This is so obviously true as to the position taken by the appellee as to need only statement. That it is also true as to the position of the appellants is demonstrated by observing that it has long since been settled that a mere conflict between courts concerning the right to adjudicate upon a particular subject-matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there would be no right to consider if the direct appeal involved solely a question of jurisdiction. *Courtney v. Pradt*, 196 U. S. 89, 91, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208, and cases cited.

The confusion in the contentions of the parties which thus appears, in our opinion will be dispelled and the questions for decision be made apparent by a consideration of the statement heretofore made. From that statement we think there is no real room for controversy: First. That the court below, in taking jurisdiction of the cause and deciding it notwithstanding the partial demurrer, maintained its power and jurisdiction as a Federal court. Second. That in rendering a decree on the merits, the court necessarily decided the question or questions under the Constitution expressly alleged in the bill. This conclusion dispenses with the necessity of considering the question of certificate as to jurisdiction, since the issue on that subject, whether certified or not, is open, in view of the constitutional questions raised in the bill: *Chappell v. United States*, 160 U. S. 499, 509, 40 L. ed. 510, 513, 16 Sup. Ct. Rep. 397.

While logically this view would adversely dispose of the motion to dismiss, it would undoubtedly, as a general proposition, require the granting of the motion to affirm without passing upon the question of diver-

sity of citizenship; since, from the statement we have made of the case, it appears that the correctness of the decision below as to the constitutional question was in 280]effect conceded. We *think, however, there is room for concluding that the argument on behalf of the appellants, upon the theory that it is justified by the record, proceeds upon the hypothesis that if there was no diversity of citizenship, the statute assailed in the bill was on its face so plainly inapplicable to the situation as to cause the assertion of its repugnancy to the Constitution to be unsubstantial and frivolous, and therefore insufficient to afford a basis either for jurisdiction in the court below or to warrant an affirmance by this court of the decree which was made below. As even although the premise upon which this proposition rests be not conceded, the demonstration of its unsoundness would require a consideration of the subject of diversity of citizenship and the relation of that subject to the assault made by the bill upon the statute, to avoid unnecessary analysis we come at once to consider the sufficiency of the averments of the bill as to the diverse citizenship of the complainant.

The whole argument as to the citizenship of the complainant turns not upon an express denial by the appellants in any form of the Kentucky citizenship of complainant directly alleged in the bill, but upon an insistence that the express averment upon that subject is so qualified by the subsequent allegations recounting the history of the road in Mississippi as at least to engender doubt sufficient to destroy the effect of such positive averment. No statement in the bill directly and expressly giving rise to such result is relied upon, but the whole contention is that by inference or subtle analysis of various paragraphs of the bill it must follow that the result above stated arises. Without, however, undertaking to re-state the passages in the bill relied upon, or to follow the forms of statement by which the result claimed to arise from the bill is sought to be demonstrated, we content ourselves with saying that we think the conclusion deduced from them is unwarranted, for the following reasons: (a) Because the passages 281]sages *in the bill relied upon to create the doubt or inconsistency, when construed in connection with the context, had reference to the alleged impairment of the obligation of a contract, and were not addressed to the subject of citizenship; (b) Because it would do violence to the very purpose of the bill to attribute to it the self-destructive effect which would result from upholding the contention insisted up-

on, especially in view of the nature and character of the litigation and the relation of the parties to the subject-matter in controversy. We say this because the very object of the bill was to prevent the state from enforcing against the company, as a foreign corporation owning and operating the road in Mississippi, a forfeiture and penalties which it is admitted would not have been applicable to the corporation if it was a domestic corporation of Mississippi. Nothing could make the conditions stated clearer than to recall the argument, heretofore adversely disposed of, which was pressed upon our attention by counsel for appellants, to demonstrate that the court erred in exerting jurisdiction because of the pendency of the suit in the state court, brought by the state of Mississippi, wherein it was expressly averred that the railroad company was a corporation of the state of Kentucky, and that it had never been incorporated in the state of Mississippi.

From these considerations it results that the judgment below must be and it is affirmed.

*PROCTER & GAMBLE COMPANY,[282
Appt.,
v.

UNITED STATES OF AMERICA, the Interstate Commerce Commission, the Cincinnati, Hamilton, & Dayton Railway Company, et al., Appellees.

(See S. C. Reporter's ed. 282-302.)

Commerce court — jurisdiction — negative action of Interstate Commerce Commission.

The jurisdiction of the commerce court under the Judicial Code of March 3, 1911 (36 Stat. at L. 1148, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 216), § 207, of "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission," embraces only complaints of affirmative action by the Commission, and does not confer the power to redress a complaint based solely upon the refusal of the Commission to award the relief asked by a shipper against demurrage regulations, upon the ground that the Federal statutes gave no right to the relief claimed.

[No. 780.]

Argued January 11 and 12, 1912. Decided
June 7, 1912.

APPEAL from the United States Commerce Court to review a decree dismissing on the merits the petition of a shipper,

based upon the refusal of the Interstate Commerce Commission to enjoin the enforcement of certain demurrage regulations. Reversed and remanded with directions to dismiss the petition for want of jurisdiction.

See same case below, 188 Fed. 221.

The facts are stated in the opinion.

Mr. George H. Warrington argued the cause and filed a brief for appellant.

Assistant Attorney General Denison argued the cause, and, with Br. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States.

Mr. P. J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. Edward Barton argued the cause and filed a brief for the Cincinnati, Hamilton, & Dayton Railway Company et al.

Mr. Chief Justice White delivered the opinion of the court:

Having three manufacturing plants, one at Ivorydale, Ohio, a second at Port Ivory, New York, and a third at Kansas City, Kansas, in which they carried on the business of refining cottonseed and other oils and of manufacturing soap and other products from grease and oil, the Procter & Gamble Company, to facilitate the transportation to their factories of the substances required for their operation, and of shipping out the finished products, became the owner of about five hundred railroad tank cars. The cars were exclusively devoted to the business of the company in the following manner: On the property of the company in the yards about their factories there were railroad tracks belonging to the company which served for holding empty or loaded cars, the cars thus situated being held for storage and for movement from place to place, as business required. At each of the factories there was also an interchange track connected with the tracks in the yards and with the tracks of the railroad company or companies through whom the business of shipping in interstate commerce to and from the factories was carried on. The movement of cars to the interchange tracks for outward shipment and from the interchange tracks when they were left there by railroad companies was at two of the factories carried on by the company through its own employees and motive power. At the other one this work was done by a railroad company, who made an independent and special charge for the service. The transportation of the private tank cars of the corporation by the railroad companies was governed by estab-

lished rules, and the price paid to the railroads for transporting the commodities of the company in its private cars was the regular price fixed for such commodities in the established tariffs. The railroads, however, paid to the company for the use of its private cars a fixed sum per mile, this payment being also stated in the regular established tariffs in compliance with law. A portion of the carrier's rule (rule 29), relating to the subject of compensation for hauling such private tank cars, is in the margin.†

*In 1910, among others, the railroads engaged in transporting tank cars from the plants of the Procter & Gamble Company adopted a system of rules governing the payment of demurrage by shippers. The provisions of these rules pertinent to this case are excerpted in the margin.‡

The rules in question were prepared by a committee of the National Association of Railroad Commissioners, composed of a representative from each state having a railroad *commission and a member of the Interstate Commerce Commission, and were adopted in convention by the National Association, and were subsequently approved by the Interstate Commerce Commission, although putting them in force was not imperatively prescribed by that body.

The Procter & Gamble Company, dissatisfied with the regulations concerning de-

†Rule 29. (Sec. 1.) In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are governed by this classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three quarters ($\frac{3}{4}$) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight-car tariffs.

‡ Rule 1.

Cars Subject to Rules.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

- (a) Cars loaded with live stock.
- (b) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.
- (c) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the order of a shipper.

NOTE.—Private cars while in railroad service, whether on carrier's or private

murrage, in so far as they imposed in certain respects charges upon its tank cars, filed a complaint with the Interstate Commerce Commission, charging the rules to be repugnant to the act to regulate commerce because unjust and oppressive, and because to enforce them would create preferences and discriminations forbidden by the act. After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act, and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied. In February, 1911, the Procter & Gamble Company filed a petition in the commerce court of the United States, making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin,† wherein it was also charged that the order

288]of the *Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of . . . said demurrage rules."

The prayer was as follows:

"Wherefore, complainant prays that the aforesaid order of said Interstate Commerce Commission made in said cause No. 3208 on November 14, 1910, be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges upon complainant's loaded tank cars after said cars have been delivered to complainant and placed upon tracks owned or controlled by it; and further, that said defendant railway companies and each of them be required to repay to complainant herein all sums found to have been wrongfully collected by them, or any of them, under the rule here complained of; and *that complainant be[289 granted such other and further relief as it may be entitled to in the premises."

The railroads answered the bill. The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss, upon this general ground: "Because the order of the Interstate Commerce Commission complained of directed no affirmative relief and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;" and

tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carriers for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

†Complainant avers that said order of said Interstate Commerce Commission, in dismissing its complaint as above set forth, is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of rule 1 of said demurrage; that said rule 1, so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading

is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant, and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without due process of law, in violation of the Constitution of the United States, and particularly of article 5 in amendment thereof, and that said provision of said rule is in violation of the said act to regulate commerce, and particularly of §§ 1 and 15 thereof, as amended June 29, 1906 [34 Stat. at L. 584, 589, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1284, 1297]; that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this court, and defendant railway companies are enjoined from enforcing the provisions of said rule.

upon the following more detailed specifications filed on behalf of the United States:

"(a) It prays that the order of the Interstate Commerce Commission be enjoined, when said order directed no action against any party, and therefore the same is not subject either to enforcement or to injunction.

"(b) It prays that the defendant common carriers, who are not proper parties to this proceeding except on their own motion, be enjoined from collecting the demurrage mentioned, when no order inhibiting the same has been made by the Interstate Commerce Commission, and in the absence of such an order this court has no power to grant such relief.

"(c) It prays that the defendant common carriers be required to repay to complainant all sums heretofore wrongfully collected as demurrage, when this court has no power or jurisdiction to grant such relief, either with or without an order of the Interstate Commerce Commission directing such repayment."

The court, declining at the threshold to consider the demurrers and motion to dismiss, postponed their consideration until the hearing on the merits. There was a consent by all the defendants except the United States and the Interstate Commerce Commission that the case be heard upon the evidence and documents introduced before the Commission and the report of that body. The United States and the Interstate Commerce Commission, however, on the overruling of its demurrer and a refusal to grant its motion to dismiss, elected to stand thereon and declined to plead further.

In disposing of the case, the court considered it in a twofold aspect,—first, as to its jurisdiction; and second, as to the merits of the case. On the first subject it held (a) that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief; and (b) as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted. On the merits, however, it was decided that the Interstate Commerce Commission had rightfully refused to grant relief and that there was no foundation for the contention that the property of the company in its private tank cars was taken without due process of law by the demurrage regulations. On this subject it was declared that as the company had accepted the provisions of the

published tariffs concerning the use of the tank cars, therefore those cars were submitted to the regulations which the carriers had lawfully established. In other words, the court concluded that because the company had availed of the proffer of the railroads to use the cars in transportation and pay for their use a stated sum, the company had acquired no right to disregard restrictions against preferences and discriminations embodied in the act to regulate commerce.

The case was then brought here by the appeal of the Procter & Gamble Company. That company insists that the court below erred in not awarding the relief which was asked and in dismissing the petition. On the other hand, the Interstate Commerce Commission and the railroads insist that the court was right in refusing relief and dismissing the bill. Before we can come, if at all, to consider the merits, however, it is necessary to dispose of the question concerning the jurisdiction of the court below to entertain the petition, because the United States insists at bar, as it did in the lower court, that the court erred in overruling the demurrer to the jurisdiction and refusing to dismiss the cause for want of jurisdiction.

The provisions of the act to establish the commerce court, fixing the jurisdiction of that court, are stated in the 1st section of the act of June 18, 1910 [36 Stat. at L. 539, chap. 309], now § 207 of the judiciary act of March 3, 1911 (36 Stat. at L. 1148, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 216). And in view of the necessity of having the provisions of the section immediately in mind, we reproduce them. They are as follows:

"Sec. 207. The commerce court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty, or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the act entitled, 'An Act to Further Regulate Commerce with Foreign Nations and Among the States,' approved February nineteenth, nineteen hundred and three [32 Stat. at L. 848, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309], are authorized to be

maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as, under the provisions of section twenty or section twenty-three of the act entitled, 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven [24 Stat. at L. 386, 387, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1304], 292]as *amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.

"The jurisdiction of the commerce court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

The question to be decided is this: Does the authority with which the commerce court is clothed in virtue of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands? In other words, the important question is, Is the authority of the commerce court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce, and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order, and accordingly pass on its correctness?

Turning for the elucidation of the question to the jurisdictional provisions, it is plain that although all of the four numbered subdivisions composing the section may serve to throw light upon the issue for decision, the solution of the question must intrinsically be found in a correct interpretation of the second subdivision. We say this because clearly the first deals alone 293]with cases for the enforcement *of orders of the Commission as therein described; the third deals only with cases brought under the act of February 19, 1903, which is wholly foreign to the subject here reviewed, since the act referred

to relates only to proceedings to enjoin either discriminations or departures by carriers from their published rates; and the fourth refers exclusively to the right to mandamus, conformably to § 20 or 23 of the act to regulate commerce, which sections are concerned with the performance of certain duties imposed upon carriers by the act to regulate commerce. The words of this second subdivision are: "Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance, when properly made, of complaints concerning the legality of orders rendered by the Commission, and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves. But if it be conceded, for the sake of argument, that the language of the provision is ambiguous, a consideration of the context of the act will at once clarify the subject. Thus, the first subdivision provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission; and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by *the first paragraph. In other words, [294 by the co-operation of the two paragraphs, authority is given, on the one hand, to enforce compliance with the orders of the Commission, if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208), provides that the mere pendency of a suit to enjoin, set aside, annul, or suspend an order of the Commission "shall not stay or suspend the operation of such order," but confers upon the court the power, under circumstances stated, to restrain or suspend, in whole or in part, the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order sought to be enforced essential

to the granting of an order or injunction restraining or suspending its enforcement.

We might well be content to rest our conclusion upon the considerations just stated. In view, however, of the importance of the subject, we do not do so, but shall consider the matter in a broader aspect, for the purpose of demonstrating that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the court below of the power which it deemed it possessed, would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action were contemplated. It cannot be disputed that the act creating the commerce court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the 295] *act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission) upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That, in adopting the provision concerning the commerce court, and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce, is certain. The act creating the commerce court was entitled, "An Act to Create a Commerce Court, and to Amend the Act Entitled, 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-seven, as Heretofore Amended, and for Other Purposes." The first six sections, which called into being the commerce court and defined its powers, all demonstrate the purpose as above stated: that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

What was then the existing system and the functions which the new court was created to perform will be conclusively shown by a brief outline of the scope and

purpose of the system which arose from the enactment of the act to regulate commerce (act February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. Supp. 1911, p. 1284) and its development. By that act, as originally enacted, many regulations and consequent duties were imposed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement, the exercise of official functions of an administrative *nature; and, second, for their har-[296 monious development, an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act (§ 11) created an administrative body endowed with what may be in some respects qualified as *quasi* judicial attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. And for the purposes stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining, limited as to the subject-matters to which we have referred, whether the provisions of the act had been violated, and if so, of primarily enforcing the act by awarding appropriate relief. The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt, coming within the scope of the administrative unity which we have mentioned, primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated, the act did not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints when, by previous submission to the Commission, they had been sanctioned by a command of that body.

In the long interval which intervened between 1887, when the act to regulate commerce was enacted, and June 18, 1910, when the commerce court act was passed, we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as *to[297 the meaning of the act to regulate commerce by dealing directly with the subject, irre-

spective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of, or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act. The subject is illustrated and made clear by the rulings in *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, ante, 863, 32 Sup. Ct. Rep. 535; *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, ante, 288, 32 Sup. Ct. Rep. 114; *Southern R. Co. v. Reid*, 222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140, and *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The latter case especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was, by the express terms of the act to regulate commerce, not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission.

Originally the duty of the courts to determine whether an order of the Commission should or not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the commerce court that, in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their [298]enforcement, the courts *were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so. *Interstate Commerce Commission v. Union P. R. Co.* 222 U. S. 541, 547, ante, 308, 311, 32 Sup. Ct. Rep. 108; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. So also, at the time the law creating the commerce court was passed, suits to compel obedience to orders

of the Commission, or to restrain an enforcement of such orders, were required to be brought in the circuit court of the United States in the district where a carrier, or one of two or more carriers to whom the order was directed, had its principal operating office.

In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the commerce court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because, as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite, action of the Commission, operate to create a vast body of rights which had no existence at the time the commerce court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would, of necessity, amount to a substitution of *the court for the Commission,[299 or, at all events, would be to create a divided authority on a matter where, from the beginning, primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against,—an interpretation which would seemingly create rights hitherto nonexistent, and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the act would necessarily amount to declaring that Congress, in seeking to unify and perfect the administrative machinery of the act to regulate commerce, and to make more beneficial its operation, had overthrown the whole fabric of the system as previously existing.

The demonstration of the error of the construction adopted below is so additionally made manifest by a consideration of the general structure and the text of the act creating the commerce court, that in

connection with the legislative history which we have previously stated, that we advert to that point of view: A. The 1st section of the act, wherein is recited the jurisdiction of the commerce court, which we have previously commented upon, makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the Interstate Commerce Commission, and in conflict with the general jurisdiction vested in the courts of the United States, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the Commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the 300]Commission. The *opening words of the section which make this result clear are as follows: It (the commerce court) shall "have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: . . ." B. Because the enumeration as to the subject-matters of jurisdiction conferred, which follows the words just quoted, which enumeration we have previously reproduced and commented upon, conforms to the existing law and evidently assumes its continued operation. C. Because the sedulous effort of Congress while creating the new machinery not to destroy the existing system finds expression in a twofold way: (1) by the declaration that nothing in the fact that the existing power of the circuit courts as to the subjects of jurisdiction transferred to the new court should be deemed as an enlarging of those powers, and (2) by the provision that nothing in the transfer of the enumerated powers to the commerce court should be considered as limiting or abridging the existing jurisdiction possessed by the circuit courts as to things and subject-matters not embraced in the power transferred. Thus the two provisos again serving to make clear the legislative intent that the creation of a new body to exercise a portion of the existing judicial power should not in any way enlarge the power as existing, or be implied as destroying or minimizing the general scope of the judicial power possessed by the circuit courts, where such power was not embraced within the authority transferred to the new body. D. Because the act which created the court contained in its latter sections provisions amending sections of the act to regulate commerce which, when

rightly interpreted, were manifestly adopted to make that act more consistent with the new situation resulting from the creation of the new court, and utterly inconsistent with the conception that that court had power not previously possessed by any court, and the existence of which would serve to set *at naught the whole sys-[301 tem of interstate commerce regulation.

Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below, and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional right concerned a subject which, from its very nature and effect, dominated the act to regulate commerce, and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the commerce court, as it could not so be without violating the express reservation and restriction as to the general power of the circuit courts which we have just quoted. If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce, that question, in the nature of things, was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce, and as to which the court had jurisdiction alone to act, in virtue of a prior affirmative order of the Commission.

The general considerations which we have stated establish the error committed by the court below in holding that it had jurisdiction over the claim of the Procter & Gamble Company to recover on a money demand based on the illegality of the demurrage charges alleged to have been wrongfully exacted by the railroad companies. Through abundance of precaution, we, however, say that, wholly irrespective of the general considerations stated, we think the conclusion of the court as to its possession of jurisdiction over the subject referred to was clearly repugnant in other respects to the express terms of the act.

As it follows from what we have said that the court below erred in taking jurisdiction of the petition, it results *that[302 our duty is to remand the cause to the court below, with directions to dismiss the petition for want of jurisdiction.

And it is so ordered.

JAMES J. HOOKER et al., Appts.,
v.
MARTIN A. KNAPP et al., Appellees.
(No. 773.)

EAGLE WHITE LEAD COMPANY et al.,
Appts.,
v.

INTERSTATE COMMERCE COMMISSION
et al., Appellees. (No. 774.)

(See S. C. Reporter's ed. 302-306.)

Commerce court — jurisdiction — negative action of Interstate Commerce Commission.

The commerce court has no jurisdiction of a complaint by shippers of the refusal of the Interstate Commerce Commission to reduce maximum rates to the full extent asked.

[Nos. 773 and 774.]

Argued January 11, 1912. Decided June 7, 1912.

APPEALS from the United States Commerce Court to review decrees dismissing on the merits bills filed by shippers which complain of the refusal of the Interstate Commerce Commission to reduce maximum rates to the full extent asked. Reversed and remanded, with directions to dismiss for want of jurisdiction.

See same case below, No. 773, 188 Fed. 242; No. 774, 188 Fed. 256.

The facts are stated in the opinion.

Mr. Francis B. James argued the cause and filed a brief for appellants:

The right of a carrier or shipper to file a bill in equity to enjoin an order of the Interstate Commerce Commission exists independent of, and does not arise out of, any statute.

F. H. Peavey & Co. v. Union P. R. Co. 176 Fed. 409; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49, ante, 83, 88, 32 Sup. Ct. Rep. 22.

To give a railroad corporation such right and deny it to a shipper would render the law unconstitutional as wanting in due process of law.

Procter & G. Co. v. United States, 188 Fed. 226.

To give the word "against" the meaning of "touching" or "concerning" or "in reference to" brings the whole of § 16 of the 56 L. ed.

act to regulate commerce into harmony with all other statutes on the same subject-matter, prevents absurd consequences flowing therefrom, and preserves the whole general intent and purpose of Congress. In addition, it gives that liberal construction to sustain a remedy which is always given to a remedial statute.

Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138; Seabright v. Seabright, 28 W. Va. 415.

Assistant Attorney General Denison argued the cause, and, with Messrs. Jesse C. Adkins and Blackburn Esterline, Special Assistants to the Attorney General, filed a brief for the United States.

Mr. P. J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. R. Walton Moore argued the cause and filed a brief for the Cincinnati, New Orleans, & Texas P. R. Co.

Mr. Chief Justice White delivered the opinion of the court.

The appellants in these cases originally applied to the Interstate Commerce Commission for reduction of the maximum rates between Cincinnati and Chattanooga from the 76c. schedule to a 60c. schedule. The Commission refused to make the full extent of this reduction. Thereupon the respective parties filed bills in the commerce court, demanding that the Commission's order be "suspended, set aside, annulled, and declared void and of no effect," and that the individual defendants and the Commission be required by mandatory injunction to set aside and annul the said order, that the case be reopened, and the complainants given further relief. The two bills were consolidated. The individual defendants, the Commission, and the railroad company all demurred to the bill on the merits. The United States moved to dismiss on the ground that the court had no jurisdiction. The court took jurisdiction, but dismissed on the merits. These appeals were then prosecuted. The cases are, in all respects, controlled by the opinion announced and ruling made in the Procter & Gamble Case, this day decided [225 U. S. 282, ante, 1091, 32 Sup. Ct. Rep. 761], *and for the reasons in that case [306 stated, these cases must be and are remanded, with directions to dismiss for want of jurisdiction, and it is so ordered.

UNITED STATES, the Interstate Commerce Commission, and the Federal Sugar Refining Company, Appts.,

v.

BALTIMORE & OHIO RAILROAD COMPANY, the Central Railroad Company of New Jersey, et al.

(See S. C. Reporter's ed. 306-326.)

Injunction — pendente lite — power of commerce court — irreparable damage.

1. Only temporary restraining orders of the commerce court, issued conformably to the act of June 18, 1910 (36 Stat. at L. 542, chap. 309), § 3, staying in whole or in part the operation of an order of the Interstate Commerce Commission for not more than sixty days, are affected by the requirements of that section respecting a statement of fact as to irreparable damage; they have no application to a preliminary injunction or injunction *pendente lite*.

[Procedure in injunction cases, see Injunction, II., in Digest Sup. Ct. 1908.]

Injunction — pendente lite — power of commerce court.

2. The granting by the commerce court of an injunction *pendente lite* suspending, until final determination of the suit, an order of the Interstate Commerce Commission, requiring certain carriers to desist from making further alleged discriminatory allowances, is not in excess of its power, under the act of June 18, 1910, § 3, unless it was plainly unnecessary because of the obvious nature and character of the legal questions as to which the judgment of the court was invoked.

[Power of Federal courts to issue injunction, see Courts, V. c, in Digest Sup. Ct. 1908.]

Appeal — from commerce court — injunction pendente lite — discretion.

3. The Federal Supreme Court will not disturb on appeal the granting by the commerce court of an injunction *pendente lite* suspending, until final determination of the suit, an order of the Interstate Commerce Commission, requiring certain carriers to desist from making further alleged discriminatory allowances, unless it was so unwarranted, arbitrary, and unreasonable as to amount to an abuse of discretion.

[For other cases, see Appeal and Error, VIII. 1, in Digest Sup. Ct. 1908.]

[No. 722.]

Argued January 15 and 16, 1912. Decided June 10, 1912.

APPEAL from the United States Commerce Court to review an order enjoining, *pendente lite*, an order of the Interstate Commerce Commission requiring certain carriers to desist from making further alleged discriminatory allowances. Affirmed.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for the United States.

Mr. P. J. Farrell filed a brief for the Interstate Commerce Commission:

The court erred in not dismissing the petitions for want of equity.

Interstate Commerce Commission, v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 301, 53 L. ed. 1004, 1006, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 277, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Union P. R. Co. v. Goodridge, 149 U. S. 680, 690, 37 L. ed. 895, 902, 13 Sup. Ct. Rep. 970; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896; Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, ante, 171, 32 Sup. Ct. Rep. 39; Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 477, 54 L. ed. 280, 290, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392.

The court erred in substituting its own judgment for the judgment of the Commission concerning the character of the discrimination which constitutes the basis of the Commission's order.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Southern P.

Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 248, 249, 251, 252, 55 L. ed. 448, 455, 456, 457, 31 Sup. Ct. Rep. 392.

Mr. Ernest A. Bigelow filed a brief for the Federal Sugar Refining Company:

The finding that there is unjust discrimination is a conclusion of fact.

Interstate Commerce Commission v. Delaware L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

The transportation of Arbuckle sugar by these carriers does not begin until the lighters are made fast to their float bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor.

Coe v. Errol, 116 U. S. 517, 528, 29 L. ed. 715, 719, 6 Sup. Ct. Rep. 475; London & L. F. Ins. Co. v. Rome, W. & O. R. Co. 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79; Pennsylvania R. Co. v. International Coal Min. Co. — L.R.A.(N.S.) —, 97 C. C. A. 383, 173 Fed. 1.

The arrangement between Arbuckle and Jamison and the carriers creates an unlawful discrimination.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 477, 54 L. ed. 290, 30 Sup. Ct. Rep. 155; Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, ante, 171, 32 Sup. Ct. Rep. 39.

The intention of the Federal Company as to the ultimate destination of its sugar has no bearing on its two separate contracts with the Ben Franklin Company, one, to transport the sugar to Pier 24 and notify the consignee; the other, to transport from Pier 24 to the rail terminals.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

On this appeal the court may properly consider and decide the whole cause on the merits.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Green v. Mills, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852.

Mr. George F. Brownell argued the cause, and, with Mr. Herbert A. Taylor, filed a brief for the Railroad Companies et al.:

The Federal Sugar Refining Company has not the status of a shipper from New York within lighterage limits; there is 56 L. ed.

a single continuous shipment of sugar by boat from Yonkers to the Jersey shore, and no new shipment originating at Pier 24, North river.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Texas & P. R. Co. v. Railroad Commission, 183 Fed. 1005.

The service performed by the Federal Sugar Refining Company through the medium of the Ben Franklin Transportation Company is not a transportation service of the railroad companies, but is wholly accessory, and cannot lawfully be paid for by these appellees.

Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 627; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; General Electric Co. v. New York C. & H. R. Co. 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246.

Railroads may secure and maintain freight depots by contract with shippers, and such depots thereby become legally and to all intents and purposes the freight depots of the railroads.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co. 11 Inters. Com. Rep. 277.

The entering into a contract with one shipper to furnish station facilities does not result in a violation of the provisions of the act to regulate commerce, forbidding undue preferences and advantages, even if similar contracts are not made with all competing shippers in the same locality.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 117, affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 Sup. Ct. Rep. 461; Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 101; Consolidating Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 1,206; Re Transportation & Refrigeration of Fruit, 10 Inters. Com. Rep. 360; Worcester Excursion Car Co. v. Pennsylvania R. Co. 3 I. C. C. Rep. 584, 2 Inters. Com. Rep. 793.

Mr. H. B. Closson filed a brief for the Brooklyn Eastern District Terminal.

Mr. William N. Dykman argued the cause and filed a brief for Jay Street Terminal and Arbuckle Brothers, Interveners:

This court reviews the findings of the Interstate Commerce Commission upon appeal from an order granting an injunction suspending the order of the Commission.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; *Interstate Commerce Commission v. Northern P. R. Co.* 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417.

The order of the Commission cannot be upheld upon the ground that the questions are of fact, not reviewable in the courts.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678.

No commission nor any court can treat that as a public or private wrong which the Congress has authorized.

Hammersmith & City R. Co. v. Brand, L. R. 4 H. L. 171, 38 L. J. Q. B. N. S. 265, 21 L. T. N. S. 238, 18 Week. Rep. 12, 7 Eng. Rul. Cas. 380; *Bellinger v. New York C. R. Co.* 23 N. Y. 42.

When the terminal receives sugar for shipment, and issues a bill of lading for and in the name of the railroad company, two results follow:

1. Title to the merchandise changes from the consignor to the consignee.

Mee v. McNider, 109 N. Y. 500, 17 N. E. 424; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Waldron v. Romaine*, 22 N. Y. 368; *Gilbert v. New York C. & H. R. R. Co.* 4 Hun, 378; *Williston, Sales*, § 278.

2. The railroad journey and responsibility begin.

Hutchinson, Carr. § 158; *Abbe v. Eaton*, 51 N. Y. 410.

The liability of the carrier, in fact, begins as soon as it receives the merchandise for carriage, even if bills of lading have not been shipped or a journey commenced; the mere reception of the goods for the purpose of immediate transportation is sufficient to inaugurate liability.

Ames v. Fargo, 114 App. Div. 666, 99 N. Y. Supp. 994; *Hutchinson, Carr.* § 113.

The Commission exceeded its power in forbidding payment to the Jay Street Terminal for handling of Arbuckle Brothers' sugar.

F. H. Peavey & Co. v. Union P. R. Co. 176 Fed. 409.

It is beyond the power of the Commission to order payments to the Federal Company for lightering sugar from Pier 24 to the railroad terminals in New Jersey.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; *Chi-*

cago & A. R. Co. v. United States, 26 L.R.A. (N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; *General Electric Co. v. New York C. & H. R. R. Co.* 14 Inters. Com. Rep. 237; *Solvay Process Co. v. Delaware, L. & W. R. Co.* 14 Inters. Com. Rep. 246; *Re Allowances for Transfer of Sugar*, 14 Inters. Com. Rep. 619.

It is not a discrimination to contract with the Jay Street Terminal to maintain a railroad freight station in Brooklyn, and there to collect, receive, and deliver freight, issue bills of lading, and float loaded cars between Brooklyn and Jersey City, and at the same time refuse to contract with the Federal Sugar Refining Company for lighterage from Pier 24.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Consolidated Forwarding Co. v. Southern P. Co.* 9 Inters. Com. Rep. 182; *Worcester Excursion Car Co. v. Pennsylvania R. Co.* 3 I. C. C. Rep. 577, 2 Inters. Com. Rep. 793; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; *United States ex rel. Morris v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617, 40 Fed. 101; *Re Transportation & Refrigeration of Fruit*, 10 Inters. Com. Rep. 360.

It is beyond the power of the Commission to allow more than the cost of lighterage to the Federal Company, to offset less than cost paid the Jay Street Terminal for its services.

Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 619.

Mr. Chief Justice White delivered the opinion of the court:

This is a suit instituted in the commerce court to enjoin the enforcement of an order by the Interstate Commerce Commission.

The complainants in the bill are the Baltimore & Ohio Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna, & Western Railroad Company, the Erie Railroad Company, the Lehigh Valley Railroad Company, the New York, Ontario, & Western Railway Company, the Pennsylvania Railroad Company. The Brooklyn Eastern District Terminal and John Arbuckle and William A. Jamison, copartners, trading as the Jay Street Terminal, intervened and were made parties complainant, they being interested to defeat the order of the Commission.

The defendant named in the bill is the United States. The Interstate Commerce

Commission appeared, and the Federal Sugar Refining Company intervened and was made a party defendant.

315] *The order which it was the purpose of the suit to enjoin was made in a proceeding commenced before the Commission on behalf of the Federal Sugar Refining Company, to compel the railroads above named to desist and abstain from paying to Arbuckle Brothers, claimed to be operating what is known as the Jay Street Terminal, certain so-called allowances for floatage, lighterage, and terminal services rendered by them to the complainants in connection with sugar transported by them in New York harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Refining Company on its sugar.

We substantially adopt as accurate a summary statement made of the subject-matter of the controversy in the brief of counsel for the railroad companies:

"The Federal Sugar Refining Company has a refinery at Yonkers, New York, and Arbuckle Brothers have a refinery in the borough of Brooklyn, New York city. The railroad companies operate what are known as trunk line railroads, extending from New York to western and southern points. In order to receive and deliver freight in New York city they are obliged to transport the same across the waters of New York harbor on lighters by what is called lighterage service; or, when the freight is carried through in railroad cars, on car floats by what is called floatage service.

"At numerous points along the New York city water front within the lighterage limits they have established public stations for the receipt and delivery of freight.

"They have also established boundaries known as 'lighterage limits,' including substantially all of what may be called manufacturing and commercial portion of the water front of New York city and the opposite shore of New Jersey, and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are, generally speaking, the same as the rates *to and from the terminals on the New Jersey shore. At 'public' docks open to any vessel, the railroad pays the wharfage; at private docks the shipper or consignee must arrange for the necessary dockage.

"At a number of points in the boroughs of Brooklyn and the Bronx, the railroad companies or some of them furnish public stations through arrangements made with terminal companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the trans-

portation of such freight between such terminal stations and the railroad companies' rails on the western shore of the harbor, all of which is done for and in the name of the railroad companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations.

"One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conducting a separate business in that respect as copartners under the name and style of 'Jay Street Terminal,' in accordance with the laws of the state of New York. Jay Street Terminal is named as a station of the railroad companies, appellees, in their respective tariffs, and is conducted under contract with the railroad companies like any other freight station, bills of lading issued from and to it on behalf of the railroad companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service and furnishing the necessary docks, freight yard, and station buildings and equipment, excepting cars. The Jay Street Terminal also floats or lighters all shipments between the terminal and the rails of the railroad companies on the New Jersey shore. For these services and facilities each railroad company pays to the *Jay Street Terminal an aggregate [317 compensation figured on the freight handled for it, based on the rate of 4½ cents per hundred pounds on freight originating at or destined to points at or west of the westerly limits of Trunk Line Territory, so called, and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limit of Trunk Line Territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York.

"The refinery of Arbuckle Brothers, a partnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal, and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal, and obtain the railroad company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight.

"The refinery of the Federal Sugar Refining Company at Yonkers, New York, formerly operated by the Federal Sugar Refining Company of Yonkers, is located on the Hudson river, 10 miles north of the limits of the lighterage limits. The sugar manufactured at this refinery and shipped over

the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Company, an independent boat line with which the Federal Sugar Refining Company has made a contract, under which the boat line lighters its sugar to the terminals of the railroad companies for 3 cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York harbor and delivers it to them for rail transportation.

"The Federal Sugar Refining Company's refinery at Yonkers is located directly on the tracks of the New York Central & Hudson River Railroad Company. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Company are, with few exceptions, the same as the rates *via* the lines of the railroad companies. To ship at the New York rate over the lines of the roads the Federal Sugar Refining Company can deliver its shipments to the New York Central & Hudson River Railroad at Yonkers, thence to be transported by that railroad to New York, and there delivered to the said railroad companies within lighterage limits. None of these railroads have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments *via* this route, the Federal Sugar Refining Company sometimes prefers to deliver said shipments by lighter to the said railroad companies at their stations on the New Jersey shore of New York harbor.

"Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Company directly to the rail terminals on the Jersey shore from Yonkers without stop. Since that date the lighters stop *en route* at Pier 24, North river. The reason for stopping at Pier 24 is found in the decision made by the Commission in case No. 1082, brought by the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, against the same railroad companies, appellees here (17 Inters. Com. Rep. 40). The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Company of Yonkers and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the railroad companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Company from Yonkers to the rail terminals of the railroad company on the western shore of New York harbor as were paid to the two terminal companies above named on account of the various services performed and terminal facilities fur-

nished by them in connection with the transportation of sugar shipped by *Arbuckle Brothers and the American Sugar Refining Company respectively. This complaint was dismissed because the extension of the lighterage limits in New York harbor of the railroad companies was a matter of business discretion, and that the Commission had no authority to require such extension beyond the then prescribed boundaries, and that the Federal Sugar Refining Company, being located outside of the prescribed lighterage limits, was not subject to unlawful discrimination by reason of the practice of the railroad companies in affording free lighterage on shipments originating at a distance to points within said lighterage limits, while refusing to so afford on shipments of the Federal Sugar Refining Company.

"As a result of this decision of the Commission the lighters of the Ben Franklin Transportation Company were stopped *en route* from Yonkers at Pier 24, North river, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North river, a point within lighterage limits. A new complaint was filed with the Commission, setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits, and not from Yonkers. The Commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24 differentiated the case from the former one, and made the following order:

"It is ordered that the above-named defendants (the appellees) be and they are hereby notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Brothers *on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Company) on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

"The so-called 'allowances' referred to in this order are a part of the payments making up the compensation of the Jay Street Terminal, figured at the rates of 3 cents and 4½ cents per hundred pounds, as above described."

This is the order the enforcement of which was the subject-matter of the controversy in the court below.

The United States, the Interstate Commerce Commission, and the Federal Sugar Refining Company promptly filed motions to dismiss the petition and the intervening petition of the Jay Street Terminal upon the ground of want of equity and because the order of the Commission was an adjudication of matters of fact as to which its judgment was conclusive. The petitioners, on the other hand, applied for an injunction *pendente lite* suspending the order of the Commission until the final determination of the action. The motions to dismiss were denied. On the same day, the motion for a temporary injunction—which had been heard upon the petition and intervening petitions and affidavits submitted by petitioners in support of the averments of the petition and intervening petition—was granted, and the assailed order “and its force and effect” were suspended until the further order of the court. This appeal was then taken.

There was clearly a right in the court below to entertain jurisdiction of the petition, and to determine whether the affirmative order of the Commission was entitled to be enforced. There was clearly also power in the court to allow a preliminary injunction, since that authority is conferred in express terms by § 3 (208 [36 Stat. at L. 1149, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 217]) of the act [36 Stat. at L. 321]542, chap. 309.] And *the right to appeal from such an order is also in express terms conferred by § 2 (210) of the act.

It is urged on behalf of the United States and the Interstate Commerce Commission that, wholly irrespective of the merits of the petition, the order granting the interlocutory injunction must be reversed because of what is insisted to be the express requirements of the act imposing the duty on the commerce court or a judge of that court, if a restraining order is granted under the conditions in the statute, to state the facts from which it is found that irreparable injury would arise if a restraining order were not allowed. The section containing the provision relied upon is as follows:

“That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part

the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the commerce court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the *order and identified by[322 reference thereto, that such irreparable damage would result to the petitioner, and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.”

Without ambiguity we think the statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction *pendente lite*, which, to quote the words of the statute, may be granted by the court to “restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit;” third, in the nature of things a perpetual injunction upon the entry of the final decree. The order in this case, made after notice and hearing, suspending the force and effect of the order of the Commission until the further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction *pendente lite*, and not of the power to allow a temporary restraining order embraced in the first of the classes stated. As we think it clear that the requirements of the statute relied upon respecting the statement of facts as to irreparable damages relate only to the first class of cases, that is, the power to issue a temporary restraining order, we hold the objection to be without merit.

This brings us to consider the scope of our reviewing authority under the right

conferred by the statute to appeal from the allowance by the court below of a preliminary injunction or injunction *pendente lite*. To determine this question requires a consideration of the nature and character of the powers which the court had a right to 323]* exert over the subject-matter presented to it by petition filed to perpetually enjoin the enforcement of the order of the Commission.

We have determined in the Procter & Gamble Case, 225 U. S. 282, ante, 1091, 32 Sup. Ct. Rep. 761, that the commerce court was but endowed in considering whether an affirmative order of the Commission should be enforced, on the one hand, or set aside and declared nonenforceable on the other, with the jurisdiction and power existing at the time that act was passed in the circuit courts of the United States. And as, at that time, it was conclusively settled that the courts had only authority to re-examine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings. Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or *pendente lite* injunction, the duty arising requires it to be determined whether, on the face of the papers presented, there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit; that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true also that where an appeal is allowed from an order granting a preliminary injunction the reviewing court is put to the duty of determining whether, on the face of the papers, the court below erred as a matter of law in granting the preliminary injunction. Do these principles apply to the case before 324]* us is then the first consideration. The result of holding that they do will inevitably cause the expunging from the act of the express authority conferred to issue a preliminary injunction, since, viewed under the general principles of equity, the criteria by which to determine the rightfulness of such an order in view of the nature and character of the

jurisdiction of the commerce court is exactly and exclusively the same criteria by which the rightfulness of a final decree of that court, issuing a perpetual injunction in conformity to such decree, would require to be tested. Our duty, however, is not to destroy the law, but to enforce it; and in doing so to seek to discover the intention of the law-maker, the wrong intended to be prevented, and the remedy designed to be afforded by the enactment of the statute. Coming to consider the statute for this purpose, we have pointed out in the Procter & Gamble Case that the great remedy intended to be accomplished was the concentration in a single court of the power to consider the rightfulness of enforcing or setting aside orders of the Commission; that, to prevent unnecessary delays, the limitations as to restraining orders and their duration, and the hearing which is commanded as to irreparable injury, were enacted. It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the Commission, instead of compelling that body virtually *eo instante* upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary, and unreasonable exercise of the power conferred. In other words, we think that the enlightened purpose of Congress was that the court which it created, in the exercise of the important trusts confined to its authority, *and where occasion re-[325] quired it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment, and that it was not intended to compel precipitate, and perhaps ill-considered, action.

Coming to consider the case presented in the light of these principles, in view of the doubt which existed as to the scope and effect of the powers conferred upon the Commission, as shown by the decision of the court in the Procter & Gamble Case, of the nature and character of the subject-matter here under consideration and its importance, of the action of the Commission had on that subject prior to the making of the order of the Commission which was assailed by the petition, and especially of the diversity of opinion which existed among the members of the Commission on the subject, we think there is no room for saying that the preliminary injunction issued was in excess of the power conferred upon the court, because of

the plain want of necessity for it, resulting from the obvious nature and character of the legal questions as to which the judgment of the court was invoked in consequence of the filing of the petition calling for the exertion of the authority conferred upon it by Congress.

It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the commerce court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court without deviation, and yet without hesitancy, where there has been an abuse of discretion, to correct it in the completest way. But as this case manifests no such abuse, our duty is not to reverse the action of the court, but to remand the case, so 326]that *there may be an opportunity to dispose of it on the merits in the forum selected by Congress for that purpose. Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly, in our judgment, appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits, or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so.

Affirmed.

INTERSTATE COMMERCE COMMISSION
and the United States, Appts.,
v.

BALTIMORE & OHIO RAILROAD COMPANY, Pennsylvania Railroad Company,
et al.

(See S. C. Reporter's ed. 326-346.)

Commerce court — jurisdiction — enjoining order of Interstate Commerce Commission.

1. The commerce court, in the exercise of its power, under the act of June 18, 1910

NOTE.—As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations—see note to *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 94 C. C. A. 230.

56 L. ed.

(36 Stat. at L. 542, chap. 309), § 3, to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission, has jurisdiction to entertain a petition to enjoin an order of the Commission requiring railway companies to cease charging lower rates for coal intended for railway consumption than is accorded to other shippers, and may enjoin such order if it considers that it will work irreparable injury, where the question presented by the petition is that the order of the Commission was not merely administrative, but proceeded from a construction of certain sections of the act to regulate commerce as applicable to the conditions which affected the traffic in the different kinds of coal, and that the different charges for transportation constituted violations of those sections.

Carriers — rates — discrimination — dissimilar conditions.

2. Differences with respect to competition between coal intended for railway consumption and other coal, and with respect to the manner of delivery, depending upon a difference in the facilities possessed by the railroads and other consignees, do not make the interstate traffic therein dissimilar in circumstances and conditions, within the meaning of the interstate commerce act of February 4, 1887 (24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155), § 2, so as to justify the giving of a lower rate for the transportation of railway fuel coal than is given to shippers of other coal between the same points.

[For other cases, see Carriers, 275 283, in Digest Sup. Ct. 1908.]

[No. 719.]

Argued January 12 and 15, 1912. Decided June 7, 1912.

APPEAL from the United States Commerce Court to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission which required railway companies to cease charging lower rates for coal intended for railway consumption than were accorded to other shippers. Reversed and remanded with directions to dismiss the petition.

Statement by Mr. Justice McKenna:

The question in the case is whether railroad companies may charge a different rate for the transportation of coal to a given point to railroads than to other shippers, the coal being intended for the use of the railroads as fuel.

The Interstate Commerce Commission

On the right of a carrier at common law to discriminate between passengers and shippers—see note to *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L.R.A. 105.

held that a charge of a different rate was an unlawful discrimination against other shippers, and made an order requiring a cessation of such charge. The execution of the order was enjoined by the commerce court.

A number of railroads are petitioners and we shall refer to them as the companies.

The companies attack in their petition the order of the Interstate Commerce Commission on several grounds, which may be summarized as follows: The movement of coal traffic from the point of origin to the point or points of junction to receiving carriers is different from the movement of coal to be delivered locally at such junction points.

The traffic is not governed by the rates published under the act to regulate commerce, which apply to the traffic in coal not intended for use by consuming railroads, because the charges go to the carrier itself. If the coal be shipped under a through rate applicable to other coal the actual rate upon which it moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

§28] *All but an inconsiderable part of such coal is necessary and intended for use as fuel in locomotives. The fueling stations are often many, and are located at convenient points along the line at varying distances from the junction points, and it is not possible at the time of shipment to tell at what point a carload of coal will be needed. If made on a through rate they must be billed and transported to a point to which the through rate is published. Even if a centrally located distributing yard for fuel be established, and all shipments billed on a through rate to that yard, there must be a reverse movement of the coal between that point and the point of junction.

The fact that fuel coal on the line of a consuming carrier is not governed by the published rates makes the commercial competitive conditions different between such coal and other coal. The value to the shipper is not the same or measured by the same conditions. There is no competition between the fuel coal and other coal.

Because of the circumstances and conditions differentiating the traffic in fuel coal the companies have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of such coal from points of origin to the junction point of delivery to the consuming carrier. The tariffs vary in their

definitions or descriptions of the traffic to which the rates apply, but in each case the traffic is such that it would move in reality, not under the published through rates, but would move under the special conditions which have been stated. Some of the tariffs apply only to coal intended for use and used for locomotive fuel. The rates named in the tariffs are open and available to all producers and shippers, if the shipments be made under the special conditions stated.

On January 4, 1910, the Interstate Commerce Commission, of its own motion, instituted an inquiry under an *order[329 of that date entitled, "in the Matter of Restrictive Rates," Docket No. 3053, making the Baltimore & Ohio and the Pennsylvania Railroad Companies parties to the proceeding. The other companies from time to time were admitted as interveners. Testimony was taken, argument heard, and the Commission entered the order complained of in which the Commission required the companies to cease and desist, on or before May 15, 1911, and for a period of two years to abstain from using the tariffs on fuel coal stated.

The Commission erred in its construction of the act to regulate commerce in that it held the facts and circumstances found by it did not distinguish fuel coal from other coal, and that the different conditions of their transportation were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of § 2 of the act.

The Commission erred in holding that the rates on fuel coal under § 2 should be no more nor less than rates for the shipment of other coal from the same point of origin for local delivery at the junction point, the circumstances and conditions showing conclusively that the services done in the transportation of them, respectively, are not alike nor substantially similar, within the meaning of the act to regulate commerce.

The Commission erred in holding that fuel coal should be transported under through rates, as other coal, and that it was unlawful for carriers to publish or charge any rates other than the through rates agreed upon going to the line of the terminal carrier, to be used by it in its business as a common carrier. And that, as the charges on such terminal carrier's line must be borne by it, the Commission erred in holding that such circumstance did not differentiate the traffic in such coal from the traffic in other coal, and did not constitute a substantial difference under § 2 in the conditions of transportation.

*The commission erred in holding[330 further, that any difference in the tariff

for fuel coal, and not applicable to all other coal, was unjustly discriminatory, in violation of § 3.

It appears on the face of the report of the Commission, it is alleged, that it proceeded in making the order upon its view of §§ 2 and 3; that it did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the difference in conditions affecting the respective tariffs could not be considered as distinguishing them. And it is alleged that the findings of the Commission are findings of law, as well in regard to the violation of the 3d section of the act as in regard to violation of the 2d section. Irreparable damages is alleged, and the alternatives presented of desisting from the carriage of fuel coal at the expense of the loss of large and valuable revenues, or accepting divisions of through rates, on both fuel coal and other coal, which will give the companies, as originating or intermediate carriers, a much lower compensation for both classes of traffic than they are now receiving and would continue to receive but for the order of the Commission.

In either case the loss will amount to many thousand dollars. There will be loss, it is alleged, to the producers of fuel coal who have sold coal under contracts for future delivery at junction points, and loss also to producers and shippers who depend on the railroad-fuel business to enable them to operate their mines at all.

A final decree is prayed for the annulment of the order and a temporary injunction enjoining and suspending it pending final hearing and determination.

The petition was supported by affidavits made by a number of coal producers and shippers.

The answer of the Interstate Commerce Commission is directed principally at the third paragraph of the petition, and charges against it as follows: Its allegations re-
331]late to *comparisons between coal, on the one hand, consigned to a railroad company, and coal, on the other hand, consigned to some other party. The former is called railroad-fuel coal, the latter is known as commercial coal. In each instance, however, regardless of the consignee, the point of origin and the point of destination of the shipments are the same, but the rate charged for transporting fuel coal is much less than the rate exacted for the transportation of commercial coal over the same line, in the same direction, and between the same points. Schedules or tariffs providing for such differences in rates have been heretofore established and put in force and are now maintained and enforced by the companies.

Where the destination is a junction which is a point of connection between the lines of two or more of the companies, the movement of coal, fuel and commercial, is the same, except that at such destination the cars containing fuel coal are ordinarily placed upon what is called an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon the side track of the delivering carrier. The cost of delivering both kinds of coal is practically the same, depending upon the nature of the delivery facilities furnished by the companies. Therefore, the cost of delivering fuel coal may be and is less than the cost of delivering the commercial coal, but the reverse is sometimes the case. It is alleged, however, that such differences are similar to differences pertaining to some shipments of commercial coal compared with other shipments.

Generally what is called "free time" is allowed by the companies, that is to say, a certain period of time for unloading the coal is allowed. If the coal is unloaded within that time, no charge is made for the use of the car. If that time be exceeded, a charge of \$1 for each day or fraction of a day in excess of the "free time," known as a demurrage charge, is exacted by the companies, while the *compensation[332 paid by one carrier to another carrier for the use of a car owned by the latter is 25 cents a day. Where the coal transported is fuel coal no "free time" is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in the rates of transportation between the different coals.

Where the destination of the shipment of coal is not a point of connection between the lines of two or more of the companies, the circumstances and conditions pertaining to the transportation and delivery of coal are the same as above described, except that at such destination there are no exchange tracks used in common by two or more of the companies. Where the shipment passes over more than one line of railway to such destination, delivery by one of the companies to another is made in the same way and under similar circumstances and conditions, regardless of whether the coal be fuel or commercial.

The lower rates established by the companies and applied by them to the transportation of fuel coal are not open alike to all shippers, but are, by reason of the schedules and tariffs above mentioned and by reason of the practices of the companies, confined to shippers of fuel coal, and de-

nied to shippers of all other coal, including commercial coal.

The Commission denies the errors attributed to it, and alleges that its report shows as follows: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination.

The Commission alleges (somewhat singularly, on information and belief) that it considered all facts, circumstances, **333]** *and conditions pertinent to the subject-matter of the order, including degrees of difference and distinction, and each and all of the tariffs and rates of the companies which are affected by the order, and did not entertain the opinion attributed to it, that the facts, circumstances, and conditions affecting the particular traffic could not be lawfully considered by it as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

It is alleged that the traffic is interstate, and that fuel coal, as compared with other coal, including commercial coal, is a like kind of traffic; that the services performed by the companies in connection with the transportation of fuel coal, as compared to the services performed by them in connection with the transportation of other coal, including commercial coal, are alike and contemporaneous, and are performed under substantially similar circumstances and conditions. It is hence alleged that the companies are violating §§ 2 and 3 of the interstate commerce act [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155].

The final allegation of the Commission is that the matters are within its jurisdiction, and that therefore the correctness of its findings is not open to review in the commerce court or any other court.

Mr. P. J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission:

The court erred in holding that, as a matter of law, the circumstances and conditions pertaining to the transportation of the railroad fuel coal are substantially different from the circumstances and conditions pertaining to the transportation of other coal.

Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 167, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v.

Delaware, L. & W. R. Co. 220 U. S. 235, 252-254, 55 L. ed. 448, 456-458, 31 Sup. Ct. Rep. 392; Capital City Gas Co. v. Central Vermont R. Co. 11 Inters. Com. Rep. 104; Re Contracts of Exp. Cos. 16 Inters. Com. Rep. 246; Hitchman Coal & Coke Co. v. Baltimore & O. R. Co. 16 Inters. Com. Rep. 512.

The commerce court erred in substituting its own judgment for the judgment of the Commission.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 252-254, 55 L. ed. 448, 456-458, 31 Sup. Ct. Rep. 392; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

Assistant Attorney General Denison argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States.

Messrs. W. Irvine Cross and Hugh L. Bond, Jr., argued the cause and filed a brief for appellees:

The United States commerce court had power to review on appeal the construction put by the Commission on the act to regulate commerce, even though the subject-matter of the order was within the jurisdiction of the Commission, and the order did not violate any constitutional right.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

Circumstances and conditions arising before the traffic was delivered by the consignor to the carrier for transportation at point of origin have been recognized as creating an unlike kind of traffic.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The Commission in Pittsburgh Plate Glass Co. v. Pittsburgh, C. C. & St. L. R. Co. 13 Inters. Com. Rep. 87, followed this decision, and in Kemble v. Boston & A. R. Co.

8 Inters. Com. Rep. 118, applied the same principle to shipments for export.

339] *Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case involves the consideration of §§ 2 and 3 of the interstate commerce act [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155]. Section 2 provides that if any common carrier shall directly or indirectly charge or receive from any person or persons a greater or less compensation than it charges or receives from any other person or persons "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination. . . .

Section 3 is directed against giving preferences or advantages to persons, localities, or descriptions of traffic in any respect whatsoever, and subjecting any person, locality, or traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The companies contend that the Commission applied these sections to the facts found by the Commission, none of them being disputed, and that therefore the findings of the Commission are conclusions of law. On the other hand, the Commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the commerce court or any court. Many of its assignments of error are expressions of this view. The other assignments assert in various ways and with many shades of particularity that the commerce court erred in disagreeing with the Commission in regard to the traffics in the different coals, not only in its decision, as indicated in its injunction, in the matters affecting such traffic, but in substituting its judgment for that of the Commission.

The facts are certainly undisputed; or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which 340] may be *called inferences of fact, yet we think "power to make the order, and not the mere expediency of having made it, is the question" presented. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155. In other words, that the question presented by the petition is that the order of the Commission was not merely administrative, but proceeded from a construction of §§ 2 and 3 as applicable to 56 L. ed.

the conditions which affected the traffic in the different kinds of coal, and that the different charges for transportation constituted violations of those sections. The commerce court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the Commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the commerce court gives that court the power to "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission, in a suit brought in the court against the United States." Whether the court erred in its judgment is now to be inquired into.

In its most abstract form the simple statement of the controversy is whether the companies may charge a different rate for the transportation of fuel coal to a given point than for the transportation of commercial coal to the same point. But when we depart from the abstract, complexities appear and attention is carried beyond the consideration of points equally distant, shippers equally circumstanced, and traffic affected by similar circumstances and conditions. It is asserted that there are disparities between the traffics and qualifying circumstances which the Commission disregarded, and, in error, held that traffic in fuel coal could not be distinguished from the traffic in commercial coal.

The Commission insists upon the simplicity of the problem and contends that there is nothing in the conditions of the traffic which dispenses with the clear legal duty of the companies under the interstate commerce act to *carry for all ship- [341 pers alike. The Commission says: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination." Its position, thus expressed, the Commission has supplemented, we are told by the companies, by its Conference Ruling No. 324, published June 19, 1911, as follows: "Division on company coal.—Upon inquiry, held, that it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in

good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The issue of principle between the Commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions, or whether the opposite is true, as decided by the Commission.

The circumstances and conditions which may so far be considered as distinguishing traffics so as to take from different transportation charges the vice of preference have been described by this court. In *Wight v. United States*, 167 U. S. 512, 518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. 822, it is said: "It was the purpose of the section [2] to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." These words are given more precision by the declaration "that the phrase, 'under substantially similar circumstances and conditions,' as found in § 2, refers to matter of carriage, and does not include competition." And this was repeated in *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 161, 166, 42 L. ed. 421, 423, 18 Sup. Ct. Rep. 45. The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392. It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lots "to the ownership of the shipment" as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put; and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations

which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. See *Pennsylvania R. Co. v. International Coal Min. Co.* — L.R.A.(N.S.) —, 97 C. C. A. 383, 173 Fed. 1.

*But what are the differences in the traffics which are asserted by the companies? We have already condensed them from the pleadings, but we may use the expression of their ultimate elements by the companies, omitting, for the time being, the physical differences in facilities. They say: "When the railroad-fuel coal is consigned to the junction point, as provided in the present system of tariffs, the circumstances and conditions that differentiate this traffic from the traffic in commercial coal consigned to the same point are:

"1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

"2. It is in competition with other coals coming upon the line of the consuming road at other points, with which the commercial coal is not in competition.

"3. The transportation service is different, in that commercial coal at the junction point has reached the point of use, while railroad-fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use,—a transportation under the 'commodities clause,' and not under tariff."

These elements the Commission disregarded, it is contended, and that while it found a similarity in the traffics, it did not consider or discuss the two most important features of difference,—"the two features" which make the traffic unlike; that is, that railroad-fuel coal "does not come into competition with the commercial coal, and is in competition with coals coming on the railroad's line at other points." But such features do not affect the carriage, qualify or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service. Such competition, therefore, is as extraneous to the transportation as the instances in the cases cited. And equally so is the other "feature" that the fuel coal may be destined for *con-
sumption beyond the junction point. The circumstances do not alter the fact that it and commercial coal go to the same point,

and are delivered at the same point. There is, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees.

The Commission, as we have seen, especially disclaimed holding that the rate to the junction point must be paid on shipments going beyond that point, and insisted that it only held that the charges to that point should be the same to all shippers, and rates through that point should also be the same to all shippers. And the Commission said that the testimony established that the service as to the coals was alike when they go beyond the junction point. The Commission, therefore, considered alone the service, disregarding circumstances and conditions which were mere accidents of it, and had relation only to the respective shippers.

But the companies say, in criticism of the reasoning and order of the Commission, they are permitted to do indirectly what they want to do directly; that an easy way of evasion of the prohibiting order is to make a joint rate from the point of origin of the fuel coal to its points of consumption, and thereby be enabled "to charge a lower rate for the fuel coal than for the commercial coal between the same points." And further, in display of the easiness with which this can be accomplished and "how readily the Commission's order lends itself to manipulation of rates," they say that they have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point which they do not intend to charge, and call their actual rate to the junction point, based on the special circumstances and conditions, a "division." They then ask if "the Commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends?" If such a situation, ³⁴⁵artfully produced, be used as a device for giving preferences, the Commission might be able to find some means to defeat it. At present we must regard its possibility as relevant as exhibiting a misconception of the Commission's purpose. The Commission has not said what the rate should be, nor has it said, as we have seen, that the local rate to the junction point should be the same as the rate beyond that point. The Commission has ordered equality, and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies

can do or want to do be, as is contended, a "question of words,"—a "question of the nomenclature to be used in tariffs,"—the order of the Commission may still be valid. Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the interstate commerce act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

There are other contentions or rather phases of those that we have considered, and which seek to further emphasize the strength of competition as a circumstance or condition differentiating the traffic. For instance, it is urged that the shipment of the fuel coal to a particular railroad "for the use of that railroad" makes special the traffic. And, further, that "a railroad is not a person," but is "rather in the nature of a geographical division and extends through long distances." Pushing the argument or illustrations farther, it is urged that a railroad company may be distinguished from the physical thing, the railroad itself, and may be a locality where a commodity is used, like "a river, a county, or a city," and be entitled to preferential rates to accommodate competitive conditions. The Import Rate Case (Texas & P. R. Co. v. Interstate Commerce Commission) 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 66, is invoked as analogous. ³⁴⁶We cannot accept the likeness nor the distinctions which are said to establish it. The railroad company cannot be put out of view as a favored shipper, and we see many differences between such a shipper, receiving coal for use in its locomotives, and a nation, as the destination of goods from other nations, for distribution throughout its expanse, on through rates from points of origin.

The point is made that "the Commission's method of filing fuel-coal rates is illegal under § 6 of the interstate commerce act and under the Elkins act [32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309]," and the later act and § 6 are quoted in illustration. The rather vague argument which is urged to support the point lands in the proposition that the right to violate the law as to preference in rates is justified by the law in its requirement of the filing of schedules of rates. However, counsel say that "it all goes back to the same principle" "dealt with under point 1." We have sufficiently discussed point 1.

The decree of the Commerce Court is reversed and the case remanded, with directions to dismiss the petition.

**347]*FREDERICK A. HYDE and Joost H. Schneider, Petitioners,
v.
UNITED STATES.**

(See S. C. Reporter's ed. 347-391.)

Conspiracy — to defraud United States — what constitutes offense — overt act.

1. The union in the unlawful purpose does not alone constitute the crime of conspiracy to defraud the United States, defined by U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, which prescribes as necessary to the offense not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

Courts — venue of crime — conspiracy.

2. The requirement of U. S. Const., 6th Amend., that a criminal prosecution shall be had in the state and district wherein the crime shall have been committed, is satisfied by laying the venue of the trial of an indictment for a conspiracy to defraud the United States, contrary to U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, at the place where an overt act was performed, since such section prescribes as necessary to the offense not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable.

[For other cases, see Courts, 979-992, in Digest Sup. Ct. 1908.]

Courts — venue of crime — conspiracy.

3. The doing of the overt act prescribed by U. S. Rev. Stat. § 5440, as necessary to the offense of a conspiracy to defraud the United States, defined by that section, renders applicable, where the place of the overt act and of the entry into the unlawful combination were in different Federal judicial districts, the provision of § 731 (U. S. Comp. Stat. 1901, p. 585), creating a double jurisdiction where an offense against the United States is begun in one district and completed in another.

[For other cases, see Courts, 979-992, in Digest Sup. Ct. 1908.]

Limitation of actions — continuing offense — conspiracy.

4. A conspiracy to acquire fraudulently school lands from the states of California and Oregon, and to corrupt or use the officers of the General Land Office to make or

facilitate their selection, under the act of June 4, 1897 (30 Stat. at L. 11, chap. 2), in exchange for other public lands, continues, so far as the statute of limitations is concerned, so long as any overt acts are done by any of the conspirators in furtherance of the conspiracy.

[Limitation of criminal prosecutions, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Limitation of actions — continuing offense — conspiracy.

5. Some affirmative action to disavow or defeat the purpose of a continuing conspiracy to defraud the United States, contrary to U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, must be taken by a conspirator in order to prevent the overt acts of any of his associates from continuing him in the conspiracy, so far as the statute of limitations is concerned. Mere failure further actively to participate is not sufficient.

[Limitation of criminal prosecutions, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Limitation of actions — continuing offense — conspiracy.

6. The disclosure by a government employee of the existence of a continuing conspiracy, to which he was a party, to defraud the United States out of its public lands, contrary to U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, is not sufficient to prevent the subsequent overt acts of any of his associates from continuing him in the conspiracy, so far as the statute of limitations is concerned, if, after the first disclosure, he silently acquiesced in the later acts.

[Limitation of criminal prosecutions, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Criminal law — plea in abatement — delay in filing.

7. Pleas in abatement, alleging irregularity in the making up of the list of jurors from which the grand jury which found the indictment was selected, were filed too late where four years had then elapsed since the finding of the indictment, and nearly two years since the filing of the mandate of a Federal circuit court of appeals, sustaining the action of the trial court in overruling a demurrer to the indictment, and a bill of particulars had been demanded and furnished.

[For other cases, see Criminal Law, III. d, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — instructions — conspiracy.

8. Defendants on trial for criminal conspiracy are not prejudiced by an instruc-

NOTE.—As to the commencement of the period of limitations against prosecutions for continuing offenses—see note to Ware v. United States, 84 C. C. A. 519.

On the effect of overt act within limitation period, where the conspiracy was originally formed and the first act committed beyond the period of limitation—see note to Ware v. United States, 12 L.R.A. (N.S.) 1053.

On coercion of disagreeing jury—see note to Darling v. New York, P. & B. R. Co. 16 L.R.A. 643.

As to impeachment of verdict by jurors—see notes to Bartlett v. Patton, 5 L.R.A. 523; Murphy v. Murphy, 9 L.R.A. 820; Hauk v. Allen, 11 L.R.A. 706; and Doss v. Tyack, 14 L. ed. U. S. 428.

tion that the jury might convict any one of the defendants alone, where two were in fact convicted, and it is clearly apparent from the other instructions that the court distinguished the purpose and effect of particular testimony, and did not mean to say that there could be a conspiracy by one defendant alone, but that there should be excluded from consideration as to each of the defendants testimony which might possibly have no relation to him.

[For other cases, see Appeal and Error, VIII. m, 4, in Digest Sup. Ct. 1908.]

Witnesses — direct examination — refreshing recollection.

9. Witnesses for the government in a criminal trial may be asked on direct examination, for the purpose of refreshing their memory, as to conversations with the district attorney, and as to previous written statements made by them to certain government representatives.

[For other cases, see Witnesses, 147-149, in Digest Sup. Ct. 1908.]

Evidence — relevancy — criminal conspiracy.

10. Evidence that certain letters in the possession of the government on the trial of a criminal conspiracy to defraud the United States, which were addressed to one of the defendants under an alias, could only have been obtained by robbing the mails, is not relevant.

[For other cases, see Evidence, XI. 1, in Digest Sup. Ct. 1908.]

Conspiracy — to defraud United States — public lands.

11. Persons conspiring to acquire fraudulently school lands from the states of California and Oregon, and to corrupt or use the officers of the General Land Office to make or facilitate their selection, under the act of June 4, 1897, in exchange for other public land, cannot successfully urge, to escape conviction under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, of conspiring to defraud the United States, that the titles obtained from the states were valid, except as to the particular state which had given the title, and which alone could assail it.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — instructions — conspiracy.

12. The refusal to instruct the jury, on the trial of a conspiracy to defraud the United States by fraudulently obtaining California and Oregon school lands and exchanging them, under the act of June 4, 1897, for other public lands, that want of personal knowledge of the character of the land applied for, or that it was not adversely occupied, did not make the applications void, is not error, where the question is immaterial, the applications being fraudulent because the applicants did not buy for their own benefit.

[For other cases, see Appeal and Error, VIII. m, 4, in Digest Sup. Ct. 1908.]

Appeal — reversible error — instructions — weight of evidence.

13. Comments of the trial court as to the

consideration to be given to written evidence are not ground for reversal where they amount only to the declaration of an abstract principle, and not to an attempt to enforce some particular part of the testimony, and to take from the jury their province of considering it all, or weighing the respective parts.

[For other cases, see Appeal and Error, 5105-5116, in Digest Sup. Ct. 1908.]

Trial — verdict — coercion.

14. The verdict in a prosecution for a criminal conspiracy cannot be said to have been coerced because, after a long trial during which the jurors were not allowed to separate, and after deliberation for three days and nights without result, they were instructed without objection to consider the possibility of the guilt of some of the defendants, following which suggestion they shortly thereafter brought in a verdict of guilty as to two of the four defendants, and not guilty as to the others, the court saying, when giving such instructions, that the law would not recognize a coerced verdict, and that it was not his intention to prolong their deliberations unduly, and that if, after another effort, they could not conscientiously and freely agree upon a verdict, they would be discharged.

[Verdict in criminal cases, see Trial, 860-870, in Digest Sup. Ct. 1908.]

New trial — impeaching verdict — testimony of jurors.

15. The verdict of a jury, convicting two of the four defendants on trial for criminal conspiracy, and acquitting the others, cannot be impeached by the testimony of the jurors tending to show that such verdict was the result of a bargain, or was induced by coercion from the court.

[For other cases, see New Trial, V. b, in Digest Sup. Ct. 1908.]

[No. 447.]

Argued October 23 and 24, 1911. Ordered for reargument before full bench December 18, 1911. Reargued May 3, 1912. Decided June 10, 1912.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a conviction in the Supreme Court of the District of conspiring to defraud the United States. Affirmed.

See same case below, 35 App. D. C. 451. The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause and filed a brief for petitioners:

The conspiracy alone constitutes the offense which is made criminal by U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676. United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Dealy v. United States, 152 U.

S. 539, 546, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; *Bannon v. United States*, 156 U. S. 464-469, 39 L. ed. 494-496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338.

In construing a clause of the Constitution, consideration should be given to the historical circumstances attending its framing; and adoption, and to the contemporaneous understanding of its terms.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429-558, 39 L. ed. 759-811, 15 Sup. Ct. Rep. 673; *Capital Traction Co. v. Hof*, 174 U. S. 5, 6, 43 L. ed. 874, 875, 19 Sup. Ct. Rep. 580; *Knowlton v. Moore*, 178 U. S. 41-95, 44 L. ed. 969-991, 20 Sup. Ct. Rep. 747.

The precautions to preserve the right of trial in the vicinage of the alleged offense, and by a jury of that vicinage, grew out of the efforts of Parliament to take citizens of the Colonies to England for trial for treason.

Constitutional Right to Trial by Jury of the Vicinage, by Henry G. Connor, 57 Am. L. Reg. 197; *People v. Powell*, 87 Cal. 348, 11 L.R.A. 78, 25 Pac. 481; 2 Elliot's Debates, 400; 3 Elliot's Debates, 431, 528; 4 Elliot's Debates, 203, 209.

The cases relied upon by the government of the United States in this case to authorize a prosecution in the District of Columbia for an offense which was committed in California, if it was committed at all, are based upon an English decision that a prosecution for a treasonable conspiracy lies wherever an overt act is alleged to have been committed by any of the alleged conspirators.

Rex v. Bowes, cited in *Rex v. Briscoe*, 4 East, 171.

There is no authority even in England for the contention that persons accused of conspiracy may be tried for that offense wherever a prosecutor sees fit to charge that something was one by somebody to carry it into effect.

Reg. v. Best, 1 Salk. 174; 3 Chitty, Crim. Law, 1142; *Reg. v. Boulton*, 12 Cox, C. C. 87.

Because the provisions of the Constitution under consideration were inserted as a protection against English statutes and English rules of law as to the place of trial of accused persons, it is submitted that English decisions such as *Reg. v. Briscoe* are not authorities in the construction of these provisions.

United States v. Guiteau, 1 Mackey, 539, 47 Am. Rep. 247.

Neither in England nor in the courts in the United States, state or Federal (except, perhaps, the court of quarter sessions in Philadelphia, in *Com. v. Corlies*, 3

Brewst. (Pa.) 575), has it yet been decided in a case where the question was squarely presented that a prosecution for conspiracy lies in any place where any one of the accused does any single act in pursuance of the unlawful agreement. The only other judicial opinions directly in point, which are not *dicta* merely, are those of the three dissenting justices in this court in *Hyde v. Shine*, in 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760, and that of Judge Lacombe in *Ireland v. Henkle*, 179 Fed. 993.

United States v. Smith, 173 Fed. 227; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Noyes v. State*, 41 N. J. L. 418; *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com. v. Corlies*, 3 Brewst. (Pa.) 575; *Com. v. Bartilson*, 85 Pa. 489; *People v. Arnold*, 46 Mich. 275, 9 N. W. 406; *Bloomer v. State*, 48 Md. 521, 3 Am. Crim. Rep. 37; *People v. Adams*, 3 Denio, 206, 45 Am. Dec. 468; *State v. Grady*, 34 Conn. 118; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654; *Fire Ins. Cos. v. State*, 75 Miss. 34, 22 So. 99; *Arnold v. Weil*, 157 Fed. 431; *Robinson v. United States*, 96 C. C. A. 307, 172 Fed. 107; *Ireland v. Henkle*, 179 Fed. 993; *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581, 30 Sup. Ct. Rep. 257; *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; *Davis v. United States*, 43 C. C. A. 448, 104 Fed. 140.

Even if it shall be held that where several have engaged in a conspiracy for their joint benefit, the act of any one of them, or the innocent agent of any one of them, in furtherance of the objects of the unlawful agreement anywhere, carries the conspiracy to that place, it is difficult to see how that principle can apply to a mere employee or to his employer after the employee's limited connection with the matter has been terminated by his discharge from the service of his employer.

United States v. Newton, 52 Fed. 286; *Wharton, Crim. Law*, 1402; *O'Donnell v. People*, 110 Ill. App. 285.

Even if the supreme court of the District of Columbia had jurisdiction of a prosecution against Hyde and Schneider for conspiracy to defraud the United States, because of the commission in that District of the overt acts referred to in the indictment, the judgment should be reversed because the crime proved is not the crime charged. If it was intended by the government to prosecute the defendants named in the indictment for a conspiracy that was entered into in California, the indictment should have informed them that that was what they were to meet. They could not legally be held for trial by the misleading

charge that what they were to face was a conspiracy entered into in this District. For that reason, if for no other, the court should have granted the instruction directing the jury to acquit all the defendants.

United States v. Burr, *Brunner*, Col. Cas. 493, Fed. Cas. No. 14,692, Fed. Cas. No. 14,693; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588, 593; *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 161; *United States v. Marx*, 122 Fed. 964.

Even in civil cases this court has frequently expressed its determination that statutes of limitation shall be strictly enforced.

Bell v. Morrison, 1 Pet. 351, 360, 7 L. ed. 174, 178; *Pillow v. Roberts*, 13 How. 472, 477, 14 L. ed. 228, 231; *Shepherd v. Thompson*, 122 U. S. 231, 234, 236, 30 L. ed. 1156, 1157, 7 Sup. Ct. Rep. 1229; *Campbell v. Haverhill*, 155 U. S. 610, 617, 39 L. ed. 280, 282, 15 Sup. Ct. Rep. 217; *Wilson v. Iseminger*, 185 U. S. 55, 60, 46 L. ed. 804, 806, 22 Sup. Ct. Rep. 573.

It is necessary for the government, in a prosecution for conspiracy, to establish affirmatively that the persons on trial "consciously participated" in carrying out the alleged conspiracy within the period covered by the statute of limitations.

Ware v. United States, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 Ann. Cas. 233; *United States v. Eccles*, 181 Fed. 906; *United States v. Greene*, 115 Fed. 350, 146 Fed. 888, 85 C. C. A. 251, 154 Fed. 401; *Ochs v. People*, 25 Ill. App. 379, 124 Ill. 399, 16 N. E. 662.

The plea in abatement was seasonably filed.

1 *Bishop*, *Crim. Proc.* 746; *Deane v. Echols*, 2 App. D. C. 522; *Thompson & M. Juries*, § 555; *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; *Rodriguez v. United States*, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; *Louisville, H. & St. L. R. Co. v. Schwab*, 127 Ky. 87, 105 S. W. 110; *Dutell v. State*, 4 G. Greene, 125; *Stokes v. State*, 24 Miss. 624; *Clare v. State*, 30 Md. 164.

The court erred in allowing the district attorney, on direct examination of his own witnesses, to examine them as to previous statements made by them to the representatives of the government, and in permitting counsel for the government, in the final argument to the jury, to use such testimony as to prior statements of the witnesses as evidence tending to show the truth of the statements.

Doe ex dem. Church v. Perkins, 3 T. R. 750; *Ellicott v. Pearl*, 10 Pet. 412, 441, 9 L. ed. 475, 487; *Walsh v. Rogers*, 13 How. 283, 287, 14 L. ed. 147, 148; *Maxwell v.* 56 L. ed.

Wilkinson (Parsons v. Wilkinson) 113 U. S. 656, 658, 28 L. ed. 1037, 1038, 5 Sup. Ct. Rep. 691; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; *Putnam v. United States*, 162 U. S. 687, 691, 40 L. ed. 1118, 1120, 16 Sup. Ct. Rep. 923; *United States v. Cross*, 9 Mackey, 377; *Richardson v. Golden*, 3 Wash. C. C. 109, Fed. Cas. No. 11, 782; *Emerson Co. v. Nimocks*, 88 Fed. 280; *People v. Elco*, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; *Cox v. Eayres*, 55 Vt. 33, 45 Am. Rep. 583; *O'Neale v. Walton*, 1 Rich. L. 234; *State v. Jackson*, 7 S. C. 283, 24 Am. Rep. 476, 3 Am. Crim. Rep. 50.

After the grant was made by the state in these cases, the state did not have even an equitable estate in the land described in the deed. It has no title, legal or equitable, which it could transmit to others. There remained in it only the right to file a bill in equity to set aside the deed. Such a right does not constitute an equitable interest in land, and is not assignable.

Story, *Eq. Jur.* § 1040; *Dickinson v. Seaver*, 44 Mich. 631, 7 N. W. 182; *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105; *Whitney v. Kelley*, 94 Cal. 151, 15 L.R.A. 813, 28 Am. St. Rep. 106, 29 Pac. 624; *Prosser v. Edmonds*, 1 *Younge & C. Exch.* 496; *French v. Shotwell*, 5 *Johns. Ch.* 565; *Graham v. La Crosse & M. R. Co.* 102 U. S. 154, 26 L. ed. 108; *Crocker v. Bellangee*, 6 Wis. 667, 70 Am. Dec. 489; 3 *Pom. Eq. Jur.* § 1276.

Deeds such as the court in its instruction told the jury are invalid are absolutely unassailable when the interests of a bona fide purchaser are involved.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 314, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 41, 36 L. ed. 66, 12 Sup. Ct. Rep. 362; *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; *Corpe v. Brooks*, 8 Or. 222; *Robertson v. State Land Board*, 42 Or. 183, 70 Pac. 614; *Miller v. Wattier*, 44 Or. 347, 75 Pac. 209; *Turner v. Donnelly*, 70 Cal. 604, 12 Pac. 469; *Doll v. Meador*, 16 Cal. 295; *Harrington v. Goldsmith*, 136 Cal. 169, 68 Pac. 594; *Frasher v. O'Connor*, 115 U. S. 102, 111, 29 L. ed. 311, 314, 5 Sup. Ct. Rep. 1141; *United States v. Clark*, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; *United States v. Conklin*, 169 Fed. 183.

The court must keep its hands off when the weight of evidence is involved.

McLanahan v. Universal Ins. Co. 1 Pet. 170, 182, 7 L. ed. 98, 104; *Tracy v. Swartwout*, 10 Pet. 80, 9 L. ed. 354; *Nudd v. Burrows*, 91 U. S. 426, 439, 23 L. ed. 286,

289; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Hicks v. United States*, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144; *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; *Smith v. United States*, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *Brown v. United States*, 164 U. S. 221, 41 L. ed. 410, 17 Sup. Ct. Rep. 33; *Metropolitan R. Co. v. Martin*, 15 App. D. C. 552; *State v. Gleim*, 17 Mont. 17, 31 L.R.A. 297, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; *Bradley v. Gorham*, 77 Conn. 211, 66 L.R.A. 934, 58 Atl. 698; *Post v. United States*, 70 L.R.A. 989, 67 C. C. A. 569, 135 Fed. 1; *State v. McCullough*, 114 Iowa, 532, 55 L.R.A. 378, 89 Am. St. Rep. 382, 87 N. W. 503; *State v. Willing*, 129 Iowa, 72, 105 N. W. 355; *Nelson v. McLellan*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747; *Nelson v. Vorce*, 55 Ind. 455; *Fulwider v. Ingels*, 87 Ind. 420; *State v. Fisk*, 170 Ind. 166, 83 N. E. 995; *State v. Musgrave*, 43 W. Va. 676, 28 S. E. 813; *Ryder v. State*, 100 Ga. 533, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *Merritt v. State*, 107 Ga. 679, 34 S. E. 361; *Knapp v. State*, 25 Ohio C. C. 571, 4 Ohio C. C. N. S. 184; *State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689, 66 N. E. 524.

The court erred in refusing to permit the examination of jurors for the purpose of showing that their verdict was the result of a bargain brought about by what, under the circumstances, amounted to coercion by the court.

Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *United States v. Reid*, 12 How. 366, 13 L. ed. 1025; *Bucklin v. United States*, 159 U. S. 682, 40 L. ed. 305, 16 Sup. Ct. Rep. 182; *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258; *Thomas v. Chapman*, 45 Barb. 98; *Sargeant v. —*, 5 Cow. 106; *State v. Bybee*, 17 Kan. 462, 2 Am. Crim. Rep. 449; *People v. Sheldon*, 156 N. Y. 285, 41 L.R.A. 644, 66 Am. St. Rep. 564, 50 N. E. 840, 11 Am. Crim. Rep. 545; *State v. Chambers*, 9 Idaho, 673, 75 Pac. 274; *Burton v. United States*, 196 U. S. 283, 307, 49 L. ed. 483, 490, 25 Sup. Ct. Rep. 243; *Simmons v. Fish*, — Mass. —, 97 N. E. 102.

Solicitor General **Lehmann** argued the cause and filed a brief for respondent:

The offense is made up of the corrupt agreement and the overt act to further it, and it is not complete without the overt act.

United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14,983; *United States v. Boyden*, 1 Low. Dec. 266, Fed. Cas. No. 14,632; *United States v. Nunnemacher*, 7 Biss. 120, Fed. Cas. No. 15,902; *United*

States v. Sacia, 2 Fed. 757; *United States v. Bayer*, 4 Dill. 410, Fed. Cas. No. 14,—547; *United States v. Hirsch*, 100 U. S. 33, 34, 25 L. ed. 539, 540; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; *United States v. Demmee*, 3 Woods, 50, Fed. Cas. No. 14,948; *United States v. Bradford*, 148 Fed. 413; *O'Connell v. Reg.* 1 Cox, C. C. 472, 11 Clark & F. 155, 9 Jur. 25; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 328; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124.

Even in common-law cases, and under statutes requiring no overt act, jurisdiction of the conspiracy exists in any locality, as to all the conspirators, in which an overt act has been committed by any of them, for even at the common law, while the unlawful agreement satisfies the definition of the crime, it does not exhaust it.

Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; 1 Russell, Crimes, 7th Eng. & 1st Can. ed. 1910, p. 179; *Rex v. Brisac*, 4 East, 164, 7 Revised Rep. 551; *Reg. v. Quinn*, 19 Cox, C. C. 78; *Reg. v. Connolly*, 25 Ont. Rep. 151; *Archbold*, Crim. Pl. 1910, p. 1420; 1 Gabbett, Crim. Law. 257; *Wharton*, Crim. Law, 10th ed. 1397; *Bishop*, Crim. Proc. 4th ed. § 61; 6 Am. & Eng. Enc. Law, 2d ed. 844; 8 Cyc. 687; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Summerfield*, 48 Misc. 242, 96 N. Y. Supp. 502; *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com. v. Corlies*, 3 Brewst. (Pa.) 575; *Com. v. Bartilson*, 85 Pa. 489; *Noyes v. State*, 41 N. J. L. 418; *State v. Nugent*, 77 N. J. L. 86, 71 Atl. 485; *Bloomer v. State*, 48 Md. 535, 3 Am. Crim. Rep. 37; *People v. Arnold*, 46 Mich. 275, 9 N. W. 406; *Fire Insurance Cos. v. State*, 75 Miss. 24, 22 So. 99; *State v. Hamilton*, 13 Nev. 393; *International Harvester Co. v. Com.* 137 Ky. 668, 126 S. W. 352; *Pearce v. Territory*, 11 Okla. 446, 68 Pac. 504; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654; *Raleigh v. Cook*, 60 Tex. 441; *United States v. Newton*, 52 Fed. 275; *United States v. Greene*, 115 Fed. 343; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Ex parte Hoffstot*, 180 Fed. 241; *United States v. Bradford*, 148 Fed. 413; *United States v. Brace*, 149 Fed. 874; *United States v. Barber*, 157 Fed. 889; *Ware v. United States*, 12 L.R.A. (N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 Ann. Cas. 233; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417; *Lorenz v. United States*, 24 App. D. C. 337.

The rule as to venue declared by the ad-

judicated cases, and by U. S. Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585, does not contravene the Constitution of the United States.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Haas v. Henkel*, 216 U. S. 462, 473, 54 L. ed. 569, 575, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

Personal presence is not essential to determine the locality of an offense.

People v. Adams, 3 Denio, 190, 45 Am. Dec. 468; *Com. v. Harvey* (Mass.) 8 Am. Jur. 69; *State v. Grady*, 34 Conn. 118; *Ex parte Rogers*, 10 Tex. App. 667, 38 Am. Rep. 654; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688; 6 Ann. Cas. 362; *Strassheim v. Daily*, 221 U. S. 280, 55 L. ed. 735, 31 Sup. Ct. Rep. 558.

The witnesses were properly permitted to refresh their memory.

Putnam v. United States, 162 U. S. 687, 694, 40 L. ed. 1118, 1121, 16 Sup. Ct. Rep. 923.

And the mode of examination which may be pursued in any particular case is within the sound discretion of the trial court.

St. Clair v. United States, 154 U. S. 134, 150, 38 L. ed. 936, 942, 14 Sup. Ct. Rep. 1002.

The allegations of the motion for new trial really do no more than disparage the discussions of the jury room in respect of the accuracy and propriety of verbal expression. Few verdicts could stand against such criticism. And the law has shielded them against it.

Perry v. Bailey, 12 Kan. 545; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Mattox v. United States*, 146 U. S. 140, 148, 149, 36 L. ed. 917, 920, 921, 13 Sup. Ct. Rep. 50; *Wright v. Illinois & M. Teleg. Co.* 20 Iowa, 210; *Gottlieb Bros. v. Jasper*, 27 Kan. 775.

Mr. Justice McKenna delivered the opinion of the court:

This writ brings up for review a judgment of the court of appeals of the District of Columbia, affirming a conviction of petitioners for the crime of conspiracy.

The main question in the case is the jurisdiction of the supreme court of the District of Columbia, where the trial and conviction were had, depending upon the place where the conspiracy, if any, was

formed and the overt acts, if any, were done to effect its purpose. What the indictment charges is a fundamental element in the question.

Before proceeding to consider the indictment it may be well to state the laws and conditions to which the conspiracy charged in the indictment relates. By acts of Congress dated, respectively, March 3, 1853 (10 Stat. at L. 246, chap. 145), and February 14, 1859 (11 Stat. at L. 383, chap. 33), the states of California and Oregon were granted, for the purpose of public schools, all of sections 16 and 32 in each township, with certain exceptions unimportant to mention. The states authorized the sale of the land so granted for \$1.25 per acre, California limiting the right of purchase *by one person (of land not[350 suitable for cultivation) to 640 acres. The limitation in Oregon was 320 acres. The states required applicants to be citizens of the United States and of the states, that the purchases be for their own benefit, and a statement from each applicant that he had made no contract for the sale or disposition of the lands applied for.

Subsequent to these grants and prior to the year 1897 most of the lands had been taken up by settlers. Those not taken up were in the mountainous regions and were regarded as valueless.

By an act of Congress approved March 3, 1891 (26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537), the President was authorized to create forest reservations, and by a subsequent act (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), it was provided "that in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent."

The charge of the indictment is that the defendants in the case conspired to use the privilege of this act after fraudulently acquiring school sections from California and Oregon, and conspired to corrupt or use the officers of the General Land Office in Washington to make or facilitate the selection in exchange for such sections lands of the United States, and thereby defraud the United States.

Its allegations, omitting repetitions and redundancies, are as follows:

Frederick A. Hyde and John A. Benson were engaged from the 24th of October, 1901, until the 1st of February, 1904, in the city of San Francisco, state of Cali-

fornia, in the business of obtaining from the United States and appropriating, in the manner hereinafter set forth, the possession and use of and title to public 351]lands of the United States outside forest reserves established under the laws of the United States, in exchange for and in lieu of lands lying within such reserves and known as school lands, by them obtained from the states of California and Oregon in the manner hereinafter set forth. Henry P. Dimond and Joost H. Schneider were, during said periods, employees of Hyde and Benson in the matter of their business, Dimond as agent and attorney and Schneider as agent. Woodford D. Harlan and William E. Valk were, before and during such period, employees of the United States, holding official positions in the General Land Office at the city of Washington, in the District of Columbia, paid salaries as such, and, respectively, charged with duties pertaining to the disposal of the public lands lying outside of forest reserves established under the laws of the United States and open to selection under said laws, in exchange for and in lieu of lands within such reserves.

Benjamin F. Allen was, before and during such period, an employee of the United States, that is, a forest superintendent, and Grant I. Taggart a forest supervisor.

Hyde, Benson, Dimond, and Schneider during such period, to wit, on the 30th day of December, 1901, at Washington, District of Columbia, unlawfully did conspire, combine, and confederate together, and with other persons unknown, to defraud the United States out of the possession and use of and title to divers tracts of the public lands of the United States open and to be opened to selection in lieu of lands within forest reserves established and to be established in California and Oregon, by means of false and fraudulent practices whereby Hyde and Benson were to obtain fraudulently from those states title to and possession of school lands within the limits of such reserves which were open to purchase from those states by residents thereof, being citizens of the United States or having declared their intention to become such, under the laws thereof, in quantities for 352]each resident not exceeding 640 acres in California and 320 acres in Oregon, upon appropriate application, supported by affidavit showing his qualifications to make such purchase, and, amongst other things (as before and during the said period was required by the laws of the said states), his intention to purchase in good faith and for his own benefit, and that he had made no contract or agreement to sell the same.

These applications were to be made in the names of fictitious persons and in the names of persons not really desiring or qualified to purchase said lands. The use of the last-mentioned names for such purpose Hyde and Benson were to procure by paying or causing to be paid to such persons small sums of money, and by falsely representing or causing to be represented to some of them that they were merely disposing of their rights to purchase such school lands.

The proposed use of fictitious affidavits is set out at considerable length, with the names that were used, the purpose being charged to obtain the lands according to the conspiracy detailed, obtain title from the United States with the intention of disposing of the same to the general public, and to defraud the United States "to the profit, gain, and use of themselves."

Hyde and Benson were, during said period, to induce and procure, and take advantage of the fact that they had induced and procured, the said Woodford D. Harlan and William E. Valk, by paying them respectively divers sums of money for that purpose, corruptly to furnish information concerning the status in the General Land Office of all matters pertaining to their said business, and especially to their false and fraudulent selections, and to expedite, contrary to their duty, the matters which should be pending in the Land Office pertaining to their business and the examination of such selections made and to be made by Hyde and Benson, and by securing the approval thereof in advance and otherwise favoring and assisting Hyde and Benson in their fraudulent practices. This *charge is dwelt upon at some length, [353 and it is charged, besides, that Allen, the forest superintendent, and Taggart, the forest supervisor, had been and were to be corrupted, whereby they were to give such advice and information as to including or not including lands within a forest reserve as should be to the interest of Hyde and Benson.

Hyde, Benson, Dimond, and Schneider, as a part of their conspiracy, were to secure by the means detailed and other means too numerous and diverse to be described, the establishment of forest reserves in California and Oregon in such localities in those states as would best effect the object of the conspiracy, by reason of the fact that large quantities of school lands in such localities were still undisposed of and open to purchase from said states, respectively.

Dimond, for money and other valuable considerations paid by Hyde and Benson, was, as attorney, to aid and assist Hyde

and Benson in their business by appearing in their behalf before the appropriate officers of the Department of the Interior and of the General Land Office, from time to time, to urge speedy action by those officers upon the matters there pending pertaining to their said business, and to further said business in the manner herein-after shown, he, Dimond, knowing full well the fraudulent character of the business.

Schneider, in the capacity of employee of Hyde and Benson, was to aid and assist them by obtaining in the states of California and Oregon the fictitious affidavits and the affidavits of those persons who would permit the use of their names as stated, he knowing, while so assisting, the fraudulent character of the applications and the purpose for which they and the affidavits were to be used.

The indictment contains the description of the lands which it was the object of the conspiracy to secure, amounting to 6,800 acres, of which 3,400 acres were selected 354] in *the name of C. W. Clarke; all of the lands being in forest reserves then lately before established under the laws of the United States.

On December 30, 1901, Dimond entered his appearance in the General Land Office as attorney for Clarke.

The other counts in the indictment, numbering 41, are substantially alike in their general allegations, differing as to their incidents. They charge, as in the first count, a conspiracy formed in Washington by the same parties and for the same purpose, and to be executed in the same way in regard to lands in the various districts of the respective states, and that, in pursuance of the conspiracy, certain overt acts were done. Most of the overt acts charged consisted in the filing in the General Land Office by Dimond, as attorney for Hyde, his appearance in different selection cases, in some of which he urges and sets forth the reasons for favoring a speedy action.

In counts 35 to 40, both inclusive, the overt act charged is the payment of money by Benson to either Valk or Harlan, alleged in the indictment to be salaried officials of the General Land Office and charged with duties pertaining to the exchange of lands of private claim or ownership included in a forest reserve or other public land.

Two overt acts are charged against Hyde, one of which was committed on July 29, 1903, by causing to be transmitted by mail from the United States land office at Vancouver to the Commissioner of the General Land Office at Washington a written notification to the Commissioner, signed by Hyde for C. W. Clarke, that the latter up-

pealed to the Secretary of the Interior from a certain decision of the Commissioner, with an assignment of errors, and the second of which was that Hyde, on March 31, 1902, caused to be presented by the hand of Dimond a paper signed by him, Hyde, notifying the Commissioner that one S. E. Kieffer was authorized and appointed as Hyde's *agent to post notices on[355 the ground described in a certain application, and to make affidavit of posting.

Shortly after the indictment was found, removal proceedings were instituted against Hyde and Dimond before a United States commissioner in California, who, after taking testimony, ordered their removal. The United States circuit court denied writs of habeas corpus and certiorari, and its action was affirmed by this court. *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

There was a demurrer to the indictment, which was overruled, the ruling upon which was affirmed by the court of appeals of the district. 27 App. D. C. 362.

Motions to require the government to elect on which counts it would proceed were filed and also motions for a bill of particulars. The latter was granted and the bill of particulars filed; the former was overruled.

Pleas in abatement were filed, to which demurrers were sustained, and finally the defendants were arraigned and pleas of not guilty made and the case proceeded to trial. Benson and Dimond were acquitted. Hyde and Schneider were convicted on all counts except 29 and 33, which were abandoned by the government. Hyde was sentenced to two years' imprisonment and to pay a fine of \$10,000, and Schneider was sentenced to imprisonment for one year and two months and to pay a fine of \$2,000.

Their conviction and sentence were affirmed by the court of appeals. 35 App. D. C. 451.

The case is here on certiorari.

The Attorney General assented to the granting of the writ, he saying that "the determination of this case depends upon the principles of law governing conspiracy," and that in view of the decisions of the lower courts and of the numerous prosecutions under the conspiracy statute, "it was of vital importance to the United States, as *well as to its citizens, that these[356 principles be definitely settled by this court."

The petitioners asked the court to review the case for the purpose of having it decide certain questions of law which they characterized as "important and fundamental," one of which, counsel says, granting the writ took out of the case. Of those

remaining, one is "as to the effect of an overt act in giving jurisdiction in an indictment for conspiracy under § 5440 (U. S. Comp. Stat. 1901, p. 3676);" and the other is "as to the effect of overt acts by some of the accused in depriving the petitioners of the benefit of the statute of limitations."

There are other questions arising from the conduct of the trial and upon which separate briefs are filed. We postpone their consideration until after the more important questions, which induced the certiorari, are discussed.

First, as to the overt acts in giving jurisdiction:

It will be observed that the indictment charges that the conspiracy was formed in the District of Columbia, and that certain of the overt acts were performed there and others in California. A question arose at the termination of the trial and before the case was submitted to the jury as to whether the charge of the indictment was sustained. Defendants moved to take the case from the jury because there was no evidence to support the allegation that the defendants conspired within the District of Columbia. The court denied the motion, but said, in passing on it, that it was "not claimed on the part of the government that the defendants had conspired within this District in any other sense than that overt acts were committed by them here." The contention was, the court said further, "that if any overt act was committed here, the defendants thereby conspired here." So understanding the contentions and the proof, the court expressed its views as follows: "If these defendants got together in California and planned to defraud the United States out of its lands by the means 357] charged in the indictment, and *in pursuance of that plan sent Dimond here to get the titles from the government, they were acting within the District of Columbia as much as if they had come and done the thing themselves." And subsequently the United States attorney assented to the proposition that the government could not prevail except on the theory that it was sufficient to show an overt act in the District of Columbia, and the court said "that if that theory was wrong, of course they failed."

The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into, or whether it may be at the place where the overt act is performed, the 6th Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the "district wherein the crime shall have been committed."

The crime of conspiracy is defined by § 5440 of the Revised Statutes as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime, and that the requirement of an overt act does not give the offense criminal quality or intent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a *locus penitentie*). The following, among other cases, are cited in support of this view: *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *Pettibone v. United States*, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; **Dealy v. United States*, 152 U. S. 539, 546, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; *Bannon v. United States*, 156 U. S. 464-469, 39 L. ed. 494-496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338, and the opinion of this court when this case was here before, 199 U. S. 62-76, 50 L. ed. 90-94, 25 Sup. Ct. Rep. 760.

It must be conceded at the outset that there is language in those cases that, considered by itself, justifies the contention based upon them. In *United States v. Britton*, for instance,—and the language of the case is resorted to for the genesis of the doctrine and makes strongest for the contention,—Mr. Justice Woods, speaking for the court said:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentie*, so that before the act [is] done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows, as a rule of criminal pleading, that in an indictment for conspiracy under § 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one

or more of the conspirators in furtherance of the object of the conspiracy. Reg. v. King, 7 Q. B. 782; Com. v. Shedd, 7 Cush. 514."

The case was followed in *Pettibone v. United States* to the effect "that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by any one or more of the conspirators in furthering the object of the conspiracy."

In *Dealy v. United States* it is said that "the gist of the offense is the conspiracy. . . . Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt acts in pursuance thereof may have been done anywhere."

359] *Indeed, it must be said that the cases abound with statements that the conspiracy is the "gist" of the offense or the "gravamen" of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by § 5440, supra. It is true that the conspiracy—the unlawful combination—has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but § 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in *Hyde v. Shine*, 199 U. S. 72, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760, that an overt act is necessary to complete the offense. And so it was said in *United States v. Hirsch*, 100 U. S. 34, 25 L. ed. 540, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete, another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial
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tribunals, such tribunals only then acquiring jurisdiction.

A question may be raised as to the extent of the agency between conspirators, but we need not enter into that broad inquiry. As far as the case at bar is concerned, it *may be admitted that the[360 act must have the conspiracy in view and have some power to effect it. In the present case the field of operation and its consummation were to be and were in the states of California and Oregon and in the District of Columbia, where the General Land Office is situated. The action of the latter was to be induced or influenced; and this might be through deception, it might be through fraud, or it might be through innocent agents and acts of themselves having no illegality, but effectually causing and moving official action to the consummation of the end designed and contemplated. Overt acts of all these kinds are charged. The bribery and deception of the officers, the intervention of attorneys, and the seemingly harmless mailing of information and directions all are charged and all had some relation to the scheme devised and were steps to its accomplishment. The powers of the Land Office were necessarily to be invoked and proceedings therein instituted and prosecuted by acts innocent, indeed, of themselves, taking only criminal taint from the purpose for which they were done. Indeed, is not this so of acts done in the execution of any crime? Discharging a loaded pistol at a target is an innocent pastime; discharging a loaded pistol at a human being, with felonious intent, takes a quality from such intent and may constitute murder.

If the unlawful combination and the overt act constitute the offense, as stated in *Hyde v. Shine*, marking its beginning and its execution or a step to its execution, § 731 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 585) must be applied. That section provides that "when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein." This provision takes an emphasis of signification from the fact *that it was[361 originally a part of the same section of the statute which defined conspiracy,—that is, § 30 of the act of March 2, 1867 (14 Stat. at L. 484, chap. 169, U. S. Comp. Stat. 1901, p. 585). Nor has the provision lost the strength of meaning derived from such association by its subsequent separation, for it is provided in § 5600 of the Revised Stat-

utes (U. S. Comp. Stat. 1901, p. 3751) that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

Section 731 was applied in *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034, to the offense of unlawfully using the mails. It was decided that an offense committed by mailing a letter was continued in the place where the letter was received, and triable in the district court of the United States having jurisdiction in such place. The case was cited in *Benson v. Henkel*, 198 U. S. 1, 15, 49 L. ed. 919, 924, 25 Sup. Ct. Rep. 559, which was concerned with extradition proceedings against one charged with the crime of bribery, alleged to have been committed by mailing a letter in the state of California, directed to certain officers of the General Land Office in the District of Columbia. It was objected to the removal of the defendant to the District of Columbia for trial that the crime was committed, if at all, in California. The contention was held untenable under the ruling in *Re Palliser*. The strong expression of counsel for the defendants may therefore be turned from derision of to the support of the view that crime, even conspiracy, may be carried from one place to another in the "mail pouches." And we may ask, in passing, may not a conspiracy be formed through the mails, constituted by letters sent by persons living in different states? And, if so formed, we may further ask, to which state would the conspiracy be assigned? In such cases must the law come forward with some presumption or fiction, if you please, to give locality to a union of minds between men who were never at the same place at the same time? The statute cuts through such puzzles and makes the act of a conspirator, which necessarily has a definite place without the aid of presumption or fiction, the legal inception of guilt, inculcating all and subjecting all to punishment.

Re Palliser was also applied in *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, in which it was held that there was jurisdiction in Missouri of a criminal charge against Burton for agreeing in that state to receive prohibited compensation for certain services to be rendered by him while he was a United States Senator, the offer being carried to Missouri by an agent and accepted there, Burton not being personally present in the state. The court said,

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through Mr. Justice Harlan (page 387): "The constitutional requirement is that the crime shall be tried in the state and district where committed, not necessarily in the state or district where the party committing it happened to be at the time. This distinction was brought out and recognized in *Re Palliser*, 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034." And after stating that the agreement between the parties was completed at the time of the acceptance of Burton's offer at St. Louis, he added: "Then the offense was committed, and it was committed at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed." And the contention was rejected "that an individual could not, either in law or within the meaning of the Constitution, commit a crime within a state in which he is not physically present at the time the crime is committed."

This court has recognized, therefore, that there may be a constructive presence in a state, distinct from a personal presence, by which a crime may be consummated. And if it may be consummated, it may be punished by an exercise of jurisdiction; that is, a person committing it may be brought to trial and condemnation. And this must be so if we would fit the laws and their administration to the acts of men, and not be led away by mere "bookish theorick." We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place,—carrying to the whole area of its operations the guilt of its conception and that which follows guilt,—trial and punishment. As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. The guilty purpose must be put into a guilty act.

We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the government a power which may be abused, and we do not wish to put out of view such possibility. But there are counter considerations. It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his

fellows in secret, and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every state in the Union and defeat punishment in all. And the suppositions are not fanciful, as illustrated by a case submitted coincidentally with this. *Brown v. Elliott*, 225 U. S. 392, post, 1136, 32 Sup. Ct. Rep. 812. The possibility of such a result repels the contention and demonstrates that to yield to it would carry technical rules and rigidity of reasoning too far for the practical administration of criminal justice. We see no reason why a constructive pres- 364]ence should not be assigned *to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete, and do with it as with other crimes which are commenced in one place and continued in another. Nor do we think that the size of our country has become too great for the effective administration of criminal justice. We held in *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428, that the transportation of merchandise for less than the published rate is, under the Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309), a continuing offense, and that the 6th Amendment of the Constitution of the United States, providing that an accused shall be tried in the state and district where the crime is committed, did not preclude a trial of the offense in any of the districts through which the transportation was conducted. See also *Haas v. Henkel*, 216 U. S. 462, 473, 54 L. ed. 569, 574, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

Cases are cited which oppose the views we have expressed and others to support them. In *Robinson v. United States*, in the circuit court of appeals of the eighth circuit, the question was directly presented. 96 C. C. A. 307, 172 Fed. 105. The conspiracy passed on was alleged in the indictment to have been entered into in Cincinnati and Chicago, the overt acts set out were proved to have been committed in Minneapolis, and the evidence showed that it was the intention of the conspirators to carry out their conspiracy at Minneapolis. The trial court was moved to direct a verdict for the defendants if the jury found that the agreement was entered into in Cincinnati and Chicago, and was complete when the parties went into the district of Minnesota. The instruction was refused, and, the defendants having been convicted, the refusal was assigned as error, in the circuit court of appeals, based 56 L. ed.

on the provisions of the Constitution of the United States giving those accused of crime the right to trial by jury of the state and district wherein the crime shall have been committed.

*The court, passing on the ruling of [365 the trial court, said by District Judge Carland, and we quote its language to avail ourselves not only of the citation of cases, but of the comments upon them:

"At common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design. 1 Archbold, *Crim. Pr. & Pl.* 8th ed. p. 226. Where a conspiracy was formed at sea, and an overt act done in Middlesex county, it was held that the venue was properly laid in that county. *Rex v. Brisac*, 4 East, 164. In the case of *Rex v. Bowes*, referred to in the above case, the conspirators were tried in Middlesex, though there was no proof of an actual conspiracy in that county, and the acts and doings of some of them were wholly in other counties. In *People v. Mather*, 4 Wend. 261, 21 Am. Dec. 122, Marcy, J., in delivering the opinion of the court, said:

"I admit that is the illegal agreement that constitutes the crime. When that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown or ever performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they renew, or perhaps, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. In this respect, conspiracy resembles *treason [366 in England, when directed against the life of the King. The crime consists in imagining the death of the King. In contemplation of law, the crime is committed wherever the traitor is and furnishes proof of his wicked intention by the exhibition of any overt act.'

"To the same effect are *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Noyes v. State*, 41 N. J. L. 418; *Com. v. Corlies*, 3 Brewst. (Pa.) 575.

"If this was the law of venue in con-

spiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force under § 5440, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), as the offense described therein for all practical purposes is not complete until an overt act is committed. . . . It seems clear, then, that whether we place reliance on the common law or on § 731, Rev. Stat. (U. S. Comp. Stat. 1901, p. 585), the venue of the offense was correctly laid in the district of Minnesota, and the evidence sustained the allegation of the indictment."

To the cases cited by the learned court these may be added: *State v. Nugent*, 77 N. J. L. 84, 86, 71 Atl. 485; *Bloomer v. State*, 48 Md. 521, 3 Am. Crim. Rep. 37; *People v. Arnold*, 46 Mich. 275, 9 N. W. 406; *Fire Ins. Cos. v. State*, 75 Miss. 24, 22 So. 99; *State v. Hamilton*, 13 Nev. 386; *International Harvester Co. v. Com.* 137 Ky. 668, 674, 126 S. W. 352; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654, and *Raleigh v. Cook*, 60 Tex. 438.

There are cases in the lower Federal courts which may be cited for and against the demarcation of the conspiracy and the overt act. To compare and comment on them would extend this opinion to too great length. We may say the same of the special citation of cases by defendants.

But it is said that the crime charged is not the crime proved, even if it be assumed that the overt act is part of the crime of conspiracy under § 5440 (U. S. Comp. Stat. 367]1901, p. 3676). In support of *the contention it is said that the averment of the indictment is that the conspiracy itself was entered into in the District of Columbia and that the overt acts were committed there. It is conceded by the government that the conspiracy was originally formed, not in the District of Columbia, but in the state of California, and we have seen that it was the view of the trial court that the defendants had not conspired within the District of Columbia "in any other sense than that overt acts were committed by them" there.

The contention is answered by the views which we have already expressed. As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed, so far as the jurisdiction of the court in which the indictment is found and tried is concerned. This is established by the cases which have been cited, and the question will be considered further in *Brown v. Elliott* and *Moore v. Elliott*, cases submitted coincidently with this

[225 U. S. 392, post, 1136, 32 Sup. Ct. Rep. 812].

The fifth, sixth, seventh, and eighth assignments of error invoke the statute of limitations in behalf of Hyde and Schneider,

The plea of the statute as affected by overt acts was considered in *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124, where it was declared that a conspiracy may be a continuing one, and the doctrine is applicable to the case at bar unless there is something special in the facts regarding Hyde and Schneider which constitutes a defense as to them. This is asserted. It is contended that the relation of Schneider to the conspiracy was only that of one rendering service as a servant of his master (Hyde), in consideration of the salary paid to him by his master, and that he had not, within three years before the finding of the indictment, participated in any way in the carrying out of the master's scheme, the subject of the conspiracy. And from this it is contended the question arises whether Hyde is not also entitled to the protection of the statute of limitation *in so far as he is charged[368 with conspiring with his employee, Schneider.

But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which preferred a certain reward rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participation in the scheme. Indeed, Schneider, in a confession which we shall presently refer to, stated that a salary and the certainty of employment was his inducement.

The government contends that there was such participation originally and to a time within the statute, and that there is nothing to show a repudiation of or withdrawal from the conspiracy by him before 1902, when he made a partial disclosure of the conspiracy to the government. But upon this the government frankly says it cannot rely for an affirmance of the judgment, in view of the charge of the court to the jury.

The court charged the jury in substance that if Schneider had engaged in the conspiracy "back of the three-year period," and the conspiracy contemplated that acts should be done from time to time through a series of years until the purpose of the conspiracy should be accomplished, although he, Schneider, did not do anything within the three-year period, but "remained acquiescent, expecting and understanding" that further acts should be performed, they, if

performed, would be his acts, "and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting."

The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was *conscious participation*. (Italics 369]ours.) The government *makes the counter contention that, however true this may be as to accomplished conspiracies, it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen, is decided and illustrated in *United States v. Kissel*. And necessarily so. Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue, it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time, he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And we think, consciously offending,—offending as certainly, as we have said, as at the first moment of his confederation, and continuously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel Case*, stated in another way. As he has started evil forces, 370]he must withdraw his support *from them or incur the guilt of their continuance. Until he does withdraw there is con-

scious offending, and the principle of the cases cited by defendants is satisfied.†

But it is contended that under the instructions of the court, Schneider was involved in criminality by overt acts done not only after he had ceased to be in Hyde's employment in any capacity, but after he had disclosed that there was a conspiracy against the government. It was testified by Woodford D. Harlan that disclosure of frauds had come through one J. A. Zabriskie, he, however, knowing nothing about the matters except as informed by Schneider. The matter was referred to an agent, who reported conversations with Schneider, giving detailed information of the frauds and the manner by which they were accomplished. This report was received at the General Land Office in November, 1902. It does not appear what became of the report. The recollection of the witness was that he saw the report first, and he testified that he took it to the clerk who was distributing the mail, but for what purpose it does not appear. He never saw it again until one day during the trial. He, however, wrote to Benson about it, and after having seen weekly statements of certain special agents who were investigating the Schneider charges, he notified Benson. This seems to have been in March, 1903. Later, in October and November, 1903, he also wrote Benson at the suggestion of detective Burns.

There are overt acts charged subsequent to the disclosure made by Schneider, and it is contended that by the instruction embodied in the seventh assignment of error Schneider was continued in the conspiracy by overt acts committed after his disclosure to the agent of the Land *Department[371 had been communicated to the Commissioner of the General Land Office.

The instruction to which this effect is attributed is as follows:

"Now if he [Schneider] had stood by that and had gone on and disclosed all he knew about the matter, and said: 'I will have nothing more to do with this matter,' nothing that could have been done by the others after that could affect him at all. He would have been out of it; he would have repudiated it. As bearing on the effect of what he did there, if you find he did it, you are to consider what he did afterwards. If, after having made this disclosure as far as he did, he shut his mouth

†Ex parte Black, 147 Fed. 832, 840, and same case in 87 C. C. A. 383, 160 Fed. 431; *Warc v. United States*, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 Ann. Cas. 233; *United States v. Eccles*, 181 Fed. 906; *United States v. Greene*, 115 Fed. 343, 350; *Ochs v. People*, 25 Ill. App. 379, s. c. 124 Ill. 399, 16 N. E. 662.

and said: 'I will not say anything more about this matter; the government shall not get anything more out of me,' that is not an act by him in furtherance of the conspiracy, but it is a piece of evidence to be considered by you as bearing on the question whether he was acquiescent,—what his attitude of mind toward the conspiracy was.

"If he had stood on his disclosure, you might have said: 'Well, he is out of it from now on,'—but in connection with that you are to consider what he said afterwards. If you find that he closed his mouth and refused to say anything more about the matter and kept still in the interest of the others, you would have a right to say that that showed that he was still acquiescent in the matter. It would neutralize, if you choose to treat it so, the effect of his former declaration, that he did know, and was willing to disclose."

The instruction does not sustain the contention based upon it. The court submitted to the jury the effect of repudiation, and whether it was adhered to, as evidence of Schneider's further participation in the conspiracy by the overt acts done subsequent to the date of his disclosure. Acts prior to that time are within the principles we have announced, and the only question **372**] under the *instruction is whether there was an acquiescence which embraced the later acts, and this, we think, under the circumstances, was for the jury to determine.

The other questions in the case we shall now proceed to consider.

It is contended (ninth assignment of error) that the court erred in sustaining the demurrers to the pleas in abatement of Hyde and Schneider.

The defendants demurred to the indictment, which was overruled, and a special appeal was allowed to the court of appeals of the District and the ruling on the demurrer affirmed.

The case was remanded for further proceedings and the mandate was filed in the supreme court of the District April 26, 1906. Nearly two years afterwards (April 1, 1908) the defendants filed pleas in abatement, alleging irregularity in the making up of the list of jurors from which the grand jury which found the indictment was selected. The charge was that the commission to make a list of jurors appointed under § 198 of the District Code [31 Stat. at L. 1222, chap. 854] placed on the "list the names of persons many of which were selected not by themselves or by any of them, but by some other person or persons whose names are" to the defendant unknown, and that on the 16th of November, 1903, the

commissioners met in the District of Columbia and then and there made an order by which they undertook to appoint one James A. Harstock secretary of said commission, and undertook by a further order to give him the right of access to the jury box provided in accordance with § 200 of the Code, and that he took the box, unaccompanied by any other person, into a room in the City Hall and there opened it and took out of it all of the pieces of paper therein containing the names of the jurors, and from day to day during several successive days replaced in the box such names as he deemed fit, and thereupon returned it to the custody of the clerk. The *names **[373]** of twenty-three persons were drawn from the box and constituted the grand jury which found the indictment. In consequence of this it was averred that the grand jury was not a legal body.

Demurrers were filed and sustained to the pleas, and to support the ruling of the court the government cites *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235. The defendants contest the application of the case on two grounds: (1) that under the District Code a plea in abatement comes properly after a demurrer to the indictment and before pleas to the matter of the indictment, such as not guilty or special pleas; and (2) that whether a plea is seasonably filed cannot be resisted by demurrer, but only by a motion to strike out.

Both propositions may be formally correct, but do not preclude the court from itself noticing an unreasonable delay or treating the demurrer as raising that objection. And by concession of counsel that is what the court, in effect, did. Indeed, in the "points and authorities" filed with the demurrer it is urged that "the said pleas are not filed within a reasonable time." There was certainly unreasonable delay. It is said in the *Agnew Case* that pleas in abatement on account of irregularities in selecting and impaneling a grand jury, which did not relate to the competency of individual jurors, must be pleaded with strict exactness, and that a defendant must take the first opportunity in his power to make the objection. The indictment in that case was returned December 12, 1895; the plea in abatement was filed on the 17th of that month. It was held to have been filed too late.

In the case at bar four years elapsed between the finding of the indictment and the filing of the plea, two years after the mandate of the court of appeals sustaining the action of the trial court upon the demurrer and after a bill of particulars had been de-

manded and furnished. The delay is not attempted to be explained.

374] *It is extremely doubtful whether the pleas were not defective under the Agnew Case. In that case it was alleged that the irregularities complained of tended to the injury and prejudice of the defendant, no grounds, however, being assigned for the conclusion, and the record did not exhibit any. In the case at bar the plea is not even that specific. It is not shown that any juror was disqualified, nor is it shown that the grand jury was composed of jurors not selected by the commission. It is alleged, it is true, the names which had been put in the box by the commissioners had been taken out by Harstock, and that he put back those only that he deemed fit and proper. It follows, of course, from this, that had all of the original names been in the box, the grand jury might have been differently composed; but from this it cannot be inferred that injury or prejudice resulted to the defendants.

The tenth assignment of error is directed against the instruction of the court that the jury might convict any one of the defendants alone, including Hyde. In explanation of the instruction the court said to the jury that as to each defendant evidence was admitted which was not admitted against the others, and instanced as an example an alleged confession of Schneider, which, the court said, was admitted against him only. "The same would be true," the court said, "as to Dimond, as to whom a great deal of evidence was admitted that was not received against the other defendants." And further: "So that it is true, as I stated in a proposition for the benefit of counsel, that there may be a verdict against any one of the defendants, whether one or more, as to whom the evidence submitted and received against him or them proves that he or they conspired as charged, provided any overt act is also proved."

If there is confusion in the instruction it is easily resolved. It is clear, when read 375] in connection with other *instructions, that the court distinguished the purpose and effect of particular testimony, and did not mean to say that there could be a conspiracy by one defendant alone. So regarding it, we pass to the consideration of the objection urged against it.

It is insisted that it is not competent in any case where two or more persons are charged with conspiracy, and all are on trial, to find a verdict against one of them only, in any aspect of the evidence; and, further, that as to the defendant Hyde there is no evidence in the case which justified a verdict against him alone, even if the

principle announced by the court is, in the abstract, correct.

The immediate answer is that there was not a verdict against one defendant, and besides, the argument of counsel is somewhat minute, and its criticism is based on a partial view of the instructions and of the evidence, which, we think, preclude the inferences which are deduced from the instructions.

The court's charge was necessarily very long and comprehensive, and a reproduction of it is not convenient, but certain of its general propositions may be stated. "Each count of the indictment," it was said, "charges the same conspiracy, and, in addition thereto, one or more overt acts alleged to have been done in pursuance of it. So that, stated in one way, these counts subsequent to the first count contain nothing new except the overt acts; and when you take those up one by one, the question is, if you have found the conspiracy in the first place, whether the overt acts charged were committed. If you do not find the conspiracy, of course the overt acts cannot be found."

The court emphasized the necessity of the proof of the conspiracy, and stated that by it the overt acts were to be judged, saying: "An overt act must be one in pursuance of the conspiracy and one in furtherance of it;" and whether a certain act was in pursuance of it might depend entirely upon what the conspiracy was.

"The first question is," the court[376 charged, "Did the defendants conspire at all? The second question is whether they conspired to accomplish the end alleged. The third question is whether they conspired to accomplish that end by the fraudulent means alleged, so far as the indictment in that respect is necessary to be proved, referring to what has been already stated in that regard. The fourth question is, under each count, whether the overt act therein mentioned has been proved.

"Two other important questions must be determined in connection with the foregoing: One relating to the place, the other to the time. The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment."

And, assuming that the conspiracy was established and overt acts in furtherance of it shown in the District of Columbia, the court explained, "the conspiracy is here [the District of Columbia] just as truly as if the defendants were all here in person, doing those things with the common mind and purpose which contemplated them. In such

circumstances the defendants would be conspiring together in the doing of each act because each act would have reference to the conspiracy. It would not be necessary that they should put their heads together and go over the terms of the conspiracy every time an act was done in furtherance of it. It would be enough if the act was an expression of their common understanding."

The court instructed the jury further as follows:

"Now, it has been suggested that if these men were guilty, there were others just as guilty. That does not make any difference. The indictment itself, in one clause of it which I did not read to you, charges that these defendants conspired with each other and with other persons to the grand jury unknown. But that does not make [377] any *difference. If there are other persons who might have been prosecuted, and would have been liable, and they are not prosecuted, that is no concern of yours. You are only to consider the question of whether these defendants conspired in the way alleged, and whether the overt act was committed."

And the court charged the jury that some of the defendants could be convicted on one count and some on another count; that there was "practically one charge, although in so many counts. It is one conspiracy with allegations of different acts done in pursuance of it. . . . But you cannot split the matter up."

We think, therefore, that the instruction excepted to was in the interest of the defendants, not to their prejudice. It excluded from consideration as to each of them testimony which might possibly have no relation to him. It is true that the jury convicted Hyde and Schneider and acquitted Benson and Dimond. But, as said by the government, "This does not signify that the evidence against Hyde and Schneider was of a different offense than that charged, but only that the proof against them was more conclusive than that against Benson and Dimond."

It is not necessary to review the cases cited by the defendants, holding that conspiracy is the crime of at least two persons, and that where all but one are acquitted there can be no legal conviction as to him, the acquittal of the others being tantamount to the finding of no conspiracy. All but one were not acquitted.

The next assignment of defendants is that the court erred in allowing the District attorney, on the direct examination of witnesses for the government, to examine them as to previous statements made by them to certain representatives of the government, and in permitting comment upon

such statements as tended to show their truth.

*This assignment is directed partic- [378] ularly against the examination of three witnesses,—William E. Valk, S. J. Holsinger, and Tillie A. Fleischauer. These witnesses, not remembering certain matters, were asked about conversations with him or of written statement made by the witnesses examined, for the purpose of refreshing their memory. This was the purpose declared at the time and was the ground of the ruling of the court. Objection was made, however, and it was urged and is now urged here, that this could not be done unless upon the ground of surprise and for the purpose of discrediting the witnesses. In support of the objection, § 1073a of the District Code is cited in regard to the manner and extent of contradicting witnesses by proof of former statements. The court, however, permitted the examination solely as a means of refreshing the memory of the witness, and they, besides, admitted the truth of what was stated. We see no error in the ruling. Indeed, it may be said that as to two of the witnesses, their statements related to Benson alone, and by his acquittal, if the ruling was error, it became unimportant.

The next contention, constituting the twelfth assignment of error, is as to the refusal of the court to permit the defendants to prove that certain letters addressed to John P. Jones never reached the Dead Letter Office. This testimony, it is insisted, became significant and important to the defendants from the fact that the District attorney had asked Schneider if he (Schneider) had not gone under the name of John P. Jones at the postoffice while in Mexico at a place called Allamos. On redirect examination he explained the reason to have been that he had suspected the postmaster at Tucson, that letters which had been written to him had not reached him, and that at the time mentioned his wife, who was at Tucson, addressed him as John P. Jones, but that nobody else had. He further testified that the letters he referred to were "right on the desk" (the desk in the [379] court room), "in the possession of the government." Upon the demand of counsel, the District attorney produced the letters. Thereupon counsel questioned Schneider as to the letters which were addressed to John P. Jones at Fuerte, Mexico, postmarked Tucson, Arizona. The District attorney then asked counsel for defendants if he desired "to offer the envelopes in evidence," to which the answer was made: "No; I don't care to offer anything further in connection with that transaction, at present." The District attorney then offered them. Ob-

jection was made, but was subsequently withdrawn, the court saying, upon the witness stating that the address upon them was in his wife's handwriting, "They [the letters] are addressed to him in the name of John P. Jones. The envelopes may be received, if it is so agreed, for the purpose of showing the postmarks, etc. This I suppose to be in corroboration of the statements of the witness as to why he changed his name."

The District attorney was then called as a witness by counsel for the defendants and testified that he had not seen the letters "until one day in court here," and that when reference was made to them "they were produced" to him "by Mr. Pugh." The latter, being called, said that they came into his "possession in an envelop taken from Secretary Hitchcock's safe some time after Mr. Burns withdrew from the case, or some time after he severed his government connection with it." Burns, he testified, was in San Francisco.

Dalzell was subsequently called as a witness to testify, as has been stated, and it was said by counsel for defendants, addressing the court, that the government had brought out that Schneider had gone under an assumed name, and that the evidence tended to show that the "reason for that, or one reason for it, was that his mail was being tampered with;" "but it leaves room 380] for the *government to contend that those letters have been to the Dead Letter Office, and have been opened there, and might have gotten in the possession of the Secretary of the Interior or Mr. Burns honestly. We offer to call this witness [Dalzell] for the purpose of closing that gap, and showing that necessarily somebody must have been committing a greater crime than is charged against any of these defendants, in robbing the mail." The District attorney in effect disclaimed the purpose which was attributed to him, and necessarily there was no gap to be closed, nor is it shown that any purpose was subsequently attempted which the testimony would have precluded.

The possibility suggested by the testimony is not attempted to be justified by the government, and gives a painful surprise, but we cannot see how proof of "a greater crime . . . in robbing the mails" was relevant to a decision of the charge then under consideration.

The thirteenth assignment of error is directed against an instruction of the court which opposed the contention of defendants that "the titles obtained from the states were perfectly and absolutely valid as to all persons and at all times, except as to the particular state which had given the 56 L. ed.

title, and which alone could assail it." The question involved in the contention is settled by the decision of the case when it was here on the proceedings in habeas corpus (199 U. S. 62, 82 and 83, 50 L. ed. 90, 96, 97, 25 Sup. Ct. Rep. 760).

The fourteenth assignment of error is that the court erred in refusing to instruct the jury that want of personal knowledge of the character of the land applied for, or that it was not adversely occupied, did not make the application void. It is contended that if the applicant believed the statements were true, the application was neither false nor fraudulent.

We answer the contention as the court of appeals did,—“the question is immaterial, because the applications were fraudulent by reason of the agreement for transfer,”—*that is, the applicants were not buy-381 ing for themselves, but for Hyde. We need not inquire whether the statutes required the affidavits to be made on personal knowledge.

Objection is made in other assignments of error to the comments of the court "that written evidence, letters, for instance, written by parties at the time, are entitled to peculiar consideration as evidence." And to the further comment as to certain anonymous letters attributed to Dimond, the court saying to the jury that they would have to consider whether he wrote them, and added the following: "That has been treated in the argument as a very important question, and justly so. You cannot fail to see the importance of that question. There are some of the letters that were typewritten, and there is one printed with a pen."

Any evidence affecting a particular defendant is important to him when on trial. It ceases to be so in a tribunal of review if he was acquitted, as Dimond was, and may be dismissed from further consideration. And we see no error in the comments of the court on the consideration to be given to written evidence. It was but the declaration of an abstract proposition. It was not an attempt to enforce some particular part of the testimony and to take from the jury their province of considering it all or weighing the respective parts. This is shown by the charge of the court, considered in its entirety.

In the seventeenth assignment of error defendants complain that they were not allowed to show by an examination of the jurors that the "verdict was the result of a bargain, and was brought about by what, under the circumstances, amounted to coercion by the court."

The record shows the following:

"Monday, June 22, 1908, at 11:30 A. M.,

the jury returned to the court room and the foreman announced that they were unable to agree. The court thereupon instructed the jury to retire for further deliberation, and *make another effort to agree upon a verdict, charging them, however, that should they render a verdict, it must be one to which they all freely agreed; that the law would not recognize a coerced verdict or one which was not the free expression of the views and opinions of the jurymen, and that if, after another conscientious effort, the jury still fail to agree, they should return to the court and so state. That it was not the purpose of the court to unduly prolong their deliberations, and that if they could not conscientiously and freely agree upon a verdict, they would be discharged."

At ten minutes before 3 o'clock they were brought into court and again declared that they were unable to agree, and the court instructed them further, after consultation with counsel for the government and defendants, and to which no exception was made, suggesting a consideration of the possibility of the guilt of some of the defendants and not of others. The jury, shortly after they went out, announced their agreement, finding a verdict against Hyde and Schneider of being guilty "in manner and form as charged," and Benson and Dimond not guilty.

On motion of counsel the jury was polled as to Hyde and Schneider, respectively, and they answered guilty on certain counts and not guilty on the 29th and 33d counts.

The supposed misconduct of the jury was made a ground of new trial. Certain supporting affidavits were made by counsel upon information. Counsel respectively averred that they believed the information given them to be true, and that it was received partly from one of the jurors and partly from a person who had conferences with another; and that two of the jurors were requested to make affidavit, but, under the advice of their counsel, they declined unless required by the court.

The motion for a new trial set forth that the verdict was the result of an agreement 383] between certain of the *jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of Benson was exchanged for the conviction of Hyde, and the conviction of Schneider for the acquittal of Dimond. And this was brought about, it is contended and argued, as the result of what, "under the circumstances, amounted to coercion by the court."

There is nothing in the record to justify the contention. It is true the trial was a

long one and that the jury were not allowed to separate. Neither fact is unusual in criminal trials; the first is often necessary, the second often expedient, and contributes to an impartial judgment for and against defendants. It is true that the jury was in consultation for three days and nights without agreement, but the case was unusual in its issues and evidence and the detailed attention that was required.

It well might be that jurors should not see the exact bearing of the evidence as it affected particular defendants until the final instructions of the court, which we have set out and about which counsel were consulted. The court took care to say to the jury that the law would not recognize a coerced verdict, and that it was not the court's intention to unduly prolong their deliberations, and if, after another effort, "they could not conscientiously and freely agree upon a verdict, they would be discharged." It is hard to believe that with that admonition yet in their ears they bartered their convictions, with that promise expressly made to them, they were coerced by a threat of confinement to acquit those who they were convinced were guilty, or convict those who they were convinced were innocent.

But, even conceiving such possibility, we think the court rightly ruled. It was within the issues of the case to convict some of the defendants and acquit others, and we think the rule expressed in *Wright v. Illinois & M. *Teleg. Co.* 20 Iowa, 195, [384] and *Gottlieb Bros. v. Jasper*, 27 Kan. 770, should apply, that the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration.

Judgment affirmed.

Mr. Justice Holmes, dissenting:

This is an indictment under Rev. Stat. § 5440, amended, act of May 17, 1879, chap. 8, 21 Stat. at L. 4, U. S. Comp. Stat. 1901, p. 3676, for a conspiracy to defraud the United States. The petitioners were tried and convicted in the District of Columbia, the conviction was affirmed by the court of appeals (35 App. D. C. 451), and thereupon a writ of certiorari was granted by this court. The scheme was to obtain by fraudulent devices from the states of California and Oregon school lands lying within forest reserves, to exchange them for public lands of the United States open to selection, and then to sell the lands so obtained. Hyde and Schneider were in California and never were actually in the District in aid of the conspiracy, but overt

acts are alleged to have been done there to effect the objects in view. Most of these acts are innocent, taken by themselves, consisting mainly of the entry of appearance by Hyde's lawyer in the matter of different selections, the filing of papers concerning them, and letters urging speed. Hyde is alleged to have caused some documents affecting the same to be transmitted from California to the Commissioner at Washington, and in the last six counts payments to employees in the Land Office are alleged to have been made with corrupt purpose and in aid of the plan by a person who was included in the indictment as a conspirator, but whom the jury did not convict.

385] *The court instructed the jury that if the defendants agreed to accomplish their purpose by having any of the alleged overt acts done in the District of Columbia, and any of those acts were done there, the conspiracy was in the District, whether the defendants were there or not. The defendants excepted to this instruction, as well as to many others.

I have said enough to show that there was more than one question in the case, but as the first and also the most important one is whether the court had jurisdiction of the alleged offense, I shall confine myself to that.

The conspiracy was continuous in its nature and is averred to have been so. *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124. Therefore, wherever it was formed, it might have been continued in the District of Columbia, as, for instance, if the conspirators had met there for the purposes of their scheme. Moreover, in order to narrow the question, I will assume that, so far as the statute of limitations is concerned, an overt act done anywhere with the express or implied consent of conspirators would show the conspiracy to be continuing between the parties so consenting, and leave them open to prosecution for three years from that date. But it does not follow that an overt act draws the conspiracy to wherever such overt act may be done, and whether it does so or not is the question before us now.

In order to answer this question it is not enough to say that as the overt act was one that was contemplated by the conspirators, it is treated as the act of them all, and that this is equivalent to saying that they were constructively present. That would be passing a *dicto secundum quid ad dictum simpliciter*. They are chargeable there for the act, but it does not follow that they were there to other intents. They are shown not to have been by the fact that they could not be treated as fugitives from justice even in respect of that very act,

when and although that act was itself a crime. *Hyatt v. New York*, 188 U. S. 691, 712, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 317. *To[386 speak of constructive presence is to use the language of fiction, and so to hinder precise analysis. When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not. For instance, if a man, acting in one state, sets forces in motion that kill a man in another, or produces or induces some consequence in that other that it regards as very hurtful and wishes to prevent, the latter state is very likely to say that, if it can catch him, it will punish him, although he was not subject to its laws when he did the act. *Strassheim v. Daily*, 221 U. S. 280, 285, 55 L. ed. 735, 738, 31 Sup. Ct. Rep. 558. But as states usually confine their threats to those within the jurisdiction at the time of the act (*American Banana Co. v. United Fruit Co.* 213 U. S. 347, 356, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047), the symmetry of general theory is preserved by saying that the offender was constructively present in the case supposed (*Burton v. United States*, 202 U. S. 344, 389, 50 L. ed. 1057, 1074, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362). We must not forget facts, however. He was not present in fact, and in theory of law he was present only so far as to be charged with the act.

Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the Constitution that the trial of crimes shall be held in the state and district where the crimes shall have been committed. Art. 3, § 2, cl. 3. Amendments, art. 6. With the country extending from ocean to ocean, this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it, of course, is attributed to the conspirators; and if that means that the conspiracy is present as such wherever any *overt act is done, it[387 might be at the choice of the government to prosecute in any one of twenty states in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even

wider if success should be held not to merge the conspiracy in the crime intended and achieved. I think it unnecessary to dwell on oppressions that I believe have been practised, or on the constitutional history impressively adduced by Mr. Worthington to show that this is one of the wrongs that our forefathers meant to prevent.

No distinction can be taken based on the gravity of the overt act, or the fact that it was contemplated, or that it is important for the accomplishment of the substantive evil that the conspiracy aims to bring about and the law seeks to prevent. That would be carrying over the law of attempts to where it does not belong. Although both are adjective crimes, a conspiracy is not an attempt, even under Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, which requires an overt act. When I first read that section I thought that it was an indefinite enlargement of the law of attempts. But reflection and the decisions both convinced me that I was wrong. The statute simply did away with a doubt as to the requirements of the common law. *Rex v. Spragg*, 2 Burr. 993, 999. *Roscoe*, *Crim. Ev.* 6th ed. 381, 382. An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offense where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that, if coupled with an intent to produce that result, the danger is very great. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276. But combination, intention, and overt act may all be present without amounting to a crime. [388]inal attempt,—as if all that *were done should be an agreement to murder a man 50 miles away, and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offense. On the other hand, the essence of the conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree. In this case the statute treats the conspiracy as the crime and the indictment follows the statute.

The cases in this court have agreed that the statute has not made the overt act a part of the crime, which still remains the conspiracy alone. By the same reasoning the overt act gives no ground for the

application of Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585, creating a double jurisdiction when an offense against the United States is begun in one district and completed in another. The act is no part of the conspiracy, even if it is an element in some other crime, as is stated in so many words in *Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760, quoting the well-known statement in *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531, that the statutory requirement merely affords a *locus penitentiae*. *Dealy v. United States*, 152 U. S. 539, 547, 38 L. ed. 545, 548, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161. See also *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *Pettibone v. United States*, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; *Bannon v. United States*, 156 U. S. 464, 469, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338. The overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a condition to punishment, but it is no more a part of the crime than it was at common law, where it was customary to allege such an act; or than is the fact that the statute of limitations has not run.

I can think of no other case in which it would be argued that an act constituting no part of the crime charged draws jurisdiction to the place where it is done. Even when the act is the substance of a felony, the history of the *law shows [389] that the courts only slowly and with hesitation came to the admission that a man, although within the jurisdiction, could be a principal when he was not present at the accomplishment of the crime. *Y. B. 7 Hen. VII.*, 18 pl. 10. The distinction between principal and accessory before the fact is a late surviving expression of the doubt. 4 Bl. Com. 36, 37. When the accessory is in a different jurisdiction, it has been held that he could not be convicted as such in the place of the crime, even in modern cases. *State v. Moore*, 26 N. H. 448, 59 Am. Dec. 354; *Bishop*, *Crim. Law*, 8th ed. § 111. It would be an amazing extension of even the broadest form of fiction if it should be held that an otherwise innocent overt act done in one state drew to itself a conspiracy in another state to defraud people in the latter, even though the first state would punish a conspiracy to commit a fraud beyond its own boundaries. Of course in the present case the conspiracy as well as the overt act was within the United States, but the case that I have supposed of different jurisdic-

tions is a perfect test of where the crime was committed. If a conspiracy exists wherever an overt act is done in aid of it, the act ought to give jurisdiction over conspirators in a foreign state, if later they should be caught in the place where the act was done.

The defendants were in California and never left the state, so far as this case is concerned. The fraud, assuming as I do, for the purposes of decision, that there was one, was to get land from the United States there and elsewhere on the Pacific coast. If successful it would be punished there. The crime with which the defendants are charged is having been engaged in or members of a conspiracy, nothing else; no act, other than what is implied as necessary to signify their understanding to each other. It is punished only to create a further obstacle to the ultimate crime in California. The defendants never were members of a conspiracy within a thousand miles of the District 390]*in fact. Yet if a lawyer entered his appearance there in a case before the Land Department, and the defendants directed it and expected to profit by it in carrying out their plans, it is said that we should feign that they were here in order to warrant their being taken across the continent and tried in this place. The Constitution is not to be satisfied with a fiction. When a man causes an unlawful act, as in the case of a prohibited use of the mails, it needs no fiction to say that the crime is committed at the place of the act, wherever the man may be. *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034. But when the offense consists solely in a relation to other men with a certain intent, it is pure fiction to say that the relation is maintained and present in the case supposed. If the government, instead of prosecuting for the substantive offense, charges only conspiracy to commit it, trial ought to be where the conspiracy exists in fact.

The effect of an overt act upon the statute of limitations is consistent with what I have said. If an overt act is done with the consent of the conspirators, and to effect their end, the reason why the statute begins to run afresh is not that a new conspiracy is made or the old one renewed by the act, but that the facts supposed show conclusively that the conspiracy is continuing in life. So long as it does so it cannot be barred, although the earlier years of it may be.

To avoid misapprehension the distinction should be noted between acts done in

aid of a conspiracy and acts that constitute and call it into being. If a conspiracy should be formed by letters between men living in California, Louisiana, and Massachusetts, who never left their several states, nothing that I have said would disparage the right of the government to indict them where, in contemplation of law, the agreement was made.

It is said that the conspiracy may be a secret one; but that cannot affect the tests of jurisdiction. The overt act may amount to evidence not only of its existence, but of its place. But to treat overt acts as evidence is one thing; it is quite another to treat any overt act as sufficient in itself to give jurisdiction, although the conspiracy exists only in another place.

The intimations that are to be found, opposed to the view that I take, appear to have been induced by the confusion that I have tried to dispel, and to assume that an overt act creates jurisdiction over a conspiracy on the same ground that causing a death may give jurisdiction in murder; or, perhaps, in *Rex v. Brisac*, 4 East, 164, 171, to proceed on the dangerous analogy of treasonable conspiracies to levy war or compass the death of the sovereign. The *dictum* in that case gains no new force from the repetition by text writers. It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis. On the other hand, if overt acts had been regarded as founding jurisdiction, the petitioners could not have been discharged in *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430, where overt acts of other conspirators within the jurisdiction were alleged and not denied. Although the point was not mentioned in the opinion, it was argued and was not overlooked. At least, in the absence of clear statutory words, I am of opinion that logic and the policy and general intent of the Constitution agree in refusing to extend the fiction of constructive presence to a case like this. I think that the true view still is that of *Reg. v. Best*, 1 Salk. 174: "The *venue* must be where the conspiracy was, not where the result of the conspiracy is put in execution," quoted as correct in principle in Markby's edition of Roscoe's Criminal Evidence, 6th ed. 391; and that to decide otherwise is to overrule not only the often-expressed and settled understanding, but the express decisions, of this court.

Mr. Justice Lurton, Mr. Justice Hughes, and Mr. Justice Lamar concur in this dissent.

392] *FRANK W. BROWN, Appt.,
v.

C. T. ELLIOTT, United States Marshal in
and for the Northern District of California, et al. (No. 201.)

E. C. MOORE, Appt.,
v.

C. T. ELLIOTT, United States Marshal in
and for the Northern District of California, et al. (No. 202.)

(See S. C. Reporter's ed. 392-404.)

Courts — venue of crime — conspiracy.

1. Laying the venue of the trial of a conspiracy to commit the offense against the United States denounced by U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, making criminal the use of the mails to carry on a scheme or artifice to defraud, in the state and Federal judicial district where an overt act is performed, satisfies the requirement of U. S. Const., 6th Amend., that all crimes be tried in the state and district where committed.

[For other cases, see Courts, 979-992, in Digest Sup. Ct. 1908.]

Limitation of actions — continuing offense — conspiracy.

2. A conspiracy to commit the offense against the United States denounced by U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, making criminal the use of the mails to carry on a scheme or artifice to defraud, which the indictment alleges was designed to be and was in fact continuous, continues, so far as the statute of limitations is concerned, so long as any overt acts are done by any of the conspirators in furtherance of the conspiracy.

[Limitation of criminal proceedings, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Indictment — sufficiency — conspiracy.

3. The exact place of the formation of a conspiracy to commit the offense against the United States denounced by U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, making criminal the use of the mails to carry on a scheme or artifice to defraud, need not be stated in an indictment which lays the venue at the place where an overt act was committed.

[For other cases, see Indictment, 69-81, in Digest Sup. Ct. 1908.]

[Nos. 201 and 202.]

Argued October 19, 1911. Ordered for reargument before a full bench December 18, 1911. Reargued May 1, 1912. Decided June 10, 1912.

NOTE.—As to the locality of crime committed through the agency of the mails or of carriers—see note to *State v. Hudson*, 19 L.R.A. 775.

As to the commencement of the period of limitations against prosecutions for continuing offenses—see note to *Ware v. United States*, 84 C. C. A. 519.

A PPEALS from the Circuit Court of the United States for the Northern District of California to review orders dismissing petitions for writs of habeas corpus to inquire into a detention under a warrant of removal in proceedings to remove to the District Court of Nebraska persons charged with conspiring to commit an offense against the United States by the fraudulent use of the mails. Affirmed.

The facts are stated in the opinion.

Mr. Henry F. Woodard and Arthur A. Birney argued the cause and filed a brief for appellants:

If the criminal offense is the conspiracy, it was essential that it be given a locality.

People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; *Bishop*, *Crim. Proc.* chap. 24; 22 Enc. Pl. & Pr. p. 825.

The confederacy to commit the offense is the gist of the criminality, although to complete it some act to effect the object of the conspiracy is needed.

United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; *Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760; *Com. v. Bartilson*, 85 Pa. 482.

An overt act may draw with it the previously formed conspiracy, so as to warrant the allegation in the indictment that the conspiracy was formed where the overt act was committed; but in this case there is no such averment, and the mere recital of overt acts committed in Omaha will not take the place of the necessary direct allegation of the place of the conspiracy, necessary to jurisdiction.

United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *Com. v. Bartilson*, 85 Pa. 482.

Upon habeas corpus the examining court will examine the indictment to determine if it contains a definite charge of crime.

Re Buell, 3 Dill. 116, Fed. Cas. No. 2,-102; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; *Re Doig*, 4 Fed. 193; *Re Coy*, 31 Fed. 794, affirmed in 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Ex parte Siebold*, 100 U. S.

On the effect of overt act within limitation period, where the conspiracy was originally formed and the first act committed beyond the period of limitation—see note to *Ware v. United States*, 12 L.R.A. (N.S.) 1053.

376, 25 L. ed. 719; *Stewart v. United States*, 55 C. C. A. 641, 119 Fed. 89; *Horn-er v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *Re Terrell*, 51 Fed. 213; *Re Greene*, 52 Fed. 104; *Ex parte Bollman*, 4 Cranch. 75, 136, 2 L. ed. 554, 574.

Since the conspiracy became indictable upon the commission of the first overt act, the statute of limitations is a bar to the prosecution.

United States v. Owen, 32 Fed. 534; *United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334, 147 Fed. 840; 2 McClain, Crim. Law, 973.

The crime of conspiracy being a noncontinuous crime, but complete upon the agreement, and subject to prosecution upon the first overt act, the *continuando* will be disregarded, and the indictment treated as charging no more than the commission of the crime on the first day.

Wharton, Crim. Pl. & Pr. 9th ed. § 125; 1 Bishop, New Crim. Proc. § 388.

Solicitor General **Lehmann** argued the cause and filed a brief for appellees:

The indictment is sufficient in substance for the purposes of removal to charge the appellant with the crime of having conspired, in violation of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, to commit offenses forbidden by § 5480.

Bannon v. United States, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; *Stokes v. United States*, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617; *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

The conspiracy and the scheme to defraud being both of them continuous, and having been continued in operation until the year of the indictment, the offense is not barred, no matter when the conspiracy was first formed.

United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; *United States v. Barber*, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209.

The indictment plainly charges that the conspiracy and the scheme were being actually operated in the Omaha division of the district of Nebraska, and nine overt acts to effectuate them having been there committed, there was jurisdiction of the offense in that division and district.

Ibid.; *People v. Mather*, 4 Wend. 259, 21 Am. Dec. 122.

Mr. Justice **McKenna** delivered the opinion of the court:

These appeals involve the action of the circuit court in dismissing petitions for writs of habeas corpus to discharge appel-

lants from the custody of appellee, United States marshal for the northern district of California. Both appellants were held under a warrant of removal made by the district court of that district upon an order of commitment made by a United States commissioner in proceedings for the removal of appellants to the district court of Nebraska.

There was an indictment found against appellants in the district court of the Omaha division of the district of Nebraska for the crime of conspiracy, in which it was charged that they and others whose names, aliases, and the numbers by which they were designated as part of the means of effecting the scheme, and who in the indictment are called "conspirators," "on the fifth day of April, in the year of our Lord one thousand nine hundred and seven, did then and there" conspire with Ernest Fenby and other persons to the grand jurors unknown "to commit the acts made offenses and crimes by § 5480 of the Revised Statutes of the United States, as amended by an act of Congress enacted March 2, 1889 [25 Stat. at L. 873, chap. 393, U. S. Comp. Stat. 1901, p. 3696], entitled, 'An Act to Punish Dealers and Pretended Dealers in Counterfeit Money and Other Fraudulent Devices for Using the United States Mails.'" And it is charged that appellants and other persons conspired in devising and intending to devise a scheme and artifice to defraud various persons out of their money and property, to be effected by means of the postoffice establishment of the United States, and particularly to defraud certain persons who were named. To avoid repetition, they are called in "the [394] indictment "victims," and they were to be defrauded of their money and property by the conspirators "agreeing to organize, institute, conduct, and manage certain horse races and athletic contests . . . as wagering contests upon which money should be bet," at Council Bluffs, in Iowa, and in certain places in Missouri, Arkansas, Colorado, Louisiana, and Washington, and other places to the grand jurors unknown, and "at Omaha, district aforesaid." The races and contests were to be conducted in a fraudulent, unfair, and dishonest manner, and to be controlled solely by the conspirators, so that the outcome was known in advance, with intention thereby to defraud the victims. The charge is made with much circumstance and detail which it is not necessary to repeat, except to say that the conspirators were, to be represented as millionaires traveling through the United States making investments in municipal, county, and city bonds, and in other projects, and having with them horses and athletes for their private amusement, which

they would match with those of strangers. One of the conspirators was to be represented to be the secretary to the others, and as having charge of the contests, which he had theretofore always managed with great financial profit and gain as well as to the amusement of his employers, but that he had become aggrieved at the treatment he had received, and would so manage the contests that the horses and athletes of the millionaires would lose, and that he was desirous of betting against them and thereby win their money for himself and for such other persons as would bet for him as his secret agents. Others of the conspirators were to represent themselves to the victims to be friends and relatives of the "secretary," and had been requested by him to produce men of financial standing to act as his secret agents in betting money against his employers, the millionaires, and it was to be represented that it was necessary for him to procure such persons of financial 395]standing and responsibility *to represent him and bet his money in order to conceal his disloyalty to his employers. Such persons were not to bet their own money, but the secretary's money, and be paid a percentage of the winnings. The victims were to be induced to bring letters of credit or negotiable paper for large sums of money, and thereby established credit in the bank of the town where the races and contests were to be conducted. And when they, relying on the fraudulent representations of the secretary, should bet and wager money furnished by him, they were to be informed that the money was not in fact his, but was his employers' money; that they, the employers, had or might become suspicious that the money was not that of the victims and the secretary not the stakeholder, and to prevent criminal prosecutions the races and contests would be called off; that therefore it would be necessary for the victims to come to his (the secretary's) rescue and bet their money for him and allay such suspicions and to insure the races and contests proceeding to a finish as arranged, the money to be returned after the races and contests. And it was to be represented that the races and contests terminated unfortunately through an unusual and deplorable accident, to wit, a serious injury to one of the jockeys or one of the athletes, and in such way that it would be unfair to declare themselves winners, and additional races and contests were to be conducted in the same manner and an opportunity afforded to win back the money lost. Finally it was to be represented to the victims that they had been engaged in a criminal transaction, which had resulted in a serious injury to a person, and to avoid arrest and

criminal prosecution they (the victims) were to depart from the scene, and leave the money bet with the secretary, who was to convert it to the use and gain of the conspirators. And this was alleged to be fraudulent and done with intention to deceive, etc.

The manner of carrying out the scheme was alleged *to be to rent a United[396 States postoffice box for the delivery of the mail in the United States postoffice at Omaha, Nebraska, and in other cities throughout the United States where any of the conspirators should establish headquarters in furtherance of the scheme and artifice to defraud, and the conspirators were to assume and request to be addressed by the number of such boxes respectively, and carry on their correspondence with each other through and by means of the postoffice establishment of the United States by the use of such assumed title numbers without the use of their own proper names, and to assume other names and request their victims to address them by such assumed names through and by means of the postoffice establishment of the United States. And it is charged that the conspirators, in further execution of their scheme, were to take and receive letters so addressed from and out of the United States postoffice at Omaha and other places which were mentioned, and that they were to write and send letters to one another by means of the postoffice establishment, which were to contain and set forth their fraudulent and deceitful schemes, and were to be shown to the victims for the purposes of inducing the latter to turn over to the conspirators large sums of money. The conspirators, it is charged, also used the postoffice establishment to open correspondence with the victims and to procure them to open correspondence with two of the conspirators, whose names are given, in pursuance of the conspiracy.

It is alleged "that the said wicked and corrupt conspiracy, combination, confederation, and agreement was originally formed and entered into by the said conspirators during the year 1905, the exact date whereof is to the grand jurors unknown, in the United States of America, the exact place and district whereof is to the grand jurors unknown, and until the 23d day of February, in the year 1909, continuously and *at all times during the four years[397 next preceding the said 23d day of February," it, the conspiracy, "was continuously in existence and in the process of execution and operation, and including all of said times, and the said conspirators did knowingly, falsely, wickedly, and corruptly

conspire, combine, confederate, and agree together as aforesaid, and with said Ernest Fenby and said divers other persons to the grand jurors unknown, as aforesaid."

Overt acts are alleged, one of which is the renting by one of the conspirators under an assumed name of a postoffice box at Omaha, Nebraska, and the receiving and sending of letters to the "victims," which set forth the scheme in detail by which the "millionaires" were to be imposed on, and the ease of its accomplishment and assurance of success displayed. The indictment contains copies of the letters.

The second count of the indictment alleged the conspiracy to have been formed on the 1st of April, 1907, and the scheme of fraud and deception was set forth in a more general way. The use of the postoffice establishment was alleged, as in the first count.

The original formation of the conspiracy was alleged, as in the first count, to have been in a place and district to the grand jurors unknown, but was continuously in existence and in process of execution for four years next preceding the 23d of February, 1909. The overt act alleged was the depositing of a letter by one of the conspirators in the postoffice at Omaha, Nebraska, which letter concerned the scheme and artifice to defraud and to effect the object of the conspiracy.

It will be observed that it is charged that appellants and those named in the indictments as "conspirators," "on April 5," 1907 (first count), "did then and there," and "on April 1," 1907 (second count), "did then and there" conspire with Ernest Fenby and others, and that races and contests upon which money was to be bet were **398***to be organized "at Council Bluffs, in the state of Iowa," and that the conspirators "further then and there, and at Omaha, district aforesaid," were to execute their scheme. And it is charged that the conspiracy was to be effected in the manner described, and that the conspirators, further to effect the object of the conspiracy, were "to rent a United States postoffice box for the delivery of mail, in the United States postoffice at Omaha, in the state of Nebraska, district aforesaid," and in other places.

The first overt act charged in pursuance of the conspiracy on the 5th of April, 1907, is the renting of such box. To effect the object of the conspiracy formed on April 1, 1907, the first overt act is alleged to have been done in July, 1907, at Omaha.

It is, however, also alleged that the conspiracy was originally formed and entered into during the year 1905 in the United States, the exact date and place being un-

known, and was continuously in existence and in the process of execution and operation during the four years preceding the 23d of February, 1909.

The assignments of error present the contentions that the indictment is essentially deficient in the following particulars:

1. It does not allege that the conspiracy was formed in Nebraska, but, on the contrary, alleges that it was formed at some place unknown to the grand jury.

2. It does not allege in any of its counts that the first overt acts were done in Nebraska, but that they were done in a place and district unknown.

3. The indictment shows that the conspiracies were formed more than three years prior to the finding of the indictment.

4. It does not allege that appellants consciously participated in any overt act within three years next preceding the finding of the indictment.

The first two contentions involve the jurisdiction of the *court under the **399** 6th Amendment of the Constitution of the United States, requiring a crime to be tried in the state and district where it was committed. The third and fourth contentions raise the question of the statute of limitations.

First, as to what the indictment shows as to the formation of the conspiracy and the commission of overt acts. The appellants consider these propositions entirely upon the assumption that the only allegation that can be regarded is that which charges the formation of the conspiracy originally in 1905, and not the allegation of the formation of a conspiracy in 1907.

But nothing is specifically alleged as having been done to execute the conspiracy as originally formed. It is true, there is an allegation that the conspiracy was in existence and in the process of execution and operation, which is somewhat vague, but is certainly not inconsistent with the fact that whatever was done, if anything, was done at Omaha.

It is charged that on April 5, 1907 (first count), and on April 1, 1907 (second count), the appellants and other persons "did then and there" conspire (we omit the adverbs). This might well be contended, so far as removal proceedings are concerned, as an allegation of the formation of the conspiracy in the district of Nebraska, or certainly a distinct and explicit renewal of it. And it would seem like giving technically too much effect to consider that the agreement made in 1905, rather than its specific and formal renewal in 1907, should determine the jurisdiction of its trial. Besides, its continued existence and operation are alleged, and we have seen if overt acts

were done prior to 1907 they may have been done at Omaha, and constituted, with those done afterwards, a part of an entire scheme, to be executed by a succession of acts.

It is only by the assumption and insistence that the conspiracy was formed in 1905 [400] that appellants give their *contentions any foundation whatever. If the conspiracy was formed at Omaha in 1907, upon the supposition that the conspiracy constitutes the offense and the state and district of its origin are the state and district of its trial, the district court of Nebraska had jurisdiction. And again, upon the supposition that the first overt act completes the offense commenced by the conspiracy, and by completing it determines the place of its trial, the district court of Nebraska had jurisdiction. This follows, no matter where the overt act was done. We have pointed out, however, that the indictment does not show that the first overt act was done at a place and district unknown. The first overt act may have been performed at Omaha.

If either view, therefore, be accepted, the judgment of the circuit court dismissing the petitions for habeas corpus must be affirmed.

If, however, we assume with appellants that the indictment charges that the conspiracy was formed in 1905 and at a place unknown to the grand jurors, the same result must be pronounced, upon the authority of *Hyde v. United States*, just decided [225 U. S. 347, ante, 1114, 32 Sup. Ct. Rep. 793]. We there held that the place of trial could be any state and district where an overt act was performed. And we further held, following *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one." These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous; and, being so, every overt [401] act *was the act of all the conspirators, made so by the terms and force of their unlawful plot.

In *Lonebaugh v. United States*, 103 C. C. A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspir-

acy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: "While the gravamen of the offense is the conspiracy, the terms of § 5440 (U. S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy, there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found." *Lorenz v. United States*, 24 App. D. C. 337, 387, s. c. 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; *Ware v. United States*, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 Ann. Cas. 233, s. c. 207 U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417, s. c. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685."

If, however, the conspiracies may be regarded as distinct, then one is charged as having been formed at Omaha in April, 1907, and that overt acts were performed there to effect its object within three years of the finding of the indictment, to wit, October 7, 1909. These allegations establish the jurisdiction of the district court of Nebraska, and exclude the application of the statute of limitations.

As the place of the overt act may be the place of jurisdiction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown *to the grand [402] jurors (and might be so in many cases), but it was intended to be executed in a number of states of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The 6th Amendment of the Constitution of the United States. We have determined otherwise in *Hyde v. United States*.

The Constitution of the United States is not intended as a facility for crime. It is

intended to prevent oppression; and its letter and its spirit are satisfied if, where a criminal purpose is executed, the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury.

Order dismissing petitions affirmed.

Mr. Justice Holmes, dissenting:

These are appeals from orders denying writs of habeas corpus on the same state of facts, which can be set out in a few words. The petitioners were taken into custody in California for removal to Omaha, in the district of Nebraska, for trial before the district court there, and severally petitioned for habeas corpus on the ground that the indictment showed that the Omaha court had no jurisdiction of the alleged offense. The indictment is under Rev. Stat. § 5440, amended by act of May 17, 1879, chap. 8, 21 Stat. at L. 4, U. S. Comp. Stat. 1901, p. 3676, for conspiring to commit an offense **403*** against the United States, namely, to send and receive letters through the postoffice in pursuance of a complex scheme to defraud various people, contrary to Rev. Stat. § 5480, amended by act of March 2, 1889, chap. 393, 25 Stat. at L. 873, U. S. Comp. Stat. 1901, p. 3696. The scheme contemplated the hiring of postoffice boxes at Omaha and other places, in six different states; and the hiring of a box there and the posting and receiving of letters in that place by conspirators other than the petitioners are alleged as overt acts done in pursuance of the scheme. But it is alleged that the place where the conspiracy was formed is unknown, no place is laid for its continuance, and the petitioners are not shown to have been engaged in it in Omaha or ever to have been in the place. Therefore no jurisdiction is shown unless the averment of the above-mentioned overt acts makes up for all that is left out.

To deny the jurisdiction, however, I must go farther than was necessary in *Hyde v. United States*, just decided [225 U. S. 347, ante, 1114, 32 Sup. Ct. Rep. 793]. For in this case the offense against the United States named as the proximate object of the conspiracy, *viz.*, the sending of letters through the postoffice in aid of the ultimately intended fraud, is alleged to have

been accomplished, and indeed is laid as the overt act. But all the parties to the conspiracy could have been indicted in Omaha for the use of the postoffice there in pursuance of their plan by some of their number, and it naturally may be asked how it can be possible that the petitioners should be collectively guilty of unlawfully using the mails in Omaha, but not guilty of being combined there for that purpose?

The answer has been suggested, at least, by what I have said in the case of *Hyde*. The parties are liable to punishment where the prohibited act is done, not on the ground of a fiction that they were present, but in spite of the fact that they were not present. And they well may be dealt with there if they can be reached, for bringing about what *is deemed a harm in that place. **[404]** But when they are punished for being and not for doing, when the offense consists in no act beyond the osmose of mutual understanding, they should be punished only where they are,—only where the wrongful relation exists. The United States can reach them equally, it is true, in either case; but as it can try them only where the crime has been committed, the test to be applied is the same that would be applied if the crime arose under the law of one of the states. It does not follow from the defendants' liability in Omaha for certain results of their conspiracy that they can be tried there for the conspiracy itself. I assume for purposes of decision, whatever misgivings may be felt as to the justice of indicting for a conspiracy to do what actually has been done, that an indictment will lie. *Reg. v. Button*, 11 Q. B. 929, 18 L. J. Mag. Cas. N. S. 19, 12 Jur. 1017, 3 Cox, C. C. 229; *United States v. McDonald*, 3 Dill. 543, Fed. Cas. No. 15,670; *United States v. Rinds-kopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *United States v. De Grief*, 16 Blatchf. 20, Fed. Cas. No. 14,936; *Rex v. Spragg*, 2 Burr. 993. But I am of opinion that Omaha is not the proper jurisdiction in which to bring it.

If the case were decided on the narrow ground that for the purposes of removal an allegation of conspiracy "then and there" in the middle of the indictment was to be taken to refer to the caption and the place where the indictment was found, I should say nothing. But as general principles are thought to be involved, I think it proper to state my opinion about them.

Mr. Justice Lurton, Mr. Justice Hughes, and Mr. Justice Lamar concur in these views.

405] *ARTHUR JOHNSON, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 405-420.)

Criminal law — record — arraignment.

1. The record sufficiently shows that the indictment was read to the accused, where, after reciting the presence of the attorney for the United States, the defendant in proper person and by his attorney, it adds that "thereupon the defendant, being arraigned upon the indictment, pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like."

[For other cases, see *Criminal Law*, VI., in *Digest Sup. Ct. 1908.*]

Appeal — record — contradiction.

2. The record on appeal imports verity, and cannot be contradicted by an affidavit which counsel files in the cause.

[For other cases, see *Appeal and Error*, V. c, in *Digest Sup. Ct. 1908.*]

Trial — murder — qualified verdict — District of Columbia.

3. The provision for a verdict of guilty of murder "without capital punishment," contained in the Federal Criminal Code of March 4, 1909 (35 Stat. at L. 1088, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1588), § 330, which Code, in § 272, makes murder a crime against the United States when committed on "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof," has no application to the District of Columbia, which, in this respect, is governed by the District Code, which contains no provision for such a qualified verdict.

[Verdict in criminal cases, see *Trial*, IX. b, in *Digest Sup. Ct. 1908.*]

Appeal — question not raised below — drawing jury.

4. The objection that the jury in a criminal case in the District of Columbia was not lawfully drawn should be taken at the trial, and is not available when first raised in the Federal Supreme Court,—especially in view of the provision of the District Code, § 919 (31 Stat. at L. 1338, chap. 854), that no verdict shall be set aside for any cause which might be alleged as ground of challenge before a jury is sworn, except for disqualifying bias not then discovered or suspected.

[For other cases, see *Appeal and Error*, 4638-4640a, in *Digest Sup. Ct. 1908.*]

[No. 1075.]

Argued May 1 and 2, 1912. Decided June 7, 1912.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a conviction of murder in the Supreme Court of the District. Affirmed.

See same case below, 38 App. D. C. 347.

The facts are stated in the opinion.

Messrs. Paca Oberlin and Thomas M. Baker (by special leave) argued the cause, and, with Mr. Joseph Salomon, filed a brief for petitioner:

A defendant in a capital case cannot waive anything essential.

Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *Hill v. People*, 16 Mich. 351; *Cancemi v. People*, 18 N. Y. 128.

Reading of an indictment is necessary in all criminal cases unless waived, and in a capital case it cannot be waived; and the record in such a case, which is silent on that point, is the same in legal effect as if it recited that reading was waived, or indictment not read; and if either be true, the record is fatally defective.

Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952.

In capital and other infamous crimes both the arraignment and plea have always been regarded as a matter of substance, and must be affirmatively shown in the record.

Ibid.

From early times it has been true that whenever there was a statute in favor of life or liberty, that construction has been adopted by the courts which would cause it to operate in all places where it could so operate. A general act, prescribing the punishment of a specific offense throughout the state, operates as a repeal of a public local act prescribing a different punishment for a particular locality.

Nusser v. Com. 25 Pa. 126.

In the state of New York it was held that § 72 of the Penal Code, punishing the crime of bribery, repealed § 58 of the New York city consolidation act, providing for the same offense within the city of New York.

People v. Jaehne, 103 N. Y. 182, 8 N. E. 374.

An act changing the punishment only is not inconsistent with a failure to modify the elements of the crime also, especially when the punishment is made less.

Com. v. Wyman, 12 Cush. 237.

The rule of construction by which general acts of Congress are held to be applicable to the District of Columbia has been followed from the beginning.

Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268; *Chase v. United States*, 7 App. D. C. 156.

For all time the Constitution fixes the purposes for which the District of Columbia was acquired, the method of acquisition being by cession from Virginia and Maryland. Congress has declared the District of Columbia to be accepted for the permanent seat of the government of

the United States. The court will not look behind the declarations of the political department to see the actual uses to which the lands are put, in construing the application of statutes relating thereto.

Benson v. United States, 146 U. S. 331, 36 L. ed. 994, 13 Sup. Ct. Rep. 60.

Lands acquired "for the exclusive use of the United States, and under the exclusive jurisdiction thereof," are not merely those lands of which the United States has the exclusive use in the ordinary proprietary sense.

United States v. Penn, 48 Fed. 669.

But even then there are large tracts of land in the District of Columbia falling within that description, such, as the Capitol grounds, the arsenal grounds, sites for public buildings, and the streets and highways owned by the government in fee. The streets and public squares in the District of Columbia were conveyed "for the use of the United States forever."

Van Ness v. Washington, 4 Pet. 232, 284, 7 L. ed. 842, 859; *District of Columbia v. Baltimore & P. R. Co.* 114 U. S. 453, 460, 29 L. ed. 216, 220, 5 Sup. Ct. Rep. 1098.

Solicitor General **Lehmann** argued the cause and filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

Johnson was indicted, tried, and convicted in the supreme court of the District of Columbia for the crime of murder for killing one *Ofenstein*, and sentenced to death.

409] *He moved for arrest of judgment and for new trial on certain grounds which, among others, present three questions—(1) whether he had been properly arraigned; (2) the action of the court in giving and refusing instructions in regard to the power of the jury to add to their verdict, if they found him guilty of murder, the words "without capital punishment;" (3) the legality of the manner of selecting the jury.

(1) The record recites the presence of the attorney for the United States, the defendant in proper person and by his attorney, and adds that "thereupon the defendant, being arraigned upon the indictment, pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like."

The contention is that there is a fatal defect in that the record does not show that the indictment was read to the defendant; and to establish that such reading was necessary counsel invoke the 6th

Amendment of the Constitution of the United States, which provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the action against him. But to this it may be urged, as it is urged, that information of the charge may be given without reading the indictment. But we may pass that, and grant also that in capital and otherwise infamous crimes both the arraignment and plea are a matter of substance, and must be affirmatively shown by the record. We think that they are shown, if such be the fair intendment of the words of the record. And this is demonstrated by the case that is relied on against it; that is, *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952. In that case the record did not show (and we quote from the opinion) "that the accused was ever formally arraigned, or that he pleaded to the indictment," except as an inference from a statement in the bill of exceptions that the jury were "sworn and charged to try the issues joined." It was held, after elaborate discussion, *three members of the court[410 dissenting, that a plea to the indictment was not a matter of form, but of substance, and should be shown by the record. In the discussion and in the cases cited the arraignment was considered as distinct from the plea, and consisted of formally calling the accused to the bar for the purpose of a trial. We may quote as illustrative the following paragraph from pages 637, 638:

"According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is, the 'demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him, *cul. prist*, and enters the prisoner's plea; then he demands how he will be tried; the common answer is, *by God and the country*, and thereupon the clerk enters *po. se*, and prays to God to send him a good deliverance.' 2 Hale, P. C. 219. So in Blackstone: 'To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment.' 'After which [after the indictment is read to the accused] it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty.' 4 Bl. Com. 322, 323 to 341. Chitty says: 'The proper mode of stating the arraignment on the record is in this form: "And being brought to the bar here in his own proper person, he is committed to the marshal," etc. And being asked how he will

acquit himself of the premises (in case of felony, and of "the high treasons" in case of treason) "above laid to his charge, saith," etc. If this statement be omitted, it seems the record will be erroneous.' 1 Chitty, Crim. Law. *419."

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment. But so far as it is expressed it has a definite meaning. By § 1032 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 722) it is [411] provided that "when any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

It will be observed that the word "arraignment" is used as comprehensively descriptive of what shall precede the plea. If it be so used in the law, it certainly can be used in the record as showing the performance of that which the law prescribes by it. We realize that both the Constitution and the law are careful to direct that information be given to the accused of the charge against him. By § 1033 it is provided that when any person is indicted for any capital offense, if it be treason, three days before the trial, and if it be any other capital offense, two days before the trial, a copy of the indictment and list of jurors and witnesses shall be delivered to him. And this can be insisted on. *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334. We may presume that the law was complied with in the present case and that Johnson was given a copy of the indictment as well as having had it read to him, which we think the record sufficiently shows; and as the record imports verity, it cannot be contradicted by an affidavit which counsel filed in the case, even if it had been filed for such purpose, which, according to counsel, it was not, but "to call the attention of the court to the defect on the face of the record." *Evans v. Stettinisch*, 149 U. S. 605, 607, 37 L. ed. 866, 867, 13 Sup. Ct. Rep. 931.

(2) Prior to January 15, 1897, homicide, as a crime against the United States, was divided into murder and manslaughter "when committed within any fort, arsenal,

dockyard, magazine, or in any place or district or *country under the exclu-[412 sive jurisdiction of the United States," and upon the high seas and certain waters out of the jurisdiction of any particular state. The punishment for murder was death; for manslaughter, a certain term of imprisonment. Sections 5336, 5340, 5343 (U. S. Comp. Stat. 1901, pp. 3624, 3628). The crime of rape, when committed in any of the specified places, was also punished by death. Section 5345.

By the act passed January 15, 1897, it was provided "that in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. at L. 487, chap. 29, U. S. Comp. Stat. 1901, p. 3620. It will be observed that § 5339 of the Revised Statutes is made part of the act. By that section, re-enacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district or country under the exclusive jurisdiction of the United States, . . . shall suffer death." The act was held applicable to the District of Columbia, and under its provisions and § 5339 until January 1, 1902, the date when the District Code became effective, murder was prosecuted. *Winston v. United States*, 172 U. S. 303, 43 L. ed. 456, 19 Sup. Ct. Rep. 212.

By the District Code murder was divided into two degrees, and it was provided that the punishment for murder in the first degree should be "death by hanging." Punishment for manslaughter was fixed at imprisonment for life, or for not less than twenty years. Sections 798, 799 (this section made it murder in the first degree to put obstructions on a railroad or street railroad), 800 and 801 [31 Stat. at L. 1321, chap. 854.]

The District Code also changed the law as to rape, and fixed its punishment at not less than five nor more than thirty years, the jury having the power to add to their *verdict, if it be guilty, the[413 words "with the death penalty." Section 808.

It necessarily followed that the provision for the qualified verdict ceased to apply in the District. Thereafter the definitions and requirements of the District Code prevailed, and the death penalty was imposed for

conviction of murder in the first degree for eight years.

In the meanwhile a commission was at work revising and codifying the criminal and penal laws of the United States, with the result that a Criminal Code was approved March 4, 1909 [35 Stat. at L. 1088, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1588]. It is the asserted clash between its provisions giving power to the jury to qualify their verdict and those of the District Code, under which, we have seen, the jury has not such power, that constitutes the question in this case.

That some provisions of the Criminal Code are applicable to the District is conceded. It is conceded by the government that the first ten chapters are applicable just as they are to the states, territories, and other districts, and that the same is true of chapter 12. The concession is put upon the ground that those chapters deal with offenses Federal in their nature. Chapter 13, it is said, relates to territorial jurisdiction and deals with certain offenses "when committed within any territory or district, or within or upon any place within the exclusive jurisdiction of the United States." So far as the District Code deals with the offenses described in chapter 13, it is superseded by the Criminal Code.

The government says: "There seems to be no room for doubt of this. The offenses defined are to be punished as prescribed 'when committed within any territory or district, or within or upon any place within the exclusive jurisdiction of the United States.' Sec. 311. The District of Columbia comes within this description. Then we find in § 319 that 'the provisions of this section shall apply only within the territories of the United States; and in 414]*§ 320, that 'the provisions of this section shall apply only within the territories of the United States and the District of Columbia.'"

The final concession of the government, therefore, is that "it cannot be said broadly that, in the enactment of the Criminal Code, there was no purpose to deal with or modify the District Code in any respect." But the government turns from these concessions and insists that chapter 11, in which murder is defined, was not intended to apply to the District. This is deduced from the report of the commission and § 272 of the chapter which defines the territorial extent and the application of the chapter. The commission in their report said: "In the revision of this chapter we have deemed it important to define with the greatest attainable precision the places within which the jurisdiction of the United States over crimes shall be exercised."

They adopted a definition by an enumeration of places. Among others, the following: "Any fort, arsenal, dockyard, magazine, other needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States."

But the suggested definition was amended by the joint committee of Congress and became § 272 of the Criminal Code, which is less broad than the provision recommended by the commission. That section provides: "The crimes and offenses defined in this chapter [11] shall be punished as herein prescribed. . . . Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The difference to be observed between this provision and that recommended by the commission is the difference between "any[415 fort . . . or other place under the exclusive jurisdiction of the United States," and "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof." The word "lands" in the latter is limited, as the word "place" was in the former, by its association. It is further limited, and, indeed, specialized, by the qualification "reserved or acquired for the exclusive use of the United States." In other words, it has a proprietary, and not a governmental, sense, and is very inapt, indeed, to describe the District of Columbia.

This view is reinforced by a comparison of § 272 with §§ 5339 and 5570 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3627, 3739) which preceded it, and of which it was intended to take the place. Section 5570 was the predecessor of the fourth subdivision of § 272, and we have no concern with it. The other three subdivisions were preceded by § 5339, which provided as follows: "Every person who commits murder—First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. . . .

"Third. . . . shall suffer death."

It will be observed, therefore, how general and comprehensive the first clause of § 5339 is, and in comparison how restricted and special is subd. 3 of § 272. In other words, there is omitted from the latter the words by which, we have seen,

it was decided in *Winston v. United States*, supra, that the act of January 15, 1897, supra, which was the first legislation giving the power to a jury to qualify their verdict, was applicable to the District of Columbia.

A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words "any lands reserved or acquired for the exclusive use of the United States," 416] used in § 272, would *be regarded as the equivalent in meaning of the words "district or country under the exclusive jurisdiction of the United States," used in § 5339. And yet it is mainly on those words in § 272 that appellant relies. The District of Columbia can hardly be said, as we have pointed out, to be in any proper or adequate sense "lands reserved for the exclusive use of the United States," while the words "district or country under the exclusive jurisdiction of the United States" can be, as they had been, properly and adequately held to include the District of Columbia.

Very little comment is necessary to show the purpose of the restricted language of § 272. Chapter 11 deals, as said by the government, with offenses of the kind subject to the jurisdiction of the states severally where there are states,—offenses not distinctively Federal in character, but subjects of local or domestic police. The territories provided their own laws in such cases, just as the states did, and there were distinct congressional enactments for Alaska and the District of Columbia which were not intended, we think, to be disturbed. This conclusion gets strength from § 289, which provides that if any act be done or omitted in any of the places mentioned in § 272 which is not made penal by a law of Congress, but is penal "within the territorial limits of any state, recognized territory, or district," shall remain penal notwithstanding a "subsequent repeal or amendment thereof by any such state or territory or district."

It follows, therefore, we think, that chapter 11 of the Criminal Code, and necessarily § 272, which is a part of it, are not applicable to the District of Columbia. And it is an immediate inference that if the chapter defining the crime of murder is not applicable, chapter 14, which deals with its trial and incidents, may not be applicable. There are circumstances which confirm the inference.

In chapter 11 the definition of murder is essentially the same as in the District 417] Code, though there are some *differences in the manner of expression. It is divided into murder in the first degree and

murder in the second degree, and in both the punishment is death, the District Code providing the manner of death to be by hanging, as does the Criminal Code, in § 323 of chapter 14.

The punishment for murder in the second degree is different in the different Codes. In the District Code it is imprisonment for life or for not less than twenty years; in the Criminal Code, for life or for not more than ten years. The punishments for manslaughter are also different, being for not more than ten years in the Criminal Code and not exceeding fifteen years in the District Code, or such imprisonment and a fine not exceeding \$1,000.

This brings us to the consideration of chapter 14, of which it may be said that most of its sections are continuations of the sections of the Revised Statutes or of former acts of Congress. For instance, § 330, which provides for the qualified verdict, is the same as the act of January 15, 1897, chap. 29, § 1 (29 Stat. at L. 487, U. S. Comp. Stat. 1901, p. 3620), except that the words "murder in the first degree" are added.

Further comparisons of the sections and provisions of the Codes will not help us to clarify the situation, which, it must be admitted, lends itself to controversy.

We think, however, that there are certain general considerations which control. The Codes are separate instruments, and no certain test can be deduced from pointing out particular likenesses or differences. But the effect of separation is important and necessarily had its purpose. The Codes had in the main special spheres of operation, and provisions accommodated to such spheres. There is certainly nothing anomalous in punishing the crime of murder differently in different jurisdictions. It is but the application of legislation to conditions. But if it be anomalous, very little argument can be drawn from it to solve the questions in controversy. The difference *existed for a number of years[418 between the District and other places under national jurisdiction, for, as we have seen, the qualified verdict has not existed in the District since the enactment of the District Code, and did not exist when the Criminal Code was enacted. There is certainly nothing in the mere act of enacting that Code which declares an intention to give to the provision conferring power on a jury to qualify their verdict greater efficacy against the Code of the District than the same provision in the act of January 15, 1897, possessed. And the difference between that act and the District Code we cannot assume was overlooked, and all that it meant in the administration

of criminal justice, when Congress came to review the laws of the country for the purpose of their codification and necessarily the territorial extent of their operation.

Congress certainly, in enacting the District Code, recognized the expediency of separate provisions for the District of Columbia. It was said at the bar, and not denied, that the District Code was not only the work of the lawyers of the District, having in mind the needs of the District, but of its citizens as well, expressed through various organizations and bodies of them. In yielding to the recommendations Congress made no new precedent. It had given local control to the territories, and it enacted a separate Code for Alaska.

But it is said that Congress recognized the incompleteness of the District Code, and provided that all inconsistent acts of Congress passed thereafter should be held to modify its provisions, and to support this § 1639 is cited: That section provides as follows:

"The enactment of this Code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect [19]as if passed after the enactment *of this Code; and, so far as such acts may vary from or conflict with any provision contained in this Code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith." [31 Stat. at L. 1436, chap. 854.]

In connection with this section, § 341 of the Criminal Code is referred to, which is as follows:

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

This section adds no force or explanation to § 1639. Of course, what was "embraced within and superseded by" the Criminal Code is repealed by it. But we have to consider, as we have considered, whether the provision of the District Code in regard to the punishment of murder was embraced within the Criminal Code, and the discussion answers as well the contention based on § 1639. There is no inconsistency of superseding or repealing effect between the Code of the District and the Criminal Code, regarding the latter as 56 L. ed.

an act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the court of appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code.

(3) The last contention of petitioner is that the jury was not lawfully drawn. This contention is made as a make-weight at the last minute. It was not made as a ground for new trial or arrest of judgment, nor was it assigned as error in the court of appeals. The contention has the broad basis, according to the argument of petitioner, that there is no way of impaneling jurors in a *capital case in [420] the District of Columbia without assenting to or dissenting from the proposition. We think it constituted a ground of objection to the competency of the jurors when they were called, and should have been availed of at the trial. It is provided by § 919 of the District Code [31 Stat. at L. 1398, chap. 854] that no verdict shall be set aside for any cause which might be alleged as ground of challenge before a juror is sworn, except for disqualifying bias not discovered or suspected by the defendant or his counsel before the juror was sworn. Judgment affirmed.

J. WESLEY GLASGOW, Appt.,

v.

WILLIAM H. MOYER, Warden of the United States Penitentiary at Atlanta, Georgia.

(See S. C. Reporter's ed. 420-430.)

Habeas corpus — as substitute for writ of error.

Habeas corpus will not issue as a substitute for a writ of error in favor of a person in custody under a conviction in a Federal circuit court having jurisdiction of the case, to review its holding that the affidavit of prejudice authorized by the Judicial Code of March 3, 1911 (36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128), § 21, could not be filed after the case had been tried and verdict rendered, or to test the correctness of the

NOTE.—On habeas corpus in the Federal courts—see notes to *Re Reinitz*, 4 L.R.A. 236; *State ex rel. Cochran v. Winters*, 10 L.R.A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to habeas corpus to test constitutionality of statute—see note to *Hovey v. Elliott*, 39 L.R.A. 449.

court's rulings upon his defenses of law or fact, although the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense.

[For other cases, see Habeas Corpus, 64-67, 108-119, in Digest Sup. Ct. 1908.]

[No. 1123.]

Argued May 13, 1912. Decided June 7, 1912.

APPEAL from the District Court of the United States for the Northern District of Georgia to review an order refusing relief by habeas corpus. Affirmed.

The facts are stated in the opinion.

Mr. John C. Fay argued the cause, and, with Mr. Charles Colden Miller, filed a brief for appellant.

Solicitor General Lehmann argued the cause and filed a brief for appellee.

Mr. Justice McKenna delivered the opinion of the court:

This appeal is prosecuted to review the order of the district court, denying petition of appellant to be discharged in proceedings for habeas corpus from the custody of the warden of the United States Penitentiary at Atlanta, Georgia.

The petition alleges the following: On the 21st of July 1911, while appellant was temporarily in Wilmington, Delaware, he was arrested and charged with peddling books without a license, and was convicted in the municipal court of the city and fined \$5. The judgment was almost immediately remitted and he was re-arrested and charged with having deposited in the United States mails a copy of an obscene book, and by one William G. Mahaffy, a United States commissioner, committed to the custody of the warden of the Newcastle County Workhouse to await the action of the grand jury. Under the direction of the United States attorney his rooms were pillaged and all of his possessions, clothing, books, etc., were carried off and deposited in the United States courthouse. Before his conviction he was stripped of his clothing, dressed in prison garb, harsh prison rules were enforced against him, and he was fed on unwholesome food. He was so confined and treated until a grand jury, selected by the commissioner who had committed him, found an indictment against him charging him with having deposited an obscene book in the United States mails, and without seeing a copy of the indictment or knowing its contents, he was arraigned in his prison clothes, notwithstanding the indictment charged no offense

against the laws of the United States and was couched in vague and uncertain language that did not apprise him of the offense (defects which he brought to the attention of the judge of the district court by pleas to the jurisdiction, demurrers, and motions to quash, all of which were overruled), and he was placed on trial before a jury selected by the commissioner who had committed him. Although the array was challenged for that cause and the number of peremptory challenges prescribed by law were not allowed him, he was forced to trial, and the jury, under instructions from the court, was constrained to find a verdict against him, papers material to his defense having been withheld by the United States attorney, with the acquiescence of the judge, and process for nonresident witnesses having been refused.

Motions in arrest of judgment and for a new trial were filed and the hearing thereof fixed for January 6, 1912, before Edward G. Bradford, district judge, who, having exhibited during the trial a deep-seated prejudice against appellant and a violent partiality in his rulings for the United States attorney, appellant in good faith, as in law he was entitled to do, filed an affidavit charging him, the district judge, with prejudice, and an application to have the same certified to the senior circuit judge, then present in the circuit court of appeals for the third circuit, together with the required certificate of counsel as required by law.

The petition further alleged that by the filing of the same and by operation of the act of March 3, 1911 [36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128], which went into operation January 1, 1912, the district judge became and was disqualified to further proceed in said cause, and any further action taken by him was without jurisdiction and absolutely null and void; further alleged that the judge forbade the clerk to enter of record the affidavit, forbade the clerk to certify the same to the senior circuit judge, proceeded to overrule the motions in arrest of judgment and for a new trial, and, against the protest of appellant, sentenced him to confinement in the penitentiary at Atlanta, Georgia, for a term of fifteen months from the 6th of January, 1912, and to pay a fine of \$500.

Appellant, the petition alleged, was placed in the hands of the United States marshal and by him imprisoned by force in his (the marshal's) office from about 1 P. M., January 6, 1912, without being permitted to return to the court house to get his personal property there,

and at midnight was spirited away by a circuitous route to Norfolk, Virginia, where he was imprisoned all night and all of the next day (Sunday). Thence he was taken, manacled, without being supplied with food or being allowed to purchase any, and delivered under the unlawful order of the district court to the custody of the appellee, by whom he has ever since been confined in the penitentiary at Atlanta, Georgia.

426] *Appellant, the petition alleged is, by the action recited, not only unlawfully imprisoned, but by the refusal to certify his application, affidavit, and certificate of counsel to the senior circuit judge, "there is now no judge of the United States district court of Delaware, and no one there authorized to pass upon his motions in arrest of judgment or motion for a new trial, or competent to sit and certify to the exceptions reserved by him to the many errors committed by said Judge Bradford during his trial, or to permit him to have the same reviewed and set aside by an appellate tribunal."

The allegations of the petition were denied by the district judge.

A writ of habeas corpus was prayed, to the end that appellant be discharged or cause to the contrary be shown.

The writ was issued, but upon its return and hearing appellant was remanded to custody.

The court, as grounds for its decision, said: "The real question in this case is whether or not, under § 21[†] of the new Judicial Code, an affidavit such as provided for therein can be filed after a case has been tried" and verdict rendered, and the attempt is to disqualify a judge from pronouncing sentence. The court pointed out that in the case at bar there was also the circumstance that the case had been tried and the verdict rendered before the

Code went into effect, and the court thought that it could not be conceived that it was the purpose of Congress to apply the act to such a situation, the section itself providing that the affidavit should be filed not less than ten days before the beginning of the term of the court, or good cause shown for failure to file within that time. The court said further: "It would require some specific language in this act to satisfy me that Congress intended such an affidavit to be filed at the stage which had been reached in this case."

*The court, however, finally concluded that the action of the district court of Delaware "was a matter for review by the circuit court of appeals on writ of error" and was "clearly beyond the proper scope and use of the" writ of habeas corpus.

The assignments of error attack the action of the district court for error (1) in holding that §§ 20 and 21 of the Judicial Code did not apply to the case at bar; (2) in holding that Judge Bradford had jurisdiction to impose the imprisonment complained of; and (3) in refusing the writ and dismissing the petition. But questions are raised here which were not presented in the petition in the court below or passed on by that court. Section 211 of the Criminal Code [35 Stat. at L. 1129, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1651] (which makes it a crime to deposit obscene books in the mails),[‡] under which appellant was indicted, is attacked as unconstitutional because (a) it is not within *the constitutional grant^[428] of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States postoffice or other authorized depository for United States mail; (b) it does not inform appellant of the nature of the accusation against him nor describe an offense with

[†]"Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in § 23, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party

shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. . . ."

[‡]"Sec. 211. Every obscene, lewd, or lascivious, and every filthy book, pamphlet, . . . is hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, . . . shall be fined not more than \$5,000, or imprisoned not more than five years, or both."

certainty; (c) it is an *ex post facto* law; (d) appellant was deprived of his liberty and property without due process of law. It is also asserted that § 211 does not create an offense against the United States.

Appellant, however, even if, in the absence of all proof of their truth, the recitals of the petition which we have previously stated be accepted for the purpose of this proceeding only as true, encounters an obstacle to a consideration of his contentions in the limitation upon the scope of a writ of habeas corpus, and this limitation was the ultimate ground of the decision of the district court.

The writ of habeas corpus cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for habeas corpus to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried, but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited,—*Re Lincoln*, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602, which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, was an appeal from a judgment discharging a writ of habeas corpus petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error, but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said, "Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its [29] conclusions." **Re Gregory*, 219 U. S. 210, 55 L. ed. 184, 31 Sup. Ct. Rep. 143, was a writ of habeas corpus brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited.

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to

be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant, before his trial, petitioned this court in habeas corpus and that his petition was denied on the ground that his proper remedy was by writ of error after trial. In his petition he charged mistreatment by the prison authorities, the taking of his papers and property from his room and from the express office, and, that although he informed the United States attorney, no permission was granted him to examine his papers for his defense. He also in the petition attacked the indictment against him on the ground that it described no offense against the laws of the United States, nor an offense "against any valid law of the United States, and afforded no justification for his imprisonment." The petition was accompanied by a brief which presented the same contentions as those now presented, though less elaborately.

*Having remitted him to a writ of [430] error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute habeas corpus. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue; in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found; and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the district court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the circuit court of appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defense which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

Order discharging writ affirmed.

CITY OF LOUISVILLE, Appt.,
v.
CUMBERLAND TELEPHONE & TELE-
GRAPH COMPANY.

(See S. C. Reporter's ed. 430-436.)

**Injunction — against municipal ordi-
nance — telephone rates — confisca-
tion.**

The enforcement of a municipal ordinance fixing telephone rates should not be enjoined as confiscatory before giving such ordinance a trial to show its actual effect, where the evidence leaves the probable result very close to the dividing line between the yield of a fair return and confiscation. [For other cases, see Injunction, I. h. in Digest Sup. Ct. 1908.]

[No. 761.]

Argued March 7 and 8, 1912. Decided
June 7, 1912.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining the enforcement of a municipal ordinance fixing telephone rates. Reversed without prejudice.

See same case below, 187 Fed. 637.

The facts are stated in the opinion.

Messrs. **Clayton B. Blakey** and **Huston Quin** argued the cause, and, with Mr. Joseph S. Lawton, filed a brief for appellant.

Messrs. **William L. Granbery** and **Alexander Pope Humphrey** argued the cause, and, with Mr. Alexander Pope Humphrey, Jr., filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill to prevent the enforcement of an ordinance of the city of Louisville fixing telephone rates, passed in 1909, after the attempt of the city to deprive the appellee of its franchise, when that seemed likely to fail. See *Louisville v. Cumberland Teleph. & Teleg. Co.* [May 13, 1912, 224 U. S. 649, ante, 934, 32 Sup. Ct. Rep. 572]. The question raised is the usual one of **confiscation**. *In consequence of the conclusion to which we have come we shall make a much more summary state-

NOTE.—On legislative regulation of tolls, rates, and prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L.R.A. 177.

On unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to *Cotting v. Godard*, 46 L. ed. U. S. 92.

On the power of municipality, apart from contract, to regulate the rates to be charged by a public-service corporation—see note to *Bluefield Waterworks & Improv. Co. v. Bluefield*, 33 L.R.A.(N.S.) 759. 56 L. ed.

ment of the facts than in other circumstances might be necessary. The case was referred to a master and he reported in favor of the city. He was of opinion that in the first year after the ordinance should go into effect there would be a loss of \$30,000, but that in another year or so, in view of the probable increase of subscribers, the company would get back to its former net revenue with a probable continuous increase thereafter and would earn a sufficient return. The judge was of a different opinion, and for the purposes of the present decision only we shall adopt his figures, subject to the changes that we shall state, which leave us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect.

The judge's values were:

Plant, including toll lines	\$1,575,000.00
Real estate	162,000.00
Supplies on hand	18,000.00
Working capital	33,000.00
	<hr/>
	\$1,788,000.00

Gross earnings for 1908, including 15 per cent of receipts from toll lines. This was undisputed

\$325,838.30

The court added 10 per cent more of the toll line receipts, making

330,926.38

The master was of opinion that the remaining 85 per cent should be added, making the total gross earnings

369,087.00

For the purpose of such an estimate as this we think that the toll lines should be either in or out, and if they are to be counted in the property upon which the appellee is not to be prevented by law from earning a fair return, as they are above, and the expenses charged to the appellee, the whole return from them should be added to the gross earnings of the appellee. So we take the total gross earnings as

369,087.00

Expenses as found by the master and accepted by the judge

\$216,363.07

But this includes amount charged to the Exchange for the use of real estate (less expenses for repairs), which, in view of the inclusion of real estate above, it should not

11,707.52

\$204,655.55

Deduct corrected expenses from gross earnings	204,655.55
Net earnings	\$164,431.45
Even if we deduct from the net earnings a sum estimated by the judge as necessary above actual expenditures of 1908 to make good average depreciation	24,095.02
we have	\$140,336.43
which is nearly 8 per cent on the estimated value. The master prophesies a falling off for the first year of	30,000.00
which would leave	\$110,336.43
or over 6 per cent on the valuation assumed.	
435] *Suppose now that we leave out the toll lines.	
Plant, with real estate, etc., as above	\$1,788,000.00
Deduct toll lines estimated at ..	125,000.00
	\$1,663,000.00
Gross earnings	325,838.30
Less 15 per cent from toll lines..	7,632.11
	\$318,206.19
Expenses	\$216,363.07
Less amount charged for use of real estate as above	11,707.52
	\$204,655.55
Less toll line expenses which if estimated (in the absence of satisfactory proof as to their amount) by dividing expenses in proportion to receipts would be approximately	30,000.00
	\$174,655.55
Deduct corrected expenses from gross earnings	174,655.55
	\$143,550.64
Additional deduction for depreciation as before	24,095.02
	\$119,455.62
Which is nearly 7 per cent, or, deducting for loss of custom the first year	30,000.00
	\$89,455.62

which is just above 5 per cent on the judge's valuation.

436] *We express no opinion whether to cut this telephone company down to 6 per

cent by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent on the values estimated by him. The judge, on assumptions to which we have stated our disagreement, makes the present earnings 51⁹/₁₇ per cent, with a reduction by the ordinance to 36¹/₁₇ per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand. Decree reversed without prejudice.

ROSEWELL E. MESSINGER, Petitioner,
v.
PETER ANDERSON.

(See S. C. Reporter's ed. 436-445.)

Second appeal—law of case.

1. The phrase "law of the case," as applied to the effect of a decision of an appellate court in an earlier appeal in the same case, merely expresses, in the absence of statute, the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power.

[For other cases, see Appeal and Error, 5624-5648, in Digest Sup. Ct. 1908.]

Second appeal — law of case — earlier appeal to lower court.

2. A prior decision of a Federal circuit court of appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case.

[For other cases, see Appeal and Error, 5649-5651, in Digest Sup. Ct. 1908.]

Federal courts — following decisions of state courts — wills.

3. No sufficient reason exists which will justify the refusal of a Federal court to

NOTE.—On conclusiveness of prior decisions on subsequent appeals—see note to Hastings v. Foxworthy, 34 L.R.A. 321.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Hill v. Hite, 29 C. C. A. 553; Forcpaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

follow the decision of a state court that the sons of the testator took not merely a life estate, but a fee, subject to be defeated only by their death without lineal descendants, under a will which, after providing that the testamentary trustees shall pay over a moiety to each son upon his attaining a specified age, states that "if either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then" the estate shall go to the brothers and sisters of the testator, with a subsequent provision that nothing in the will shall be construed to deprive the sons of the power to dispose of their portions by will.

[For other cases, see Courts, 1976-1983, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued January 19 and 22, 1912. Decided June 7, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, on a third writ of error, affirmed a judgment of the Circuit Court for the Northern District of Ohio in favor of plaintiff in an action of ejectment. Reversed.

See same case below, first appeal, 7 L.R.A. (N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929; second appeal, 85 C. C. A. 468, 158 Fed. 250; third appeal, 96 C. C. A. 445, 171 Fed. 785.

The facts are stated in the opinion.

Messrs. **Harry E. King** and **Clayton W. Everett** argued the cause, and, with Mr. **Oliver B. Snider**, filed a brief for petitioner:

Until the last judgment of the circuit court, no final judgment was rendered herein.

Smith v. Adams, 130 U. S. 167-177, 32 L. ed. 895-899, 9 Sup. Ct. Rep. 566.

This court, upon its writ of certiorari herein, has power to review each of the three judgments of the circuit court of appeals and the last judgment of the circuit court.

Panama R. Co. v. Napier Shipping Co. 166 U. S. 280-284, 41 L. ed. 1004, 1005, 17 Sup. Ct. Rep. 572; *William W. Bierce v. Waterhouse*, 219 U. S. 320, 331, 332, 55 L. ed. 237, 241, 242, 31 Sup. Ct. Rep. 241.

The word "property," used in the will in the devise to William Anderson, shows an intention to devise a fee, and is sufficient to do so.

Carter v. Gray, 58 N. J. Eq. 411, 43 Atl. 711; *Doe ex dem. Chamberlain v. Owings*, 30 Md. 455; *Piatt v. Sinton*, 37 Ohio St. 353.

The word "estate," in the devise to the surviving son, is the most general, significant

and operative that can be used in a will, and according to all the cases may embrace every degree and species of interest,—it carries a fee from its established and legal import and operation.

Lambert v. Paine, 3 Cranch, 97-134, 2 L. ed. 377-390.

The view of the circuit court of appeals is contrary to a long-settled rule of property in Ohio.

Abbott v. Essex Co. 18 How. 202, 15 L. ed. 352; *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 331; *Taylor v. Foster*, 17 Ohio St. 166; *Piatt v. Sinton*, 37 Ohio St. 355; *Martin v. Lapham*, 38 Ohio St. 541; *Collins v. Collins*, 40 Ohio St. 353; *Anderson v. United Realty Co.* 79 Ohio St. 23, — L.R.A. (N.S.) —, 86 N. E. 644; *Walker v. Walker*, 20 Ohio C. C. 409, 11 Ohio C. D. 291; *Darlington v. Compton*, 20 Ohio C. C. 242, 10 Ohio C. D. 467; *Durfee v. MacNeil*, 58 Ohio St. 244, 50 N. E. 721; *Pendleton v. Bowler*, 27 Ohio L. J. 316.

The Federal courts must look to the law of the state in which land is situated for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other instruments conveying title thereto, and in trials at law must regard the state law as a rule of decision.

Brine v. Hartford F. Ins. Co. 96 U. S. 627, 634, 24 L. ed. 858, 861; *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461; *Clarke v. Clarke*, 178 U. S. 186, 190, 191, 44 L. ed. 1028, 1030, 1031, 20 Sup. Ct. Rep. 873; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. ed. 196, 201, 22 Sup. Ct. Rep. 213; *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 272, 51 L. ed. 476, 481, 27 Sup. Ct. Rep. 258; *Olmsted v. Olmsted*, 216 U. S. 386, 54 L. ed. 530, 25 L.R.A. (N.S.) 1292, 30 Sup. Ct. Rep. 292.

The circuit court of appeals did not follow the Ohio decisions and statute, and therein erred.

Roberts v. Lewis, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945; *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205; *Bilger v. Nunan*, 186 Fed. 665; *Devecmon v. Shaw*, 70 Md. 226, 16 Atl. 645.

Decisions construing statutes like the Ohio statute are pertinent here.

Page, Wills, § 562, pp. 653, 654; *Devecmon v. Shaw*, 70 Md. 226, 16 Atl. 645; *Snyder v. Baer*, 144 Pa. 278, 13 L.R.A. 359, 22 Atl. 897; *Kiefel v. Keppler*, 173 Pa. 181, 33 Atl. 1043; *Simonds v. Simonds*, 168 Mass. 146, 46 N. E. 421; *Harris v. Dyer*, 18 R. I. 543, 28 Atl. 971; *May v. San Antonio & A. P. Town Site Co.* 83 Tex. 502, 18 S. W. 959.

Independently of statute, the will devised only a defeasible fee.

Thompson v. Hoop, 6 Ohio St. 480; Schouler, Wills, 262, p. 549; Parish v. Ferris, 6 Ohio St. 563; Niles v. Gray, 12 Ohio St. 320; Abbott v. Essex Co. 18 How. 202, 15 L. ed. 352; Piatt v. Sinton, 37 Ohio St. 353; Taylor v. Foster, 17 Ohio St. 166; Collins v. Collins, 40 Ohio St. 353; Duffee v. MacNeil, 58 Ohio St. 238, 50 N. E. 721; Anderson v. United Realty Co. 79 Ohio St. 23, — L.R.A.(N.S.) —, 86 N. E. 644; Darlington v. Compton, 20 Ohio C. C. 242, 10 Ohio C. D. 467.

Since the will provided a limitation over on a definite failure of issue, an estate tail or an estate in remainder was not and could not have been created or implied, and such an estate could only have been created or implied from a limitation over on an indefinite failure of issue, which by will may occur without reference to any particular time.

4 Kent, Com. pp. 274, 275; 1 Tiffany, Real Prop. § 25, p. 63; 2 Jarman, Wills, 6th ed. p. 1320; 2 Washb. Real Prop. 5th ed. pp. 355, *753; Niles v. Gray, 12 Ohio St. 330; Parish v. Ferris, 6 Ohio St. 563.

A limitation over after definite failure of issue creates a defeasible fee.

Pells v. Brown, Cro. Jac. 590; De Wolf v. Middleton, 18 R. I. 813, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271; Toman v. Dunlop, 18 Pa. 76; Jordan v. Roach, 32 Miss. 608; Daniel v. Thomson, 14 B. Mon. 670; Den ex dem. Wardell v. Allaire, 20 N. J. L. 6; Page, Wills, § 591.

The construction of the Anderson will by the circuit court of appeals rests largely upon three cases which have been either discredited or overruled in the several states in which they arose; viz.: Shaw v. Hoard, 18 Ohio St. 228; Wetter v. United Hydraulic Cotton Press Co. 75 Ga. 540; Carr v. Green, 2 M'Cord, L. 75.

Anderson v. United Realty Co. 79 Ohio St. 23, — L.R.A.(N.S.) —, 86 N. E. 644; Matthews v. Hudson, 81 Ga. 126, 12 Am. St. Rep. 305, 7 S. E. 286; Chewning v. Shumate, 106 Ga. 751, 32 S. E. 544; Hill v. Terrell, 123 Ga. 49, 51 S. E. 81; Kinard v. Hale, 128 Ga. 485, 57 S. E. 761; Carr v. Jeannerett, 2 M'Cord, L. 66; Durant v. Nash, 30 S. C. 184, 9 S. E. 19; Gordon v. Gordon, 32 S. C. 563, 11 S. E. 334; Powers v. Bullwinkle, 33 S. C. 293, 11 S. E. 971; Thomson v. Peake, 38 S. C. 440, 17 S. E. 45; Sheppard v. Jones, 77 S. C. 279, 57 S. E. 844.

The decision of the circuit court of appeals is also opposed to the decisions of the highest court of Mississippi, where the testator resided when his will was drawn, executed, and took effect.

Jordan v. Roach, 32 Miss. 604; Sims v. Conger, 39 Miss. 231, 77 Am. Dec. 671; Busby v. Rhodes, 58 Miss. 237; Johnson v. Delome Land & Planting Co. 77 Miss. 15, 26 So. 360; Halsey v. Gee, 79 Miss. 193, 30 So. 604.

The decision of the circuit court of appeals is also contrary to the decisions of the highest courts of all the states comprising the territory over which the jurisdiction of that court extends in addition to Ohio; to-wit: Kentucky, Tennessee, and Michigan.

Hart v. Thompson, 3 B. Mon. 482; Daniel v. Thomson, 14 B. Mon. 862; Harris v. Berry, 7 Bush, 113; Sale v. Crutchfield, 8 Bush, 636; Crozier v. Cundall, 99 Ky. 202, 35 S. W. 546; Smith v. Ballard, 117 Ky. 179, 77 S. W. 714; Harvey v. Bell, 118 Ky. 512, 81 S. W. 671; Rice v. Rice, 133 Ky. 406, 118 S. W. 270; Williamson v. Tunis, 107 Tenn. 83, 64 S. W. 10; Mullreed v. Clark, 110 Mich. 229, 68 N. W. 138, 989.

The decision of the circuit court of appeals is also contrary to the decisions of the Supreme Court of the United States.

Abbott v. Essex Co. 18 How. 202, 15 L. ed. 352; Britton v. Thornton, 112 U. S. 526, 28 L. ed. 816, 5 Sup. Ct. Rep. 291; Roberts v. Lewis, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945.

And, in addition to the state courts above cited, is contrary to the decisions of the highest courts of the following states:

Newsom v. Holesapple, 101 Ala. 682, 15 So. 644; Carter v. Couch, 157 Ala. 470, 20 L.R.A.(N.S.) 858, 47 So. 1006; Friedman v. Steiner, 107 Ill. 125; Summers v. Smith, 127 Ill. 645, 21 N. E. 191; Bond v. Moore, 236 Ill. 576, 19 L.R.A.(N.S.) 540, 86 N. E. 386; Kendall v. Taylor, 245 Ill. 617, 37 L.R.A.(N.S.) 164, 92 N. E. 562; Greer v. Wilson, 108 Ind. 322, 9 N. E. 284; Woodman v. Madigan, 58 N. H. 6; Steward v. Knight, 62 N. J. Eq. 232, 49 Atl. 535; Hilleary v. Hilleary, 26 Md. 274; Hutehins v. Pearce, 80 Md. 434, 31 Atl. 501; Yocum v. Siler, 160 Mo. 281, 61 S. W. 208; Gannon v. Pauk, 200 Mo. 75, 98 S. W. 471; Schnitter v. McManaman, 85 Neb. 337, 27 L.R.A.(N.S.) 1047, 123 N. W. 299; Taylor v. Maris, 90 N. C. 619; Trexler v. Holler, 107 N. C. 617, 12 S. E. 288; Randall v. Josselyn, 59 Vt. 563, 10 Atl. 577; Chaplin v. Doty, 60 Vt. 712, 15 Atl. 362; Atkinson v. McCormick, 76 Va. 791; Randolph v. Wright, 81 Va. 608; Johnson v. Richmond Citizens' Bank, 83 Va. 63, 1 S. E. 705; Dent v. Pickens, 61 W. Va. 488, 58 S. E. 1029.

And is also contrary to the views and conclusions of leading authors on wills.

1 Jarman, Wills, Bigelow's 6th ed. 555; Underhill, Wills, § 468; Page, Wills, §§ 676, 797.

Messrs. Rhea P. Cary and C. H. Trimble argued the cause and filed a brief for respondent:

The decision of the Ohio supreme court is not one which the circuit court of appeals was under obligation to follow as a local rule of property.

Burgess v. Seligman, 107 U. S. 20, 33, 35, 27 L. ed. 359, 365, 366, 2 Sup. Ct. Rep. 10.

The construction placed by the circuit court of appeals upon Henry Anderson's will was correct.

Holton v. Doe, 23 N. J. L. 330; Lytle v. Beveridge, 58 N. Y. 592; Re Stafford, 11 Misc. 436, 33 N. Y. Supp. 419; Bentley v. Kaufman, 12 Phila. 435; McAlpin's Estate, 211 Pa. 26, 60 Atl. 321; Beilstein v. Beilstein, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73.

Petitioner's construction of the will is impossible, because of the destructive effect of the power of disposition upon the executory devise.

Jackson ex dem. Brewster v. Bull, 10 Johns. 19; Burleigh v. Clough, 52 N. H. 275, 13 Am. Rep. 23; 4 Kent, Com. 270.

If only a life estate is granted, a power of disposition in the life tenant does not invalidate a remainder over.

Kelley v. Meins, 135 Mass. 234; Ramsdell v. Ramsdell, 21 Me. 288; Larned v. Bridge, 17 Pick. 339; Burleigh v. Clough, 52 N. H. 273, 13 Am. Rep. 23.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of ejectment for land 442] in Toledo, Ohio, *brought by the respondent, Anderson. The case went three times to the circuit court of appeals, and ended in a judgment for the plaintiff. 7 L.R.A. (N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929; 85 C. C. A. 468, 158 Fed. 250; 96 C. C. A. 445, 171 Fed. 785. The facts that need to be stated are these: In 1841 Charles Butler assigned an overdue mortgage of the land to Henry Anderson as security for a note of his own. He made default, Anderson brought a bill to foreclose (Butler not being served with process), got a decree, bought in, and got the sale confirmed. For the purposes of this decision it may be assumed that Anderson got the land in fee simple, subject to some question as to Butler's rights. The plaintiff below, the respondent here, claimed as remainderman under the will of Henry Anderson, who was his grandfather. The petitioner claims un-

der a conveyance from Butler. If the plaintiff's title is bad, that is an end of the case.

In 1846 Henry Anderson, then domiciled in Mississippi, made his will and died, leaving two sons, William and James. These sons executed deeds declaring that their father, Henry, held and intended to hold the land in trust to secure the payment of Butler's note, and Butler subsequently made such payments on the same that it may be assumed that unless the plaintiff has a title that his father, James, could not affect by the above-mentioned deed, he has none. Whether he has such a title depends on the terms of Henry's will. That instrument, after creating a general trust of substantially all the testator's property, went on thus: "Item. It is my will that when my son William arrives at the age of twenty-one years the trustees . . . shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one half of my property, reserving thereout two-fifth parts of said moiety, by valuation, which my said trustees shall hold in trust and properly invest and pay over to *him at the age[443 of twenty-five years. . . . And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William," etc.

If these clauses were all, there would be no doubt that William and James got an absolute title when they reached the age mentioned. But a following paragraph reads: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then" over to brothers and sisters of the testator. Later in the paragraph the testator says: "I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons of disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills." The testator's son William died in 1850, unmarried and intestate. The other son, James, died in 1902, intestate and leaving the plaintiff his only child.

The circuit court of appeals, when this case first came up, held that James took only a life estate, and that the plaintiff got a remainder that his father could not affect. 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929. But pending the proceedings another case was tried in the state courts between these same parties concerning other parcels of land in Toledo, depending on the same title, in which it was decided by the lower court and affirmed on writ of error by the supreme court of Ohio that James took a fee, subject to be defeated **444**ed *only by his leaving no lineal descendant. *Anderson v. United Realty Co.* 79 Ohio St. 23, — L.R.A.(N.S.) —, 86 N. E. 644, S. C. 222 U. S. 164, ante, 144, 32 Sup. Ct. Rep. 521. The judgment of the lower court was pleaded, but it was held by the circuit court of appeals, after the affirmation by the supreme court, that its own previous decision was the law of the case, and that it was not at liberty to reverse the judgment, even if the matter was *res judicata* on the principle laid down in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905. See *Parrish v. Ferris*, 2 Black, 606, 17 L. ed. 317. In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U. S. 92, 100, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; *Remington v. Central P. R. Co.* 198 U. S. 95, 99, 100, 49 L. ed. 959, 963, 25 Sup. Ct. Rep. 577; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. Of course this court, at least, is free when the case comes here. *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572; *United States v. Denver & R. G. R. Co.* 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep. 33. In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals, it was right.

The later clauses that we have quoted from the will make a difference, it is true, according to whether the sons leave lineal descendants at their death or not. But the interest thus exhibited in descendants is satisfied by the probability that they would inherit the property or be provided for out of it. It is not shown to be so definite and paramount as to cut down the gifts imported by the previous words except in the sin-

gle event in which the will does so in terms. On the contrary, the still later provision that nothing shall be construed to "deprive" the sons of the power to dispose of "their portions" by will *indicates that the **445** testator meant the sons to be owners of his estate, subject to the divesting clause.

We should lean toward an agreement with the state courts, especially in a matter like this. In the present instance we see no sufficient reason for refusing to follow their judgment, even if, for any cause not pointed out to us, it did not finally adjudicate the question of title as between these parties in such wise as to be binding upon every court before which that title subsequently might be discussed.

Judgment reversed.

LOUIS ZECKENDORF, Appt.,

v.

ALBERT STEINFELD, J. N. Curtis, R. K. Shelton, et al. (No. 139.)

ALBERT STEINFELD, J. N. Curtis, R. K. Shelton, et al., Appts.,

v.

LOUIS ZECKENDORF and Silver Bell Copper Company. (No. 140.)

(See S. C. Reporter's ed. 445-459.)

Second appeal—law of case.

1. The holding of a territorial supreme court on the first appeal is not the law of the case for the Federal Supreme Court when reviewing a decree rendered on the second appeal.

[For other cases, see *Appeal and Error*, 5649-5651, in *Digest Sup. Ct.* 1908.]

Corporations — contracts — rescission.

2. That part of an agreement between a corporation and one of its directors and stockholders by which there was vested in the corporation the proceeds of the sale of certain mining properties controlled by him, in consideration of reimbursement for his outlay, and the assumption by the corporation of all his obligations with respect to such properties, cannot be deemed included by the general terms of a stockholders' rescinding resolution, where, from a consid-

NOTE.—On conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy*, 34 L.R.A. 321.

On fiduciary relations of corporate officers and their dealings with corporate property—see notes to *Koehler v. Black River Falls Iron Co.* 17 L. ed. U. S. 340; *McGourkey v. Toledo & O. C. R. Co.* 36 L. ed. U. S. 1079; and *Bensiek v. Thomas*, 13 C. C. A. 466.

As to the power to appoint receivers of corporations where there is no other relief asked—see note to *Supreme Sitting*, O. I. H. v. Baker, 20 L.R.A. 210.

eration of the proceedings of the meeting and the known facts surrounding the parties at the time, it is apparent that they had in mind only to affect the director's right under the agreement to retain for his indemnity the custody of the proceeds of the sale.

[Matters as to corporate contracts, see Corporations, VI. d, in Digest Sup. Ct. 1908.]

Corporations — officer as trustee.

3. A stockholder and director of a corporation, purchasing in his own name and that of the company the shares of another stockholder under an agreement to pay the purchase price from the proceeds of the workings of the company's property or from its sale, and having the stock transferred on the company's books to him as trustee, holds the same in trust for the corporation, and must account to it for the dividends received by him upon such stock. [For other cases, see Corporations, V. d, in Digest Sup. Ct. 1908.]

Receivers — of corporation — in stockholder's suit.

4. A receiver is properly appointed in a stockholder's suit, where the company's properties have all been sold and its assets are to be distributed among the stockholders. [For other cases, see Receivers, I., in Digest Sup. Ct. 1908.]

[Nos. 139 and 140.]

Argued March 15, 1912. Decided June 7, 1912.

CROSS APPEALS from the Supreme Court of the Territory of Arizona to review a decree which, on a second appeal, affirmed a decree of the District Court for Pima County in that territory, rendered in a stockholder's suit, finding against the stockholder on one cause of action and in his favor on the other. Reversed in so far as the decree affirms the decree of the District Court on the first cause of action; otherwise affirmed.

See same case below, first appeal, 10 Ariz. 221, 86 Pac. 7; second appeal, 12 Ariz. 245, 100 Pac. 784.

The facts are stated in the opinion.

Messrs. Frank H. Herford and Edwin A. Meserve argued the cause and filed a brief for Zeckendorf:

Steinfeld was at all times a constructive trustee.

Sun Dance Gold Min. Co. v. Frost, 7 Ariz. 289, 64 Pac. 435, 21 Mor. Min. Rep. 252; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; Averill v. Barber, 2 Silv. Sup. Ct. 40, 6 N. Y. Supp. 255; Beach, Trusts & Trustees, pp. 217, 220, ¶¶ 105, 106; Blake v. Buffalo Creek R. Co. 56 N. Y. 485; Dickinson v. Codwise, 1 Sandf. Ch. 214; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Seacoast R. Co. v. 56 L. ed.

Wood, 65 N. J. Eq. 530, 56 Atl. 337; Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; De Bardeleben v. Bessemer Land & Improv. Co. 140 Ala. 621, 37 So. 511; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242; Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420; Jansen v. Williams, 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279; Kroegeher v. Calivada Colonization Co. 56 C. C. A. 257, 119 Fed. 641; Oliven v. Kastor, 45 Tex. Civ. App. 555, 101 S. W. 563; McCourt v. Singers-Bigger, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287; 2 Pom. Eq. Jur. chap. 7, §§ 902-959, 1090, 1094; Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666; Stewart v. Douglass, 148 Cal. 511, 83 Pac. 699; Miller v. O'Boyle, 89 Fed. 140.

Stockholders, as such, have no implied power to rescind agreements made by the directors or officers of the corporation, for they are not agents of the corporation, and cannot make or rescind contracts for the corporation.

3 Clark & M. Priv. Corp. pp. 1905, 1906, ¶ 627(b).

The rule that prohibits Steinfeld, the partner, from purchasing the properties, the proceeds of which are involved in this litigation, for his own benefit and to the exclusion of his partner Zeckendorf, until Zeckendorf had had an opportunity, with knowledge of the facts, to join in or refuse to join in the purchase, has long since been recognized and referred to this court.

Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355.

The contract under which this money was paid to and received by Steinfeld was void, and its fairness could not have been set up as a defense, even if it had been tried, and all money received thereunder must be turned back to the corporation.

2 Cook, Corp. 4th ed. §§ 734-879, p. 1549 note; 3 Clark & M. Priv. Corp. pp. 1674-1678, 1683, 1690; Morawetz, Priv. Corp. §§ 517 et seq; 3 Thomp. Corp. §§ 4042, 6503, et seq; 3 Pom. Eq. Jur. § 1095; 21 Am. & Eng. Enc. Law, 897, 990, 991; 1 Beach, Corp. 241, 242, 246, 276; Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co. 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Bassett v. Fairchild, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, 64 Pac. 1082; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Bensick v. Thomas, 13 C. C. A. 451, 27 U. S. App. 765, 66 Fed. 104; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; Beach v. Miller, 130 Ill. 162, 17 Am. St.

Rep. 291, 22 N. E. 464; *Smith v. Los Angeles Immigration & Land Co-op. Asso.* 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1; *Shaw v. Davis*, 78 Md. 308, 23 L.R.A. 294, 28 Atl. 619; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 374, 59 N. W. 838; *Barr v. New York, L. E. & W. R. Co.* 96 N. Y. 444; *George v. Central R. & Bkg. Co.* 101 Ala. 607, 14 So. 752; *Bell v. Montgomery Light Co.* 103 Ala. 275, 15 So. 569; *Hannerty v. Standard Theater Co.* 109 Mo. 297, 19 S. W. 82; *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118, 50 N. J. Eq. 485, 27 Atl. 636; *Hardee v. Sunset Oil Co.* 56 Fed. 51; *Martin v. Santa Cruz Water Storage Co.* 4 Ariz. 171, 36 Pac. 36; *Robertson v. H. E. Bucklen & Co.* 107 Ill. App. 369; *The Telegraph v. Lee*, 125 Iowa, 17, 98 N. W. 364; *Adams v. Burke*, 201 Ill. 395, 66 N. E. 235; *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; *Cook v. Sherman*, 4 McCrary, 20, 20 Fed. 167; *Meeker v. Winthrop Iron Co.* 17 Fed. 48, affirmed in 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; *Pickett v. School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Vanderveer v. Asbury Park & B. Street R. Co.* 82 Fed. 355; *People ex rel. Plugger v. Overysse*, 11 Mich. 222; *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 67; *Milford v. Milford Water Co.* 124 Pa. 610, 3 L.R.A. 122, 17 Atl. 185; *Pearson v. Concord R. Corp.* 62 N. H. 537, 13 Am. St. Rep. 590; *Wardell v. Union P. R. Co.* 103 U. S. 657, 26 L. ed. 511, 7 Mor. Min. Rep. 144; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; *Hawes v. Oakland (Hawes v. Contra Costo Water Co.)* 104 U. S. 450, 26 L. ed. 827; *Richardson v. Green (Washburn v. Green)* 133 U. S. 30, 33 L. ed. 516, 10 Sup. Ct. Rep. 280; *Thomas v. Brownsville, Ft. K. & P. R. Co.* 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; *Smith v. Los Angeles Immigration & Land Co-op. Asso.* 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Goodell v. Verdugo Canon Water Co.* 138 Cal. 308, 71 Pac. 354; *Bill v. Western U. Telg. Co.* 16 Fed. 16; *McConnell v. Combination Min. & Mill Co.* 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 197; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 9; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1; *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; *Ten Eyck v. Pontiac, O. & P. A. R. Co.* 74 Mich. 226, 3 L.R.A. 378, 16 Am. St. Rep.

633, 41 N. W. 905; *Ogden v. Murray*, 39 N. Y. 202; *Cumberland Coal & L. Co. v. Sherman*, 30 Barb. 553, 1 Mor. Min. Rep. 322; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 350; *David v. Rock Creek Lumber, Flume & Min. Co.* 55 Cal. 364, 36 Am. Rep. 40; *Munson v. Syracuse, G. & C. R. Co.* 103 N. Y. 74, 8 N. E. 355.

An interested director cannot be counted to make up the quorum, so as to authorize or ratify an action taken in his favor.

Bassett v. Fairchild, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, 64 Pac. 1082; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

Curtis and Shelton, being but the mere representatives, tools, and instruments of *Steinfeld*, and on the board but to do his bidding, were in exactly the same position, and labored under the same disabilities, as did *Steinfeld*.

Richardson v. Green (Washburn v. Green) 133 U. S. 30, 33 L. ed. 516, 10 Sup. Ct. Rep. 280; *Woodroof v. Howes*, 88 Cal. 202, 26 Pac. 111; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218.

Where a director or officer of a corporation is in control of the board of directors, so that he has it in his power to direct action of a majority of the board, any action of that board in matters where such director or officer was personally interested would be held to be void when attacked either by the corporation or by the stockholders, suing in its behalf.

Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075; *Greathouse v. Martin*, — Tex. Civ. App. —, 91 S. W. 385; *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Savage v. Madelia Farmers' Warehouse Co.* 98 Minn. 343, 108 N. W. 296; *McCourt v. Singers-Bigger*, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287.

Mr. Eugene S. Ives argued the cause and filed a brief for *Steinfeld et al.*:

The injustice is obvious of permitting one holding the right to assert an ownership in mining property voluntarily to await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 592, 593, 23 L. ed. 329, 331, 3 Mor. Min. Rep. 688; *Credit Co. v. Arkansas C. R. Co.* 5 McCrary, 23, 15 Fed. 54.

One undertaking to procure by decree the creation of a constructive trust must act forthwith, and must offer to pay the

money which had been advanced by the party against whom the trusteeship is sought to be enforced.

Hoyt v. Latham, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; Patterson v. Hewitt, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35; Wenham v. Switzer, 51 Fed. 351, 8 C. C. A. 404, 15 U. S. App. 302, 59 Fed. 947; Mix v. Baldue, 78 Ill. 215; Sandy River R. Co. v. Stubbs, 77 Me. 594, 2 Atl. 9; Duffield v. Michaels, 97 Fed. 825; Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554.

The test of a constructive trusteeship is the right of the party claiming to be the beneficiary, and therefore the true owner of the property, to compel by suit in equity the party holding the legal title to convey or assign the corpus of the trust property.

Pom. Eq. Jur. § 1058.

A court of equity will not lend its assistance to enable a corporation to commit an *ultra vires* act even to remedy actual fraud.

Case v. Kelly, 133 U. S. 21, 28, 29, 33 L. ed. 513, 515, 516, 10 Sup. Ct. Rep. 216.

A constructive trust may only be imposed against one who buys for himself property which it was his duty to buy for another.

Parker v. Nickerson, 137 Mass. 497; Steinbeck v. Bon Homme Min. Co. 152 Fed. 333.

Even if the corporation had had funds sufficient to make the purchase, under the facts as they existed Steinfeld could have purchased for his own benefit.

Lagarde v. Anniston Lime & Stone Co. 126 Ala. 496, 28 So. 199, 20 Mor. Min. Rep. 545; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620.

A wrong cannot be predicated upon the expression of an intent to do something, which intent is not afterwards carried out.

15 Am. & Eng. Enc. Law, 2d ed. 1193; Dilts v. Stewart, 1 Sadler (Pa.) 230, 1 Atl. 587; Stonehill v. Swartz, 129 Ind. 310, 28 N. E. 620; Acker v. Priest, 92 Iowa, 620, 61 N. W. 236; Hamilton v. Downer, 152 Ill. 656, 38 N. E. 735; Piedmont Land Improv. Co. v. Piedmont Foundry & Mach. Co. 96 Ala. 395, 11 So. 334; Scribner v. Meade, 10 Ariz. 143, 85 Pac. 480.

Unless the corporation parted with something or lost or was deprived of something of value by virtue of such promise, there was no fraud, and Steinfeld was in the relation of a mere volunteer, free to carry out his expressed intent or not, as he might thereafter choose.

Piedmont Land Improv. Co. v. Piedmont Foundry & Mach. Co. 96 Ala. 389, 11 So. 332; Pearson v. Pearson, 125 Ind. 341, 25 56 L. ed.

N. E. 342; Stonehill v. Swartz, 129 Ind. 310, 28 N. E. 620.

No admissions can create a trust. No subsequent event other than a formal declaration of trust by Steinfeld, for a consideration, could create a trust.

Ducie v. Ford, 138 U. S. 587, 34 L. ed. 1091, 11 Sup. Ct. Rep. 417.

A proposition to a corporation, and its acceptance by a board of directors, is nothing more nor less than a contract made by correspondence, where one party makes a proposition in writing and the other party accepts it. It is unquestionably the law that a contract of this character, as well as an oral contract, when followed by a formal agreement, is merged in the formally written contract.

Keystone Surgical Supply Co. v. Bate, 196 Pa. 566, 46 Atl. 887.

The minutes of a directors' meeting of a corporation are only evidence of what occurred at the meeting.

Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Gilson Quartz Min. Co. v. Gilson, 51 Cal. 341.

One party to a contract cannot declare a part of the contract null and void. He must either abide by the contract, even though it be tainted by fraud, or annul it *in toto*. He cannot elect to enjoy the benefits of a portion of it and repudiate the obligations of another portion.

Smith v. Ferris & C. H. R. Co. — Cal. —, 51 Pac. 716.

Acting with full knowledge of the facts, plaintiff took his chances as to what the result might be, and therefore he is forever estopped from questioning the validity of the rescission, even if he was mistaken as to the legal effect of his action.

Kelley v. Newburyport & A. Horse R. Co. 141 Mass. 496, 6 N. E. 743.

While we have found no authority expressly holding that the action of the stockholders can effectively repudiate a voidable contract without subsequent action by the directors, such right is apparently assumed by the courts in numerous opinions.

2 Cook, Corp. 5th ed. § 709, p. 172; Colorado Springs Co. v. American Pub. Co. 38 C. C. A. 433, 97 Fed. 853; Metropolitan Elev. R. Co. v. Manhattan R. Co. 14 Abb. N. C. 273; Kirwin v. Washington Match Co. 37 Wash. 285, 79 Pac. 928; O'Conner Min. & Mfg. Co. v. Coosa Furnace Co. 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290.

While a corporation may, under certain circumstances, elect to avoid a contract made by directors with themselves, a minority stockholder may not avoid such contract except upon allegation and proof of injury to the corporation by such contract.

Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 21 L. ed. 329, 3 Mor. Min. Rep. 688; MacNaughton v. Osgood, 41 Hun, 110; 2 Cook, Corp. § 658, 5th ed. 1512; Smith v. Ferries & C. H. R. Co. — Cal. —, 51 Pac. 710; Lyman v. Kansas City & A. R. Co. 101 Fed. 636; Shaw v. Little Rock & Ft. S. R. Co. 100 U. S. 605, 25 L. ed. 757; Sacramento Bank v. Copsey, 133 Cal. 663, 85 Am. St. Rep. 242, 66 Pac. 8,205; Hodge v. United States Steel Corp. 64 N. J. Eq. 111, 54 Atl. 553.

Dividends should be paid to those in whose name the stock stands upon the books of the company.

Jones v. Terre Haute & R. R. Co. 17 How. Pr. 529.

Messrs. Eugene S. Ives and Francis J. Heney filed a separate brief for Steinfeld et al.

Mr. Justice Day delivered the opinion of the court:

Louis Zeekendorf brought this suit in the district court of Pima county, territory of Arizona, as a stockholder of the Silver Bell Copper Company, hereinafter called the Silver Bell Company, for and on its behalf, against Albert Steinfeld, J. N. Curtis, and R. K. Shelton, as individuals and as officers and directors of the Silver Bell Company, the Silver Bell Company, and a certain company known as the Mammoth Copper Company. He sought to recover \$338,710.15 for so much money wrongfully appropriated by and to the use of the defendant Steinfeld, which rightfully belonged to the Silver Bell Company, and to recover, as belonging to the company, 300 shares of stock in the Silver Bell Company. There was also a prayer for an accounting and the return of 447]the money and shares and *for the appointment of a receiver. Steinfeld answered that the money, a portion of which was the proceeds of certain mining properties which had belonged to him and had been sold in conjunction with properties belonging to the Silver Bell Company, and shares of stock, belonged to him, and for reasons set forth were rightfully in his possession.

The district court, upon the first trial, found in favor of Zeekendorf. This judgment was reversed by the supreme court of Arizona and the case sent back for further findings. 10 Ariz. 221, 86 Pac. 7. The pleadings were amended, the amended complaint dividing the controversy into two causes of action, the first embracing the ownership of the proceeds of sale taken by Steinfeld and the second the title to the 300 shares of stock and dividends thereon. Upon the second trial the district court found against Zeekendorf on the first cause

of action and against Steinfeld on the second cause of action upon the facts found, made certain provisions as to attorney fees, and, in view of the situation of the Silver Bell Company, appointed a receiver and ordered that the property and the assets of the company be turned over to him for distribution according to the order and judgment of the court, and that upon final hearing the Silver Bell Company be dissolved, its debts paid and assets distributed among the stockholders according to their rights. The court further ordered that Steinfeld should hold in his hands the sum of \$25,750 to secure him against his liability as garnishee in a case by one Franklin against the Silver Bell Company, Steinfeld to account to the company for the money on the final determination of the action. An appeal was again taken to the supreme court of the territory of Arizona, and that court affirmed the judgment and orders of the district court. 12 Ariz. 245, 100 Pac. 784.

Both parties appealed. No. 139 is the appeal of Zeekendorf from that part of the judgment dismissing on the *merits[448 his first cause of action, concerning the moneys paid to Steinfeld. No. 140 is the appeal of Steinfeld from the order and judgment holding that the 300 shares of stock belong to the company, and requiring him to account for the dividends thereon. The supreme court of the territory made elaborate findings of fact, adopting the findings of the district court and making certain findings of its own. So far as necessary to determine the case as we view it, the findings may be summarized as follows:

Since 1878 Albert Steinfeld and Louis Zeekendorf have been partners under the firm name of Louis Zeekendorf & Company. Zeekendorf lived in the city of New York, Steinfeld resided in the city of Tucson, Arizona, and was the active member of the firm in its mining operations. William and Julia Zeekendorf were the owners of a certain mine known as the Old Boot or Mammoth mine, which was being operated by the Carl Nielsen, under contract with Steinfeld as trustee of the owners. Nielsen became so indebted to the partnership that, in order to secure such indebtedness, in January, 1899, a company was incorporated under the laws of Arizona known as the Nielsen Mining & Smelting Company, the name being changed on January 14, 1901, to the Silver Bell Mining Company, and all the stock of the company was originally issued to Carl Nielsen, in consideration of the transfer to the company of his rights in the Old Boot mine, and a like transfer of personal property used in working the mine. The stock was divided as follows: 499

shares to L. Zeckendorf & Company, 30 shares to Albert Steinfeld, trustee of William and Julia Zeckendorf, 170 shares to J. N. Curtis, 300 shares to Carl Nielsen, and one share to R. K. Shelton, but being in fact the property of L. Zeckendorf & Company. In January, 1901, the 300 shares in Nielsen's name were transferred on the books of the company to the name of Albert Steinfeld, trustee. On the 6th of June, 1903, the 499 shares of L. Zeckendorf & 449] Company were *divided, 250 shares to Louis Zeckendorf and 249 shares to Albert Steinfeld, Steinfeld taking the one share standing in the name of Shelton, which was in Steinfeld's possession until December 9, 1903, when it was given to Shelton. At the meeting of the stockholders Steinfeld voted the stock in his name as trustee, and the stock of L. Zeckendorf & Company, and Louis Zeckendorf was never at any stockholders' meeting and did not vote therein by proxy until the stockholders' meeting of December 26, 1903, at which he was present. Subsequent to January 14, 1901, Albert Steinfeld, J. N. Curtis, and R. K. Shelton were the directors of the corporation, all residing in Tucson, Arizona. Shelton was at all times the representative of Steinfeld on the board of directors of the company, and at all times involved in this action voted as ordered, directed, and requested by Steinfeld. After June 6, 1903, J. N. Curtis, as director and other officer of the Silver Bell Company, was under the dominion and control of Steinfeld and did as he directed.

In the year 1900 Steinfeld purchased, in his own name and in the name of the Mammoth Copper Company, which was owned and controlled by him, certain mining properties in the neighborhood of the Old Boot mine, known as the English Group of Mines, and in September, 1900, proceeded to Europe, and there concluded the purchase of the English title to that group.

The findings of fact sent up to us, and which must alone be the basis of our judgment (*Eagle Min. & Improv. Co. v. Hamilton*, 218 U. S. 513, 515, 54 L. ed. 1131, 1132 31 Sup. Ct. Rep. 27), showing that Steinfeld, in purchasing the English Group of Mines, did not purchase them with the intent that they should thereby become the property of the Silver Bell Company, but that at that time he purposed to give the Silver Bell Company an opportunity to take the mines upon reimbursing him for his outlays and expenditures in that connection, which he expected the Silver Bell Company would 450] do, intending, if it did not, *to keep them for his own. In our view, the facts found show that Steinfeld and the company effectually carried out this purpose, 56 L. ed.

and that the subsequent attempt to rescind the action by which the proceeds of the sale of the English Group of Mines became the property of the Silver Bell Company, and to give the proceeds to Steinfeld, must be held for naught.

The findings show that after the acquisition of the English Group of Mines Steinfeld turned them over to the possession of the Nielsen Mining & Smelting Company (the name of which was subsequently changed to the Silver Bell Copper Company), which assumed the possession and control of them; that they were operated in connection with the other mining property of the company, known as the Old Boot mine; that maps were prepared, under the direction of Steinfeld, showing the mining properties as one entire group of mines, and that the president of the company made reports of the mines as the properties of the Silver Bell Company; that these maps and reports were sent to Zeckendorf and others, and that efforts were made by Steinfeld to sell the properties as a whole, including the English Group.

In the early part of 1901, Curtis, who was president of the Silver Bell Company, holding certain shares in his own right, contended that the English Group of mines was held in trust by Steinfeld for the Silver Bell Company. Both parties consulted one Franklin, an attorney, who advised that Steinfeld could not hold the properties as his own until he had given the company an opportunity to take them upon reimbursing him for his outlays and expenses, and it had declined to do so.

Steinfeld acquiesced in this position, and on July 15, 1901, made a proposition in writing to the Silver Bell Company. The substance of this proposal was that he would hold in trust for the Silver Bell Company all the mining properties controlled by him, the company to assume *all ob-[451 ligations, counsel fees, etc., to pay for the annual assessment work, and to reimburse him for his outlays on or before the 15th of October, 1901 (and that he would also turn over the Nielsen stock in controversy in the second cause of the action upon the assumption of certain obligations). And upon compliance with the terms of the proposition the mining properties were to belong to the Silver Bell Company. Steinfeld stated in this proposal:

"I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you to purchase and acquire the same, I am willing to place you in my shoes; that is to say,

to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance on your part, of all the matters and things and payments which, under the various contracts, I am liable or responsible for. To this end I herewith submit to you the following proposition."

The Silver Bell Company was given until October 15, 1901, to accept the proposition; and, in the event it failed to do so and to comply therewith by such date, the option was to be at an end. This proposition was presented to the board of directors on July 15, 1901, and it was ordered that a meeting of the stockholders should be called to decide upon it. Another meeting of the directors took place October 1, 1901, at which Steinfeld stated that he would agree, on condition that the company pay for the assessment work done and to be done in 1900, 1901, and 1902, and pay interest for the interval on the amount named in his original proposition, to extend the time for acceptance of his proposal to the 15th day of September, 1902. This proposition of ex-452]tension was accepted by *the board, and it was further resolved that a stockholders' meeting should be called not later than September 15, 1902, and a stockholders' meeting was held later on that day, October 1, 1901, but Zeekendorf was not present and no action was taken. And the Silver Bell Company continued to possess, use, and work the properties as its own with the full knowledge and consent of Steinfeld and the Mammoth Copper Company.

In this situation of affairs Steinfeld negotiated the sale of all of the properties, and on May 13, 1903, reported to the board of directors that he had, on behalf of himself, the Mammoth Copper Company, and the Silver Bell Company, given an option for the sale of the properties for \$515,000, as one entire property, and requested that his action be confirmed, which was done, Steinfeld himself voting in favor of such confirmation. At the time the price of \$515,000 was fixed, Steinfeld intended to renew and permit the corporation to accept the terms of his proposition of July 15, 1901, as extended, and the officers of the Silver Bell Company expected the corporation to avail itself of the offer, so that the whole of the purchase money would be paid to and become the property of the Silver Bell Company. On May 20, 1903, all the properties were conveyed to the Imperial Copper Company for the purchase price of \$515,000, \$115,000 in cash and the balance in notes payable in four equal quarterly instalments. The cash and notes were turned

over to Steinfeld as the treasurer of the Silver Bell Company, and were to be held by him under a certain agreement, dated May 20, 1903, which permitted Steinfeld to hold the money and notes as indemnity for the obligations and liabilities to the Imperial Copper Company which he had assumed, the latter company having required Steinfeld to guarantee the titles to the mines sold for one year. It was mutually agreed in the agreement of May 20, 1903, that the purchase price paid and to be paid upon the sale should belong to *the[453 Silver Bell Company. Between May 20, 1903, and January 20, 1904, the Imperial Copper Company paid to Steinfeld, as treasurer and trustee of the Silver Bell Company, \$319,487.50, representing the cash payment and the proceeds of the first two notes, with interest, out of which money was paid \$118,000, including \$18,117 to Steinfeld. In October and November, 1903, Steinfeld sent all the money, except \$50,000 which had been attached in his hands at the suit of Franklin, to the Bank of California, at San Francisco, California, and deposited it there in his individual name.

On the day the contract of May 20, 1903, was executed, the board of directors held a meeting, Steinfeld, Curtis, and Shelton being present, at which the president reported the various transactions attending the sale and submitted certain documents. He further reported that Steinfeld, who had conducted the negotiations with the Imperial Copper Company, had again submitted for acceptance his proposition of July 15, 1901, with the modifications that the company forthwith pay him in cash the sum of \$18,117, being the sum named in the original proposal, with interest, and assume all obligations incurred in past and present negotiations and transactions with respect to such mining properties, and the president stated that it was necessary to adjust with the Mammoth Copper Company the disposition of the purchase money, and submitted the agreement of May 20, 1903. Five several resolutions were thereupon unanimously adopted: (1) Ratifying the sale; (2) accepting Steinfeld's proposition and directing the payment forthwith of the \$18,117, and providing for certain other payments; (3) authorizing the payment of certain commissions on the sale; (4) fully empowering the president and secretary of the company to indemnify Steinfeld against loss or damage for having guaranteed the titles to the properties; and (5) specifically ratifying and approving the agreement of May 20, 1903, *providing for the dis-[454 position of the proceeds of the sale and indemnifying Steinfeld. And on the day following, May 21, 1903, the \$18,117 was

paid to Steinfeld. Zeckendorf was not at this meeting or any of the meetings except the stockholders' meeting on December 26, 1903.

In December, 1903, Zeckendorf brought a suit in California to enjoin the bank therefrom turning over to Steinfeld the moneys and notes so deposited by him, and obtained an injunction restraining Steinfeld from receiving and the bank from delivering to him the money and notes.

Thereafter, on December 26 1903, a stockholders' meeting was held in Tucson, Arizona, all the stockholders and the respective attorneys of Zeckendorf and Steinfeld being present, and it was at this meeting, it is contended, that the action theretofore taken vesting the proceeds of sale in the Silver Bell Company was rescinded. The supreme court of Arizona, on the first appeal of this case to that court (10 Ariz. 221, 86 Pac. 7), found that such rescission was accomplished, notwithstanding the stockholders may have intended to do no more than rescind the indemnity feature of the former agreement and resolutions, and sent the case back for findings of fact as to the ownership of the English Group of Mines and also of the 300 shares of stock, and as to the rights of the parties as to the distribution of the proceeds of the sale. This conclusion as to the rescission of the agreement of May 20, 1903, it is said, has become the law of the case and binding in its subsequent stages. Whatever might be the holding of the supreme court of Arizona as to the effect of this decision upon its own judgment and that of the district court, the case reached this court for the first time upon the present appeal, and certainly the holding of the supreme court of Arizona at any of the stages of the case prior to this appeal would not be the law of the case for this court. United States v. Denver & R. G. R. Co. 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33.

455] *We cannot agree with the supreme court of Arizona that the effect of this stockholders' meeting was to rescind so much of the former action as vested the proceeds of the sale in the Silver Bell Company. Nor can we agree, as the court held, that, if the parties did intend to rescind only the former action as to the custody of the proceeds of the sale, they made a mistake only as to the legal effect of the rescinding resolution. On the other hand, we think it is apparent from a consideration of the proceedings of that meeting, which the supreme court of Arizona has made a finding of itself, that the objection of Zeckendorf, the principal stockholder other than Steinfeld, was to so much of the former action as pertained to the

turning over of the proceeds of the sale to Steinfeld to be held by him for his indemnity. At the meeting no disposition was manifested to give Steinfeld the ownership of the proceeds of the sale of the English mines, nor to treat any modification of the former action as a rescission of the entire matter.

The discussion at that meeting throughout shows that the object of Zeckendorf was to get the money and the proceeds of the notes into the hands of a treasurer of the company who would give security therefor, and to have the entire proceeds of the sale divided among the stockholders. There was no intimation that the money or notes then held by the treasurer would be taken from the Silver Bell Company and one half thereof turned over to Steinfeld as the vendor of the English Group of Mines. As the counsel of Steinfeld said:

"We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and *agreement, and *relinquish all right whatever to the personal custody of that money, and turn it over to the company.*"

"Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the board) should offer." (Italics ours.)

Thereupon the resolution in the following language was offered:

"Resolved, that the agreement executed on May 20th by the president and secretary of the corporation, the Mammoth Copper Company, and Albert Steinfeld, be and the same is hereby rescinded, and that the said agreement and resolution passed on said day be declared null and void."

After the resolution had been offered and before the vote was taken, counsel for Steinfeld said further:

"We are acquiescing in your demand.

. . .

"We will now organize as a stockholders' meeting.

"Our desire is in good faith to rescind that resolution, *but we will never admit we acted wrongfully in taking the money*; you attacked the resolution, and we are willing, if you wish, to rescind it." (Italics ours.)

What resolution does this refer to? Certainly not the one (1) ratifying and approving the sale to the Imperial Copper Company; nor the one (2) accepting Stein-

feld's proposition and authorizing payments to Steinfeld and those from whom he had purchased; nor (3) the payment of commissions. But manifestly all parties had in mind so much of the resolutions as referred to the right of Steinfeld to continue to hold the proceeds of the sale, cash and notes, for his indemnity.

At the stockholders' meeting, the entire 1,000 shares, representing those belonging to Zeckendorf, Steinfeld, Shelton, and Curtis, were all voted in favor of the resolution.

We will not stop to recite the other parts of the long finding which includes all 457]the proceedings of this meeting. *At the end of the findings of fact in this connection the supreme court of Arizona makes this significant statement:

"In the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, *nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.*" (Italics ours.)

It is argued that this is but a conclusion, and not in any proper sense a finding of fact. If this be so, we think it is the proper conclusion from the facts stated. In our view it cannot be reasonably maintained that, in passing the resolution, when it is read in the light of the proceedings at the meeting and the known facts surrounding the parties at the time, the stockholders intending to rescind any more of the transaction than related to the indemnity agreement. On the other hand, the fair inference from the proceedings at this meeting leaves no doubt in our minds that the stockholders intended to affirm the previous transactions except so far as they related to Steinfeld's right to hold the money and notes for his indemnity, and that Steinfeld acquiesced in such modification as one of the stockholders.

In interpreting the action of the stockholders in passing the resolution, the facts and circumstances surrounding them may legitimately be looked to. *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 100, 101, 21 L. ed. 64, 67, 68. In construing written 458]documents, **"this kind of evidence,"* said Mr. Justice Bradley, speaking for the court, "is especially pertinent when the

inquiry is as to the subject-matter of the agreement" (p. 101). To the same effect, *Reed v. Merchants' Mut. Ins. Co.* 95 U. S. 23, 30, 31, 24 L. ed. 348-350.

Notwithstanding the directors did not, in good faith, understand the rescission to go beyond the indemnity feature, as above stated, on December 26, 1903, the directors, Steinfeld, Shelton, and Curtis, met and undertook to rescind their former action. It is specifically found that Zeckendorf had no knowledge of this meeting, although it was held on the same day as the meeting of the stockholders to which we have referred. On January 16, 1904, Curtis and Shelton, for the directors, without notice to the other stockholders, and no one else being present but Steinfeld and his counsel, at the request of Steinfeld, adopted the resolution which divided the \$515,000, the proceeds of the sale to the Imperial Copper Company, by awarding to Steinfeld and his company, the Mammoth Copper Company, as the owners of one half of the property sold, one half of the cash and notes, less certain payments which are recited. Under that supposed authority, Curtis, as treasurer, turned over to Steinfeld \$145,743.75 in cash and one of the notes. In so voting and acting it is specifically found that Curtis and Shelton consulted with no person whatsoever except Steinfeld and his attorney, and that they were under the complete dominion and control of Steinfeld, and voted and acted on his orders and not otherwise. For the reasons stated, we are of the opinion that the supreme court of Arizona erred in affirming so much of the judgment as dismissed the first cause of action. This conclusion renders it unnecessary to consider whether Steinfeld, in view of his relation to the company, could have held the title acquired by him except in trust for the company.

As to the second cause of action:

*On the 20th of January, 1904.[459 Steinfeld received \$33,300 as dividends upon the stock standing in his name as trustee and which is in controversy in the second cause of action, a dividend of \$111 per share having been declared by the board of directors. As to this phase of the case, it is unnecessary to recite the facts found by the supreme court of Arizona. They are clear and distinct, and there can be no doubt that Steinfeld held the 300 shares of stock purchased from Nielsen for the company, and the court was right in affirming the judgment upon the second cause of action upon the facts found.

It is contended that it was wrong to appoint a receiver in the case, but we think that, in view of the situation of the property and the final winding up of the com-

pany, the appointment of the receiver was proper, and that that officer should be continued for the final settlement of the affairs of the company.

It follows that the judgment of the Supreme Court of the Territory of Arizona should be reversed in so far as it affirms the judgment of the District Court on the first cause of action, and affirmed in so far as the Supreme Court affirms the District Court on the second cause of action; and the case remanded to the Supreme Court of the state of Arizona, as successor of the Territorial Supreme Court (36 Stat. at L. chap. 310, pp. 576, 577, U. S. Comp. Stat. Supp. 1911, p. 158; *Nielsen v. Steinfeld*, 224 U. S. 534, ante, 872, 32 Sup. Ct. Rep. 609), for such further proceedings as may not be inconsistent with the opinion of this court.

Judgment accordingly.

460]*LOW WAH SUEY and Li A. Sim
(Mrs. Low Wah Suey), Appts.,
v.

SAMUEL W. BACKUS, Commissioner of
Immigration, Port of San Francisco.

(See S. C. Reporter's ed. 460-476.)

Constitutional law — due process of law — deportation of alien.

1. Proceedings resulting in the deportation of an alien found as an inmate of a house of prostitution within three years subsequent to her entry into the United States are not wanting in due process of law because she had no counsel when first under examination, where such an examination is within the authority of the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), as amended by the act of March 26, 1910 (36 Stat. at L. 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501), and at subsequent stages in the proceeding, and before the hearing was closed or the orders for deportation made, she had the assistance and advice of counsel.

[For other cases, see *Constitutional Law*, IV. b, 8, in *Digest Sup. Ct. 1908.*]

Constitutional law — due process of law — deportation of alien.

2. The immigration officer's lack of power to issue process to compel the attendance of witnesses does not render invalid, as denying due process of law, the proceedings

had conformably to the act of February 20, 1907, as amended by the act of March 26, 1910, resulting in the deportation of an alien found as an inmate of a house of prostitution within three years subsequent to her entry into the United States.

[For other cases, see *Constitutional Law*, IV. b, 8, in *Digest Sup. Ct. 1908.*]

Aliens — deportation — departmental regulations.

3. The rules of the Secretary of Commerce and Labor governing the deportation of aliens found as inmates of houses of prostitution within three years subsequent to their entry into the United States are not so arbitrary as to be beyond his power, under the act of February 20, 1907, as amended by the act of March 26, 1910, because provision is thereby made for an examination in the absence of counsel, where they also provide for a hearing at which the alien shall have opportunity to show cause why she should not be deported, and for her appraisal at such stage of the proceedings as the person before whom the hearing was held shall deem proper that she may thereafter be represented by counsel, and for the forwarding to the Department of all papers, including the minutes and any written argument submitted by counsel.

[For other cases, see *Aliens*, VI., in *Digest Sup. Ct. 1908.*]

Aliens — deportation — wife of citizen.

4. A foreign-born Chinese woman, though married to a Chinaman of American birth, is an alien, within the meaning of the provisions of the act of February 20, 1907, as amended by the act of March 26, 1910, for the deportation of any alien found as an inmate of a house of prostitution within three years subsequent to her entry into the United States.

[For other cases, see *Aliens*, VI., in *Digest Sup. Ct. 1908.*]

[No. 869.]

Argued April 30, 1912. Decided June 7, 1912.

APPEAL from the District Court of the United States for the Northern District of California to review a decree refusing relief by habeas corpus to an alien immigrant whose deportation was ordered by the Department of Commerce and Labor. Affirmed.

The facts are stated in the opinion.

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to 56 L. ed.

Kuntz v. Sumption, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

As to what Chinese persons are excluded from the United States—see note to *Wong You v. United States*, 104 C. C. A. 538.

On the effect of marriage on wife's status as an alien—see note to *Comitis v. Parkerson*, 22 L.R.A. 148.

Mr. Corry M. Stadden argued the cause, and, with Mr. George A. McGowand, filed a brief for appellants:

Even if the marriage left Li A Sim an alien, she was not such an alien as was contemplated or intended to be included within the terms of the general immigration law.

Gonzales v. Williams, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177; *Re Nicola*, 106 C. C. A. 464, 184 Fed. 322; *Tsoi Sim v. United States*, 54 C. C. A. 154, 116 Fed. 925.

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280.

The guaranties of the Federal Constitution were not respected on the hearing.

United States ex rel. Bosny v. Williams, 185 Fed. 598; *Redfern v. Halpert*, 108 C. C. A. 262, 186 Fed. 150.

The immigration officials are not at liberty arbitrarily and without reason to believe or disbelieve, regard or disregard, evidence, as they see fit.

United States v. Chin Len, 109 C. C. A. 310, 187 Fed. 544; *Lewis v. Frick*, 189 Fed. 146; *Ex parte Lee Kow*, 161 Fed. 592; *Ex parte Koerner*, 176 Fed. 478; *Woey Ho v. United States*, 48 C. C. A. 705, 109 Fed. 888; *Sharon v. Sharon*, 75 Cal. 48, 16 Pac. 345; 14 Cyc. 383; *Rothrock v. Carr*, 55 Ind. 335.

Assistant Attorney General **Harr** argued the cause, and, with Solicitor General Lehmann, filed a brief for appellee:

To give this court jurisdiction on a direct appeal from, or writ of error to, a circuit court, on the ground of a constitutional question, such question must be real and substantial, and not a mere claim in words.

Farrell v. O'Brien (*O'Callaghan v. O'Brien*) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.

Fong Yue Ting v. United States, 149 U. S. 698, 716, 37 L. ed. 905, 914, 13 Sup. Ct. Rep. 1016.

The marriage of Li A. Sim to a citizen could not confer citizenship upon her.

Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; *Burton v. Burton*, 1 Keyes, 359; *Leonard v. Grant*, 6 Sawy. 603, 5 Fed. 11; *Kane v. McCarthy*, 63 N. C. 299; *United States v. Kellar*, 11 Biss. 314, 13 Fed. 82.

Assistant Attorney General **Harr** also filed a separate brief for appellee:

If it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive, and is not subject to review by the court.

Tang Tun v. Edsell, 223 U. S. 673, ante, 606, 32 Sup. Ct. Rep. 359; *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther.

Chin Yow v. United States, 208 U. S. 11, 52 L. ed. 369, 28 Sup. Ct. Rep. 201. See also *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 194, 54 L. ed. 435, 442, 30 Sup. Ct. Rep. 356; *Japanese Immigrant Case* (*Yamataya v. Fisher*) 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 6, 11; *Cooley, Taxn.* 3d ed. p. 59; *King v. Mullins*, 171 U. S. 404, 429, 43 L. ed. 214, 224, 18 Sup. Ct. Rep. 925.

An alien has no right to be represented by counsel at all stages of the proceedings leading to his deportation.

United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Chin Yow v. United States*, 208 U. S. 8, 11, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; *Re Can Pon*, 93 C. C. A. 635, 168 Fed. 483.

Marriage to a citizen does not prevent the deportation of an alien woman for a violation of the immigration laws.

Yeung How v. North, 223 U. S. 705, ante, 621, 32 Sup. Ct. Rep. 517; *Hoo Choy v. North*, 105 C. C. A. 384, 183 Fed. 92.

The marriage of Li A. Sim to Low Wah Suey did not change her political status with respect to this country.

Shanks v. Dupont, 3 Pet. 242, 246; 7 L. ed. 666, 668; *White v. White*, 2 Met. (Ky.) 191; *Sutliff v. Forgey*, 1 Cow. 89; 5 Cow. 713; *Mick v. Mick*, 10 Wend. 379; *Connolly v. Smith*, 21 Wend. 59.

The fact that the application of the law may produce hardship and injustice is immaterial.

Zartarian v. Billings, 204 U. S. 170, 175, 176, 51 L. ed. 428, 430, 27 Sup. Ct. Rep. 182.

Mr. Justice Day delivered the opinion of the court:

Li A. Sim, a Chinese woman, wife of Low Wah Suey, was ordered to be deported by the Department of Commerce and Labor, a hearing having been had before an immigration inspector at San Francisco and appeal taken to the Secretary of Commerce and Labor under the provisions of the act of Congress approved February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), the warrant for deportation reciting that she had landed at the port of San Francisco, California, on the 15th of April, 1910, and had been found in the United States in violation of the act of February 20, 1907, as amended by the act approved March 26, 1910 (36 Stat. at L. 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501); namely, that she was an alien, found as an inmate of a house of prostitution within three years subsequent to her entry into the United States.

The statutes of the United States under which the proceedings were had and the warrant issued are principally § 3 of the act of March 26, 1910, amending § 3 of the act of February 20, 1907, and §§ 20 and 21 of the latter act. Section 3 provides: " . . . Any alien who shall 467] be found *an inmate of or connected with the management of a house of prostitution or practising prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from, any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States, and shall be deported in the manner provided by sections twenty and twenty-one of this act. . . ." Section 20 provides that any alien who enters the United States in violation of law, etc., shall, upon the warrant of the Secretary of Commerce and Labor, be deported to the country whence he came within three years after his entry into the United States. Section 21 provides that the Secretary of Commerce and Labor, upon being satisfied that an alien is found in the United States in violation of the act, or is subject to deportation under the act or any law of the United States, shall cause such alien to be taken into custody, and returned to the country whence he came within three years after landing or entry in the United States. The act also provides for a

hearing before an inspector or commissioner under rules prescribed by the Secretary of Commerce and Labor. The inspector or commissioner reports his conclusions and the testimony on which they are based to the Secretary, who, after examination, may order a release or deportation, as in his judgment the case may warrant. Under this statute the Secretary of Commerce and Labor has provided certain instructions and rules, some of which will be hereinafter noticed.

That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States, and may provide for the expulsion of aliens or classes of aliens from *its territory, and may de-[468 volve upon the executive department or subordinate officials the right and duty of identifying and arresting such persons, is settled by previous decisions of this court. *Wong Wing v. United States*, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977.

A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; *Tang Tun v. Edsell*, 223 U. S. 673, ante, 606, 32 Sup. Ct. Rep. 359.

In the case of *Yeung How v. North*, 223 U. S. 705, ante, 621, 32 Sup. Ct. Rep. 517, decided at the present term, this court dismissed the appeal in a *per curiam* opinion. An examination of that case shows that it was in all respects like the case at bar, so far as the status of Yeung How, the person deported, is concerned, she being a Chinese woman who had married a Chinaman of American birth, except that the husband of Yeung How was dead, so that at the time of the deportation order she was the widow of an American citizen. An examination of the briefs in that case show that it was contended in behalf of the petitioner that the statute and procedure thereunder, the case being one of the deportation, and not of the admission, of an alien, deprived the petitioner of due process of law under the Constitution of the United States, inasmuch as there was no provision by which the pe-

petitioner could procure or compel the attendance of witnesses, and because the statute made no provision for the punishment of 469]a witness giving false *testimony against the detained person, and because such alien, lawfully within this country, could not be deported without a hearing of a judicial character. Notwithstanding these alleged infractions of constitutional right, this court dismissed the appeal.

In the case now under consideration, the proceedings and order for deportation were attacked by a writ of habeas corpus filed in the district court of the United States for the northern district of California. The case was decided upon demurrer, and the question therefore arises whether, upon the allegations well pleaded, a case was made for the discharge of the prisoner. The petition abounds in conclusions of law. We will examine such of the allegations advanced as a basis for the relief sought as state facts. The petitioner, Low Wah Suey, who instituted the proceedings in behalf of his wife, Li A. Sim, alleged that he was a resident of the city and county of San Francisco, California, born in the United States of parents regularly domiciled therein; that consequently he is a citizen of the United States and of the state of California; that he was married to Li A. Sim on the 10th of March, 1910, in Hong Kong, a British province, and that they have since been and were, at the date of the filing of the petition, husband and wife; that they entered the United States on the 15th of September, 1910; that the entry was lawful, and that until the commencement of proceedings for deportation they continuously lived and cohabited together as husband and wife; that they had a son, Low Sang, born to them on February 9, 1911, at their home in the state of California; and that both Low Wah Suey and Li A. Sim are citizens of the state of California. The arrest and hearing before the commissioner of immigration at the port of San Francisco are recited, as is the approval of the Secretary of Commerce and Labor and the warrant for deportation. It is further alleged that Li A. Sim was refused the right to 470]be represented *by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and before she had been advised of her right to counsel, and before she was given an opportunity of securing bail; and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and with-

out the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that, under examination before the inspection officer, at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel.

It is next averred that the Secretary of Commerce and Labor and the Commissioner of Immigration refused to take the necessary steps to enforce the attendance of witnesses to testify on behalf of the petitioner, although it is said that the immigration officers did use their power to procure witnesses to testify against her; and that had such witnesses as she wished been produced, she says, upon information and belief, that the testimony in the record would have been such as to require a different order by the Secretary of Commerce and Labor, and sufficient to prevent the issuing of the order of deportation. The statute does not give authority to issue process to compel the attendance of witnesses. It does not appear from the record that any witnesses offered on behalf of the petitioner were not heard or that anything was done to prevent the production of such witnesses, and the nature and character of the proposed testimony offered is not set forth. This *objection was urged in the Yeung[471 How v. North Case, and the lack of power to compel witnesses by the immigration officer was alleged as depriving the appellant of due process of law. This court dismissed the case upon reference to other cases which indicate its view that no constitutional right was thereby taken from the petitioner. The former cases have sustained the right to provide for such hearing, and nothing was done to prevent the production of such witnesses as the petitioner might have seen fit to produce.

It is further alleged that the executive officer acted in bad faith and arbitrarily in receiving a report based on hearsay information, the name of the informer being withheld from Li A. Sim, and no opportunity being given her to offset or disprove such hearsay evidence. The nature and character of this testimony is not set forth, and we have no means of knowing it was not such as might properly have been considered in such a hearing.

It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of rule 35. From these rules, it ap-

pears that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded, and to meet any evidence that theretofore has been or may thereafter be presented by the government; and it is further provided that all the papers, including the minutes and any written argument submitted by counsel, together with the recommendations, upon the merits, of the examining officer and the officer in charge, shall be forwarded to the Department as *the record on which to determine whether or not a warrant for deportation shall issue. Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing, as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute.

The petition would be much more satisfactory if the general rule had been complied with and the proceedings had before the immigration officer had been set out. As a general rule, in habeas corpus proceedings a copy of the record of the proceedings attacked is required. *Craemer v. Washington*, 168 U. S. 124, 128, 129, 42 L. ed. 407, 409, 18 Sup. Ct. Rep. 1. The reasons given for failure to comply with this rule, as stated in the petition, are that the record is too voluminous to be made a part thereof, that to incorporate a copy of the entire proceedings would "burden the petition and cloud the issue," that the petitioner was not in the possession of the entire record and was unable to secure it in time to file it with his petition, and that the Commissioner of Immigration had a copy of the record which he could produce with the body of Li A. Sim. It does not appear that a copy of the essential part of the proceedings was not in the possession of the petitioner or could not be had, and so far as it was within his power, he should have complied with the rule.

An examination of the petition, omitting such allegations as are merely conclusions or charge of bad faith, we think, justified the court below in sustaining the demurrer

provided that, at the time of the arrest and order of deportation, Li A. Sim was an alien within the meaning of the statute which provides for the deportation of any alien found as an inmate of a house of prostitution or practising prostitution after entering the United States, when the *proceeding shall be instituted with-[473 in three years from the entry of such alien in this country.

The statute in terms applies in general to all aliens. An alien has been defined to be "one born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws." 2 Kent, Com. 50; 1 Bouvier's Law Dict. 129. Within this general description Li A. Sim would clearly come, unless her status was changed, as is alleged, by marriage to a Chinaman of American birth, who is consequently an American citizen. It is unnecessary to discuss the effect of such marriage at common law, as in this country the matter is regulated by statute. Section 1994 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1268) provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

This section is said to originate in the act of Congress of February 10, 1855 (10 Stat. at L. 604, chap. 71), which in its 2d section provided "that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen." This section was construed in *Kelly v. Owen*, 7 Wall. 496, 19 L. ed. 283, and was held to confer the privileges of citizenship upon women married to citizens of the United States, if they were of the class of persons for whose naturalization the acts of Congress provide. So, under the present statute, when a woman who could be naturalized marries a citizen of the United States, she becomes by that act a citizen herself.

Li A. Sim was a Chinese person not born in this country, and could not become a naturalized citizen under the laws of the United States. *Fong Yue Ting v. United States*, 149 U. S. 698, 716, 37 L. ed. 905, 914, 13 Sup. Ct. Rep. 1016; act of May 6, 1882 (22 Stat. at L. 58, 61, § 14, chap. 126, U. S. Comp. Stat. 1901, pp. 1305, 1333). Being incapable of naturalization herself, although the wife of a Chinaman of American birth, she remained an alien and subject to the terms of the act, unless *it[474 can be successfully maintained that she was not within the intent and purpose of the act when it is properly construed. In this behalf the argument of her counsel is that

Congress did not intend, notwithstanding the terms of the act in question, to make it applicable to a Chinese woman married to an American citizen lawfully domiciled within this country.

To sustain this position *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177, is cited by counsel. In that case this court held that Isabella Gonzales, an inhabitant of Porto Rico at the date of the proclamation of the treaty of 1898 [30 Stat. at L. 1754], could not be prevented from landing and detained by an immigration inspector as an alien immigrant, in order that she might be returned to Porto Rico, it appearing likely that she might become a public charge. This court held that she had been made by act of Congress a citizen of Porto Rico; that she was within the class absolved from all previous allegiance to the Spanish government; that the act excluding alien immigrants was intended to apply to foreigners as respects this country, to persons owing allegiance to a foreign government and citizens or subjects thereof; that citizens of Porto Rico whose permanent allegiance was due to the United States, and who lived in the peace of its dominion, the organic law of whose domicile was enacted by the United States and enforced through its officials, could not be considered alien immigrants within the meaning of the exclusion act of March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294). From a reading of that case it is manifest that this court did not think that Congress intended to exclude those over whom it had acquired jurisdiction under the treaty of Paris and the subsequent legislation of Congress, whose sole allegiance was to this country, and who were not aliens to it in any just sense of the term.

The case of *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415, is also relied upon. We think that case is readily distinguished from the one [475] at bar. It was there held that *the wife of a Chinese merchant entitled by treaty to come into this country and dwell here could not be required to furnish the certificate required by the statute from Chinese persons other than laborers, as such construction of the statute would lead to absurd results in requiring a certificate from the wife of a merchant in regard to whom it would be impossible to give the particulars which the statute required should be stated in the certificate; that the real purpose of the statute was not to prevent the persons named, who, under the second article of the treaty, had the right to come into this country, from entering, but was to prevent

Chinese laborers from entering under the guise of being one of the classes permitted to enter. "To hold that a certificate is required in this case," the court said, at p. 468, "is to decide that the woman [the wife of a Chinese merchant] cannot come into the country at all, for it is not possible for her to comply with the act, because she cannot in any event procure the certificate, even by returning to China. She must come in as the wife of her domiciled husband or not at all;" and it was held that the act was never intended to exclude the wife and minor children of a merchant lawfully entitled to enter.

It is argued that, being a citizen of California, the petitioner and her husband are to be protected from the operation of the act. Assuming that they are citizens of California, there is nothing in that fact to prevent the officers of the United States from exercising the authority conferred upon them to exclude or deport aliens or others who are such within the terms of the Federal law.

We find nothing in the previous decisions of this court which exempts Li A. Sim from the operations of the statute as an alien person. True it is, as contended, that all statutes must be given a reasonable construction, with a view to effecting the object and purposes thereof. It was the manifest purpose of Congress in passing this law to prevent the introduction and keeping in the United States *of women of [176] the prohibited class. The object of the act was to exclude alien prostitutes, or, if they entered and were found violating the statute within the period prescribed, to return them to the country whence they came. A married woman may be as objectionable as a single one in the respects denounced in the law. There is nothing in the terms of the act showing the congressional purpose to exclude from its provisions an alien who had previously married or who might marry an American citizen. Indeed, if this construction were adopted, the marriage of such alien to a countryman of American citizenship who might be ignorant of the conduct of the alien or willing to condone it would afford an easy means of evading the statute. In the present case, in view of the finding of the immigration officer, approved by the Secretary of Commerce and Labor, it must be taken as true that Li A. Sim, notwithstanding her marriage relation, was found in a house of prostitution, in violation of the statute. This situation was one of her own making; and, conceding her right to come into the United States and dwell with her husband because of his American citizenship, it is obvious that such

right could have been retained by proper conduct on her part, and was only lost upon her violation of the statute; she, being an alien, thereby forfeiting her right to longer remain in this country. If it be admitted that the present is a hard application of the rule of the statute, with the effect of such law this court has nothing to do. The provisions of the statute are plain, and it was passed by Congress with full power over the subject. In our view the present case is brought within the terms of the law, when given a reasonable construction with a view to effecting its purposes. If it ought to be amended so as to except from its operation alien wives of American citizens, that result can only be legitimately obtained in the exercise of legislative authority.

Judgment affirmed.

477]*SEABOARD AIR LINE RAILWAY,
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(See S. C. Reporter's ed. 477-488.)

Error to state court — Federal question — certificate of state court.

1. The certificate of the chief justice of the highest court of a state cannot cure the entire failure of the record to show that a Federal question was so raised and decided as to sustain a writ of error from the Supreme Court of the United States.

[For other cases, see Appeal and Error, 2317-2339, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — how shown on the record.

2. To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that there was set up and denied a right, privilege, or immunity claimed under a Federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act so directly involved that the state court could not have given the judgment it did without deciding against the contention of the plaintiff in error.

[For other cases, see Appeal and Error, 2257-2316, in Digest Sup. Ct. 1908.]

[No. 304.]

Argued April 30, 1912. Decided June 10, 1912.

NOTE.—On certificate of state court as showing presence of Federal question—see note to *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 50 L. ed. U. S. 428.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L.R.A. 471.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Moore County, in that state, in favor of a railway employee in an action to recover damages from a railway company for personal injuries alleged to have been received while in the course of his employment. Dismissed for want of jurisdiction.

See same case below, 152 N. C. 524, 67 S. E. 1008.

The facts are stated in the opinion.

Messrs. Walter H. Neal and Benjamin Micou argued the cause, and, with Messrs. Hilary A. Herbert, Richard P. Whitely, and E. T. Cansler, filed a brief for plaintiff in error:

The action was brought under the Federal statute.

Emerson v. St. Louis & H. R. Co. 111 Mo. 161, 19 S. W. 1113; *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457; *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136, 1 Ann. Cas. 947; *Peru v. Barrett*, 100 Me. 213, 70 L.R.A. 567, 109 Am. St. Rep. 494, 60 Atl. 968; *Voelker v. Chicago, M. & St. P. R. Co.* 116 Fed. 867; *Thornton, Federal Employers' Liability*, § 175; *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 703; *Hancock v. Norfolk & W. R. Co.* 124 N. C. 222, 32 S. E. 679, 20 Enc. Pl. & Pr. 594.

The opinion of the highest court of the state may always be examined to ascertain whether the Federal question was presented and passed upon by the highest court.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Mallett v. North Carolina*, 181 U. S. 592, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; *Leigh v. Green*, 193 U. S. 85, 48 L. ed. 626, 24 Sup. Ct. Rep. 390.

The granting of the writ by the Chief Justice is certainly corroborative of his statement that the contention of the plaintiff in error here, made before him, was that, under the Federal employers' liability act, the defendant in error was not entitled to recover.

Illinois C. R. Co. v. McKendree, 203 U. S. 525, 51 L. ed. 303, 27 Sup. Ct. Rep.

153; *Rector v. City Deposit Bank Co.* 200 U. S. 405-412, 50 L. ed. 527-529, 26 Sup. Ct. Rep. 289; *Marvin v. Trout*, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

The case must have been tried under the Federal act, and could not be tried under the state law, as the Federal act, as to cases coming within its purview, supercedes the local state law, both common and statutory.

Thornton, Federal Employers' Liability, § 17, p. 31; *Fulgham v. Midland Valley R. Co.* 167 Fed. 662; *Dewberry v. Southern R. Co.* 175 Fed. 307; *Clark v. Southern P. Co.* 175 Fed. 122; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 703; *State v. Texas & N. O. R. Co.* — *Tex. Civ. App.* —, 124 S. W. 984; *Calhoun v. Central of Georgia R. Co.* 7 Ga. App. 528, 67 S. E. 274.

Where a party relies upon an act of Congress, and the questions construed by the court, and upon which the case turned, were whether the party had brought himself within the scope of that act, a Federal question is presented.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

If, upon proper construction of the Federal act, the evidence, when considered in the light most favorable to the plaintiff in error, would show that the defendant in error was not, within the meaning of the act, injured while employed in interstate commerce, then the Federal question clearly arose upon the trial of the case.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257.

The Federal question was properly and seasonably presented in the court below.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

Mr. William C. Douglass argued the cause and filed a brief for defendant in error:

No right, privilege, or immunity was specially set up or claimed in either the trial court or the supreme court of North Carolina.

Chesapeake & O. R. Co. v. McDonald. 214 U. S. 192, 193, 53 L. ed. 963, 964, 29 Sup. Ct. Rep. 546; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Michigan Sugar Co. v. Michigan* (*Michigan Sugar Co. v. Dix*) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep.

581; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Kiser v. Texarkana & Ft. S. R. Co.* 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Warfield v. Chaffe*, 91 U. S. 690, 23 L. ed. 383; *O'Neil v. Vermont*, 144 U. S. 335, 36 L. ed. 457, 12 Sup. Ct. Rep. 693; *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

No Federal question was presented to or decided by the state court; no such decision was necessary to the determination of the case; there was no denial of any right, privilege, or immunity under any statute of the United States, and the judgment as rendered was given without deciding any right, privilege, or immunity granted under the Constitution or any act of Congress.

Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 566, 40 L. ed. 539, 16 Sup. Ct. Rep. 389; *DeSaussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Moore v. Mississippi*, 21 Wall. 636, 22 L. ed. 653; *Bolling v. Lersner*, 91 U. S. 594, 23 L. ed. 366; *Brown v. Atwell*, 92 U. S. 327, 23 L. ed. 511; *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140, 25 L. ed. 114; *First Nat. Bank v. Home Sav. Bank*, 21 Wall. 294, 22 L. ed. 560; *Endowment Benev. Asso. v. Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *Semple v. Hagar*, 4 Wall. 431, 18 L. ed. 402; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Cox v. Texas*, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; *Chapman v. Goodnow* (*Chapman v. Crane*) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 576, 40 L. ed. 540, 16 Sup. Ct. Rep. 389.

Both the trial court and the supreme court of North Carolina tried and decided this case under the broad principles of the

common law, and no interpretation of the Federal employers' liability act of 1908 became necessary.

Scott v. Jones, 5 How. 374, 12 L. ed. 195; Crowell v. Randell, 10 Pet. 391, 9 L. ed. 467; McQuade v. Trenton, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; 2 Foster, Fed. Pr. 3d ed. 1187; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Hopkins v. McLure, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Moran v. Horsky, 178 U. S. 208, 44 L. ed. 1039, 20 Sup. Ct. Rep. 856; 1 Rose, Code Fed. Proc. §§ 38 n, j; McQuade v. Trenton, 172 U. S. 639, 43 L. ed. 582, 19 Sup. Ct. Rep. 292; Hammond v. Johnston, 142 U. S. 78, 35 L. ed. 942, 12 Sup. Ct. Rep. 141; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; Egan v. Hart, 165 U. S. 193, 41 L. ed. 682, 17 Sup. Ct. Rep. 300; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Miller v. Illinois C. R. Co. 168 Fed. 982; Nelson v. Southern R. Co. 172 Fed. 478; Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Brown v. Colorado, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175.

The only reason suggested for the interference of this court with the opinion and judgment of the supreme court of North Carolina is by vague and inferential suggestions in prayers for instructions and in exceptions to certain instructions given by the trial court, which are in no way connected with the Federal employers' liability act.

Thomas v. Iowa, 209 U. S. 261, 262, 52 L. ed. 782, 783, 28 Sup. Ct. Rep. 487; 56 L. ed.

Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227.

This court has no jurisdiction to review the decision of the highest court of a state upon pure questions of fact.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

There was no necessity of construing this act, but if the courts of North Carolina had been compelled to construe the act in order to render the judgments and orders therein, they would have had no other guide than the rules and principles of the common law and the decisions thereunder, and this court would have had no jurisdiction to review the construction of the act in question by the state courts of North Carolina.

Rakes v. United States, 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. Rep. 244.

If the court should be of the opinion that the right, title, privilege, or immunity relied on by the plaintiff in error was specially set up or claimed, it was not set up at the proper time, nor in the proper way.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 307, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Reed v. Moore, 25 N. C. (3 Ired. L.) 310; State v. Gallimore, 29 N. C. (7 Ired. L.) 147; State v. Collins, 30 N. C. (8 Ired. L.) 407; Ring v. King, 20 N. C. 301 (4 Dev. & B. L. 164); Briggs v. Evans, 27 N. C. (5 Ired. L.) 16; State v. Langford, 44 N. C. (Busbee L.) 436; Brown v. Kyle, 47 N. C. (2 Jones, L.) 442; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; Re Buchanan, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Hughes, Fed. Proc. § 194, p. 489.

Mr. Justice Lurton delivered the opinion of the court:

This was an action by an employee of the

plaintiff in error to recover damages for severe and permanent personal injuries alleged to have been received while in its service. The plaintiff alleged that he was baggage master and flagman on one of the defendant's passenger trains, running from Portsmouth, Virginia, to Monroe, North Carolina. That a head-on collision occurred with another of defendant's trains, whereby plaintiff and others were injured, and that the collision was due to the negligence of defendant's officers and agents. The answer was, in substance, a general denial for want of knowledge. There was a jury, verdict and judgment for the defendant in error, which was later affirmed by the supreme court of the state. This writ of error was allowed by the chief justice of that court upon the ground that "there was drawn into question a right, privilege, or immunity claimed by the railroad company under a statute of the United States, and the decision was against such right, privilege, or immunity so claimed and specially set up by said defendant," etc. Such a certificate is, however, not sufficient to confer jurisdiction to review the judgment of a state court under § 709 Revised Statutes (U. S. Comp. Stat. 1901, p. 575). That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record; and such a certificate is only of value to make more definite or certain that the Federal right was definitely asserted and decided. *Sayward v. Denny*, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; 482] **Louisville & N. R. Co. v. Smith, H. & Co.* 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401.

The Federal question relied upon to sustain the writ of error to this court concerns the construction and application of the Employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322). Neither the complaint nor the answer makes any direct reference to that act; but the complaint did allege that the railroad company was operating a line of railroad between Portsmouth, Virginia, and Monroe, North Carolina, and that the plaintiff, while in its employment as baggage master and flagman upon a passenger train running between said points, was negligently injured by a head-on collision. This states a ground of action under that act, and it was so assumed by the trial court, as appears from that part of the charge relating to the effect of contributory negligence, as well as from some of the questions made in the supreme court of the state.

That the collision was due to negligence was conceded. The only defense which

seems to have been made was that, under the rules of the company, the plaintiff was required to remain in the baggage car; but that he was hurt while in the express car, a place where, it is claimed, his duty did not call him, and therefore, he was not injured while employed in the service of the company, or engaged in any duty his employment devolved upon him.

The case was submitted upon these issues, and the finding of the jury upon each was as follows:

"1. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

"2. Was the plaintiff's injury caused by his contributory negligence? Answer. No.

"3. What damage is the plaintiff entitled to recover? Answer. \$30,000."

Four requests for special charges, which bear upon this defense and which were denied, have been assigned here *as error[483 reviewable by this court. They were as follows:

"1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will find the first issue 'No.'

"3. That as the plaintiff admits that he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had that notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment; and if he has failed to so satisfy the jury, you will answer the first issue 'No.'

"4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue 'No.'

"6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight

of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor 484] wished him to "go to discharge his duties as an employee of the defendant, the jury will answer the first issue 'No.'"

The plaintiff in error also excepted to a part of the court's charge which was in these words:

"If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation*, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes:'. If you do not so find, it would be your duty to answer the second issue 'No.'"

Not one of the requests asks any definite construction of any part of the employers' liability act, or, indeed, contains any reference whatever to the act.

They are based alone upon the admitted facts that at the time of the collision the plaintiff was in the express car, and that there was a rule of the company requiring him to be in the baggage car. They assume that, in being in the express car, he was where he had no right to be; and that if injured while there, the jury must acquit the company of negligence, and upon that issue find for the railroad company. The requests take no account of the legal effect of other evidence in the case. Thus, there was evidence tending to show that the express car was used for through baggage, and that baggage was often received from the platform into the express car, and carried to the adjacent baggage car. There was also evidence tending to show that the rule referred to was not enforced, and that the baggage master and express messenger frequently exchanged work, and that this was known to the conductor, who made no objection. There was also evidence tending to show that both the conductor and the 485]*plaintiff had gone to the express car, either upon the call of the messenger or for social purpose, the plaintiff in either event going by direction or on invitation of his immediate superior, the conductor of the train. Any question as to whether his being in the express car at the moment of the collision either contributed to the collision or to the injury sustained, as well as any consideration of the question whether he was in any way negligent in being there, as being in a place of

greater danger than if in the baggage car, was ignored.

The trial court was under no obligation to give special charges based upon but a part of the evidence,—charges which, in effect, took from the jury every question save the single fact that plaintiff was, when hurt, in the express car, and that there was a rule which required him to remain in the baggage car.

But the plaintiff in error now urges that it was entitled to have construed that provision of the employers' liability act which requires that a plaintiff, to recover under it, must have been injured "while he was employed by such carrier in such commerce;" and that the requests denied were applicable to the evidence which tended to show that he had ceased to be such an employee, because he was not, at the moment of the injury, engaged in the conduct of interstate commerce, or at the place where his duty required him to be. That the plaintiff was in the general employment of an interstate railroad, and at the time was the baggage master of one of its trains running from one state to another, was shown by all the evidence. If his employment had been terminated, it was solely because he had momentarily gone into the adjacent express car. If he was injured while employed about something which it was not his duty to do, it was solely due to the fact that he had gone into that car either under direction or with the consent of his conductor.

This case does not come here from a Federal court, and *we are therefore not[486 a court of general review. It comes under § 709, Rev. Stat., and the power to review a judgment of a state court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute . . . and the decision is against the title, right, privilege, or immunity specially set up or claimed, . . . may be re-examined and reversed . . ."

This action was brought under an act of Congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court. In *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, it was said:

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will

lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States, and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

That case came from a state court from a judgment against the plaintiff in error in 487]an action under the safety *appliance act. But in that case the Federal question was specially set up and definite rulings had upon definite questions requiring a construction of the act. Thus the court concludes the paragraph above set out by saying:

"The defendant, now plaintiff in error, objected to an erroneous construction of the safety appliance act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here."

It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right "specially set up" and denied by the court. "It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it." Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. *Maxwell v. Newbold*, 18 How. 515, 15 L. ed. 508; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Speed v. McCarthy*, 181 U. S. 262, 275, 276, 45 L. ed. 855, 358,

859, 21 Sup. Ct. Rep. 613; *Gaar, S. & Co. v. Shannon*, decided at present term [223 U. S. 468, ante, 510, 32 Sup. Ct. Rep. 236]. In *Appleby v. Buffalo*, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699, this court said:

"This court has had frequent occasion to say that its right to review the judgment of the highest court of a state is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an *alleged[488 denial of some right, privilege, or immunity specially set up and claimed under the Constitution or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. *Sayward v. Denny*, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220."

Passing now to the error assigned to a paragraph in the general charge, the part objected to and assigned as error is the clause italicized. It was a part of the general charge in respect of contributory negligence. It was limited to the separate issue submitted to the jury as to such negligence.

It is not easy to see why the mere going into the express car would be negligent unless the conditions were such as to be an act of imprudence which a reasonable man would not have done. But this we pass by as pertaining to the merits. In any event the exception did not raise any specific question as to the proper construction of the act under which this action had been brought.

The jury was in explicit terms told that if they found the plaintiff guilty of contributory negligence it would not bar a recovery, but that the damages assessed must be diminished in proportion to the amount of negligence attributable to the plaintiff. This was in pursuance of the statute. The jury specially found that the plaintiff had not been guilty of contributory negligence.

In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this court may review. The motion to dismiss the writ for want of jurisdiction is therefore granted.

**489]*DAVID LUPTON'S SONS COMPANY, Plff. in Err.,
v.
AUTOMOBILE CLUB OF AMERICA.**

(See S. C. Reporter's ed. 489-501.)

Appeal — review of facts — findings of referee.

1. Exceptions to the findings of fact of a referee, or to his refusal to find facts as requested, cannot be considered on a writ of error to review a judgment entered upon the facts found.

[For other cases, see Appeal and Error, 4909-4930, in Digest Sup. Ct. 1908.]

Foreign corporations — doing business in state — validity of contract — suit.

2. The prohibition against suit in the

NOTE. — On construction and effect of "strike" clause in contract of sale and delivery—see note to *Cottrell v. Smokeless Fuel Co.* 9 L.R.A.(N.S.) 1187.

Enforceability in Federal court of contract made by a foreign corporation which had not complied with the conditions of doing business within the state.

It is held, practically without contradiction, that a state statute which merely closes the courts of the state to a foreign corporation which has not complied with the conditions of doing business within the state, without expressly or constructively declaring the contract itself void, does not prevent the maintenance of an action in a Federal court sitting in that state, by such foreign corporation, upon a contract made within the state. *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *Sullivan v. Beck*, 79 Fed. 200; *Blodgett v. Lanyon Zine Co.* 58 C. C. A. 79, 120 Fed. 893; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 871; *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545; *Vitagraph Co. v. Twentieth Century Optiscope Co.* 157 Fed. 699; *Johnson v. New York Breweries Co.* 101 C. C. A. 639, 178 Fed. 513; *Richmond Cedar Works v. Buckner*, 181 Fed. 424; *Thomas v. Birmingham R. Light & P. Co.* 195 Fed. 340.

Generally the provision closing the courts to the foreign corporation is in the form that it shall not maintain any action or proceeding "in any of the courts of this state;" and the result in the cases just cited might, therefore, be sustained even as a matter for statutory construction; but it is clearly implied in the cases that such a provision could not be made operative upon the Federal courts, and it is expressly so declared in *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 871; *Vitagraph Co. v. Twentieth Century Optiscope Co.* 157 Fed. 699. And in *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 871, *Johnson v. New York Breweries* 56 L. ed.

New York courts, which is the only penalty prescribed for a disregard by a foreign corporation of the provisions of N. Y. Laws 1890, chap. 563, § 15, prohibiting the doing of local business by a foreign corporation without a certificate of authority, does not make the contract void, but it remains valid and enforceable by suit in the Federal courts.

[For other cases, see *Corporations*, XII. b; XII. e, in Digest Sup. Ct. 1908.]

Set-off — breach of building contract — expense of completion.

3. The amount necessarily expended by the owner to complete a building contract under an adjustment by the architect, after there had been a strike and cessation of work on account of the character and condition of the labor furnished by the con-

Co. 101 C. C. A. 639, 178 Fed. 513, and *Richmond Cedar Works v. Buckner*, 181 Fed. 424, the statute was in the form that no such corporation shall maintain any action "in this state" upon any contract made by it in this state,—being the same statute considered in *DAVID LUPTON'S SONS CO. v. AUTOMOBILE CLUB*.

It is also held or assumed by the Federal courts, with practically no dissent, that if the state statute, either in express terms or by construction, renders a contract void because made by a foreign corporation which had not complied with the conditions of doing business within the state, no action can be maintained thereon in a Federal court sitting in the state, and doubtless the rule would apply equally to a Federal court sitting in any other state. This, of course, assumes that the state statute applies to the particular contract or transaction in question, and that it is constitutional as so applied. *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 35 L.R.A. 236, 24 C. C. A. 11, 39 U. S. App. 332, 76 Fed. 420; *Diamond Glue Co. v. United States Glue Co.* 103 Fed. 838 (affirmed in 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206); *Cyclone Min. Co. v. Baker Light & P. Co.* 165 Fed. 996; *LaMoine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980; *Pittsburgh Constr. Co. v. West Side Belt R. Co.* 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; *Thomas v. Birmingham R. Light & P. Co.* 195 Fed. 340. This is also clearly implied in the Federal cases above cited in support of the rule that if the state statute merely closes the courts to the foreign corporation, and does not declare the contract void, the contract may be enforced in the Federal court.

The rule that if the state statute renders contracts within its operation void, such a contract cannot be enforced in a Federal court, was impliedly recognized in *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1, although it was not applied, because the contracts in question were held not to be within the operation of the state statute, because they related to interstate commerce.

tractor, should be credited against the contract price, where the contract provides that under such circumstances the owner shall have full authority "to arbitrate or adjust the matter," and that the contractor shall make good the loss, to be fixed by the architect or by arbitration.
[For other cases, see Set-Off and Counterclaim, II. b, in Digest Sup. Ct. 1908.]

[No. 137.]

Argued December 20, 1911. Decided June 7, 1912.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment dismissing the complaint in an action by a foreign corporation upon a contract made by it in that state without a certificate of authority. Reversed and remanded with instructions to enter judgment for plaintiff.

The facts are stated in the opinion.

Mr. William Ford Upson argued the cause, and, with Mr. William Forse Scott, filed a brief for plaintiff in error:

The judgment is reviewable.

Roberts v. Benjamin, 124 U. S. 64, 67, 71, 72, 31 L. ed. 334-337, 8 Sup. Ct. Rep. 393; Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 364, 44 L. ed. 1099, 1105, 20 Sup. Ct. Rep. 924; Bagley v. General Fire Extinguisher Co. 80 C. C. A. 172, 150 Fed. 284.

The business of plaintiff, and the transaction in suit, are interstate commerce and, as such, under the protection of the Federal Constitution.

Brown v. Maryland, 12 Wheat. 419, 447, 6 L. ed. 678, 688; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 734, 737, 28 L. ed. 1137, 1139, 1140, 5 Sup. Ct. Rep. 739; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 59, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Milan Mill. & Mfg. Co. v. Gorten, 93 Tenn. 590, 26 L.R.A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971; Black-Clawson Co. v. Carlyle Paper Co. 133 Ill. App. 64; Chuse Engine & Mfg. Co. v. Vromania Apartment Co. 154 Mo. App. 139, 133 S. W. 624; Wolf Co. v. Kutch, 147 Wis. 209, 132 N. W. 981; Rearick v. Pennsylvania, 203 U. S. 507, 511, 512, 51 L. ed. 295, 297, 298, 27 Sup. Ct. Rep. 159.

The New York statute is in contravention of the Federal Constitution, and the provision that the corporation may not maintain any action in any court in the state is inseparable from the rest of the statute, and falls with it.

International Textbook Co. v. Pigg, 217 U. S. 91, 108-112, 54 L. ed. 678, 686-688, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103.

The interference of defendant excused performance to the extent of the work which defendant caused to be done by others.

United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Kingsley v. Brooklyn, 78 N. Y. 216.

While defendant was having frames set and sash hung by another contractor, it was still proceeding under the contract in suit and confirming it.

Elgee Cotton Cases (United States v. Woodruff) 22 Wall. 180, 187, 188, 22 L. ed. 863, 867, 868; Johnson v. Hunt, 11 Wend. 137; Bayley v. Anderson, 71 Wis. 417, 36 N. W. 863; Wooten v. Read, 2 Smedes & M. 589; Manchester Mills v. Rundlett, 23 N. H. 273.

Defendant also waived any previous default in strict performance of conditions by recalling plaintiff and allowing it to complete the work under the contract.

Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 649, 656, 23 L. ed. 341, 342, 345.

Defendant became a party to an unlawful interference with interstate commerce, and cannot be allowed thereby to avoid payment under its contract.

Loewe v. Lawlor, 208 U. S. 274, 292-298, 52 L. ed. 488, 496-499, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Irving v. Joint Dist. Council, U. B. C. & J. 180 Fed. 901; Adair v. United States, 208 U. S. 161, 174, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 353, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275.

Mr. William W. Niles argued the cause and filed a brief for defendant in error:

The judgment entered herein on the report of the referee is not reviewable.

York & C. R. Co. v. Myers, 18 How. 252, 253, 15 L. ed. 382, 383; Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Kearney v. Case, 12 Wall. 275, 20 L. ed. 395.

The Supreme Court will not review alleged errors in the refusal of the court to find facts requested.

Shipman v. Straitsville Cent. Min. Co. 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827.

The transcript of record contains no bill of exceptions, and thus fails to show what questions were raised on the trial of the action before the referee, and fails to show that any question which would give this

court jurisdiction was in issue in the court below.

Ibid.

All the alleged errors on rulings of law that the court might possibly review are immaterial in view of the finding by the referee of all material facts affecting the merits in favor of the defendant, and in view of said referee's finding that the plaintiff had substantially failed to carry out its contract and had broken its contract.

Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Burton v. United States*, 196 U. S. 283-295, 49 L. ed. 482-486, 25 Sup. Ct. Rep. 243.

The plaintiff having failed to perform, and there being no pretense that it had any excuse for nonperformance, or that performance had been waived, could not recover, and the complaint was properly dismissed.

Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; *Spence v. Ham*, 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Fuchs v. Saladino*, 133 App. Div. 710, 118 N. Y. Supp. 172; *Schultze v. Goodstein*, 180 N. Y. 249, 73 N. E. 21.

Impossibility of performance without fault of contractor does not excuse him from performing contract.

Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 527, 40 L. ed. 515, 524, 16 Sup. Ct. Rep. 379.

This court cannot review any of the exceptions to the findings of fact by the referee, or to his refusal to find facts as requested.

Roberts v. Benjamin, 124 U. S. 74, 31 L. ed. 337, 8 Sup. Ct. Rep. 393.

The referee was right in holding that an action could not be maintained by the plaintiff against the defendant under the circumstances of this case.

Wood & Selick v. Ball, 190 N. Y. 217, 83 N. E. 21; *Colonial Trust Co. v. Montello Brick Works*, 97 C. C. A. 144, 172 Fed. 310.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error, David Lupton's Sons Company, a Pennsylvania corporation, was engaged in the business of manufacturing and installing metal window frames and sash. Its factory was in Pennsylvania. In 1905 it entered into a contract in New York with the defendant, the Automobile Club of America, by which it agreed to manufacture and to place in position frames and sash for the defendant's building, to be erected in the city of New York, for the sum of \$10,344. While the Lupton Company was putting in the frames a strike oc-

curred, and all the other persons employed by the defendant in the construction of the building stopped work on account, as it is found, "of the character and condition of labor" employed by the Lupton Company, and the material it furnished, of which complaint had been made by a New York labor union. After various negotiations, the defendant—under an adjustment by the architect, and in order to get its building constructed—employed another *con-[494] cern to complete the work embraced in the contract with the Lupton Company. The latter received, for what it did, \$5,837.72; the defendant paid for the completion \$3,796.76; and if this were credited against the contract price there would remain a balance of \$709.52.

The Lupton Company, insisting that it was wrongfully prevented from performance, brought this suit in the circuit court of the United States to recover the sum of \$5,000 as the damages sustained by the alleged breach. The defendant pleaded several defenses, as well as a counterclaim for damages for breach by the plaintiff. Among the defenses was one that the Lupton Company could not maintain this action because it was a foreign corporation doing business in the state of New York without a certificate of authority, in violation of § 15 of the general corporation law of that state. Laws of 1890, chap. 563, § 15; Laws of 1892, chap. 687, § 15, as amended.

Upon written stipulation the action was referred to a referee to hear and determine the issues. The referee reported his findings of fact and conclusions of law, holding that the contract was void under the statute and that the complaint should be dismissed. Upon the plaintiff's application, the report was recommitted in order that further findings might be proposed. The referee then passed on numerous requests submitted by the plaintiff, and on the filing of his supplemental report, which left unchanged the original conclusions of law, judgment was entered for the defendant. The Lupton Company brings the case here on writ of error to the circuit court, upon the ground that the New York statute, as applied to the transaction in question, was in contravention of the Constitution of the United States, as an unwarrantable interference with interstate commerce.

As the trial was had before the referee, pursuant to the stipulation, the only question presented here is whether *there[495] is any error of law in the judgment rendered by the court upon the facts found by the referee. The findings of fact are conclusive in this court. We cannot review any of the exceptions to these findings or to the refusal of the referee to find facts as

requested. *Roberts v. Benjamin*, 124 U. S. 64, 71, 74, 31 L. ed. 334, 336, 337, 8 Sup. Ct. Rep. 393; *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 356, 361, 39 L. ed. 1015, 1016, 15 Sup. Ct. Rep. 886; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 364, 44 L. ed. 1099, 1105, 20 Sup. Ct. Rep. 924; *Hecker v. Fowler*, 2 Wall. 123, 17 L. ed. 759; *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Paine v. Central Vermont R. Co.* 118 U. S. 152, 158, 30 L. ed. 193, 195, 6 Sup. Ct. Rep. 1019.

Under § 15 of the general corporation law of the state of New York a foreign stock corporation, other than a moneyed corporation, is prohibited from doing business in the state without having first procured from the secretary of state a certificate that it has complied with certain prescribed conditions. The corporation is required (§ 16) to file with the secretary of state a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in the state; to designate its principal place of business within the state, and to appoint a person upon whom legal process may be served. *Wood & Selick v. Ball*, 190 N. Y. 217, 224, 83 N. E. 21. Section 15 provides: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless, prior to the making of such contract, it shall have procured such certificate." In his original report, the referee found that the Lupton Company was doing business in the state of New York, within the meaning of the statute, without a certificate of authority; and after the report was recommitted, he made additional findings with respect to the nature of its business, upon which the plaintiff in error bases its contention that the statute has been held to apply to transactions in interstate commerce which were not subject to the state's interdiction. It is not necessary, however, to review these findings, for the statute has received a construction by the 496] *highest court of the state of New York which precludes it, in any aspect of the case, from being regarded as a bar to the maintenance of this action.

The referee's ruling that the contract was void was based upon the statement in the opinion in *Wood & Selick v. Ball*, supra, that "the procuring of a license must precede the transaction of business, or the contracts of the corporation are not lawful." But in *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, — L.R.A.(N.S.) —, 97 N. E. 587, the court of appeals of New York has declared that a contract made by a foreign corporation doing business within the state without certificate of authority is

not absolutely void; that the only penalty prescribed by the general corporation law for a disregard of the provisions of § 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects.

In the *Mahar* Case, the action was brought to recover a sum deposited under a contract made in New York with the defendant, a foreign corporation, which it was alleged was transacting business in the state without authority at the time the contract was made. It was asserted, in support of the action, that the contract was void, and hence that there was a failure of consideration. The court of appeals held that the complaint did not state a cause of action. In the opinion delivered by Willard Bartlett, J., in which the majority of the court concurred, it is said: .

"It is assumed in the prevailing opinion" (that is, the opinion below, 146 App. Div. 756, 131 N. Y. Supp. 514) "that this court held in the case of *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21, that noncompliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this state absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was 'that compliance with § 15 *of [497 the general corporation law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this state.'

. . . The only penalty which the general corporation law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless, prior to the making of such contract, it shall have procured such certificate.' Consol. Laws, chap. 23, § 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but in my opinion it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York, without the certificate of authority required by § 15 of the general corporation law is limited to that thus prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done

so. This was the view taken in *J. R. Alsing Co. v. New England Quartz & Spar Co.* 66 App. Div. 473, 73 N. Y. Supp. 347, affirmed in 174 N. Y. 536, 66 N. E. 1110, where it was held that § 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counterclaim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court, and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed, unless there is a distinct provision to the contrary, not only to defend, but also to litigate, any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such [498]prohibitive provision *in this statute, and therefore the obtaining of the certificate would not be a prerequisite to a recovery upon the counterclaim in question.' (P. 476.) The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state, imposing conditions upon it as a prerequisite to the lawful transaction of business therein. In *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that state until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unquestionably violated the laws of Colorado when it purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for noncompliance with these provisions, was that the officers, agents, and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute prescribing the terms upon which foreign corporations might do business in that state; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it.

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"If I am right in assuming that the only infirmity in the contract mentioned in the complaint is the disability of one of the parties to it, namely, the foreign corporation, *to sue upon it in the courts of [499] this state, it remains a valid and effective instrument in all other respects."

In this view, despite its transaction of business without authority, the foreign corporation could sue upon its contracts in any court of competent jurisdiction other than a court of the state of New York. Accordingly, it was held by the court of errors and appeals of New Jersey that a suit might be brought by the corporation in that state upon a contract made in New York, where it was doing business without the prescribed certificate. *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. The court conceded the general rule both in New Jersey and New York to be that a contract void by the law of the state where made would not be enforced in the state of the forum. But it was held that the New York statute did not in terms declare the contract void; it provided that no such action should be maintained in that state.

In dismissing the writ of error to review that judgment (*Allen v. Alleghany Co.* 196 U. S. 458, 465, 49 L. ed. 551, 556, 25 Sup. Ct. Rep. 311, this court commented upon the decision of the New York court in the case of the *Neuchatel Asphalte Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043, which rose under the statute in an earlier form, the section (15) of the general corporation law then providing that the foreign corporation should not maintain "any action in this state upon any contract made by it in this state until it shall have procured such certificate." This court said: "The court of appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for noncompliance was provided, except the suspension of civil remedies in that state, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93."

It must follow, upon the similar construction of § 15, as it read at the time of the transaction in question, that *the [500] Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The state could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the en-

forcement of a valid contract. *Union Bank v. Vaiden*, 18 How. 503, 507, 15 L. ed. 472, 474; *Hyde v. Stone*, 20 How. 170, 175, 15 L. ed. 874, 875; *Cowles v. Mercer County*, 7 Wall. 118, 122, 19 L. ed. 86, 87; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *Re Tyler*, 149 U. S. 164, 189, 37 L. ed. 689, 697, 13 Sup. Ct. Rep. 785; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526. The state in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue "in the courts of New York." Before this decision of the state court, the circuit court of appeals for the second circuit reached the same conclusion as to the meaning of the statute, and upheld the right of the foreign corporation to sue in the Federal court. *Johnson v. New York Breweries Co.* 101 C. C. A. 639, 178 Fed. 513. The court below erred in dismissing the complaint.

With respect to the facts going to the merits of the claim of the Lupton Company, the referee made numerous findings which it is not necessary to set forth or to review at length. The contract provided that "in the event of any strike or cessation of work, caused by character or condition of labor employed or material furnished," the owner should have full authority "to arbitrate or adjust the matter," and the contractor should make good the loss, to be fixed by the architect or by arbitration. This clause was evidently inserted to meet the sort of difficulty which actually arose. The referee found, as has been stated, that it was "on account of the character and condition of labor employed by the plaintiff and the 501] material furnished *by it" that the strike took place and all the other persons employed on the building stopped work. It was also found that to complete the contract the defendant necessarily expended the sum of \$3,796.76. This was done under an adjustment by the architect, and upon the findings the defendant was properly allowed a credit for the amount thus paid. There remained due to the plaintiff the sum of \$709.52, for which it was entitled to judgment with interest.

Judgment reversed and the cause remanded to the District Court with instructions to enter judgment in favor of the plaintiff for \$709.52, with interest from the date of the commencement of the action.

MARION W. SAVAGE, Appt.,
v.

WILLIAM J. JONES, JR., State Chemist
of the State of Indiana.

(See S. C. Reporter's ed. 501-540.)

Appeal — from circuit court — Federal question.

1. A suit to enjoin a state official from enforcing the provisions of a registration and inspection law is one in which the law of a state is claimed to be in contravention of the Constitution of the United States, within the meaning of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, so as to permit a direct appeal to the Federal Supreme Court from a decree of a circuit court, sustaining a general demurrer to the bill for want of equity, where such bill, although averring that complainant's product is not comprehended by the statute, properly interpreted, also alleges that the defendant, who was authorized to enforce the statute, had construed it to be applicable to such product, and challenges the constitutionality of the statute as so construed.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

2. The reduction in the interstate sales of a nonresident manufacturer by reason of a state registration and inspection law affecting the right of the importing purchasers to sell in the original packages,

NOTE.—On direct review in Federal Supreme Court of district or circuit courts—see notes to *Gwin v. United States*, 46 L. ed. U. S. 741; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333; *B. Altman & Co. v. United States*, ante, 894.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to *Pugh v. Pugh*, 32 L.R.A.(N.S.) 954.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.R.A. 366; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 217; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311; and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

On inspection laws as regulations of commerce—see note to *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 51 L. ed. U. S. 78.

which result he can avoid only by compliance with the statute, gives him a standing to challenge the validity of such act as an unconstitutional regulation of interstate commerce.

[For other cases, see Statutes, I. d. 3, in Digest Sup. Ct. 1908.]

Commerce — state regulation — inspection laws.

3. The prohibition against sales by importing purchasers of concentrated commercial feeding stuffs in the original packages, which is made by Ind. Acts 1907, chap. 206, unless there be compliance with its requirements as to inspection and analysis, and the disclosure of the ingredients, including the minimum percentage of crude fat and crude protein, and the maximum percentage of crude fiber, and its incidental provisions for the filing of a certificate, for registration, and for labels and stamps, is a proper exercise of the police power of the state, and not an unconstitutional regulation of interstate commerce.

[For other cases, see Commerce, VI. c, in Digest Sup. Ct. 1908.]

Commerce — state regulation — inspection charge.

4. An inspection charge of 80 cents per hundred for stamps to be affixed to packages of concentrated commercial feeding stuffs, made by Ind. Laws 1907, chap. 206, is not on its face so unreasonably in excess of the cost of analysis, salaries of officials, and other necessary expenses, as to invalidate the statute, when applied to sales by importers in the original packages, as a disguised revenue measure.

[For other cases, see Commerce, 546, 547, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — inspection.

5. Congress did not, by the passage of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, preclude the enactment of Ind. Acts of 1907, chap. 206, prohibiting sales of concentrated commercial feeding stuffs in the original packages unless there be compliance with its requirements as to inspection and analysis and the disclosure of the ingredients, including the minimum percentage of crude fat and crude protein, and the maximum percentage of crude fiber, and with its incidental provisions for the filing of a certificate, for registration, and for labels and stamps.

[For other cases, see Commerce, VI. c, in Digest Sup. Ct. 1908.]

[No. 68.]

Argued January 18, 1912. Decided June 7, 1912.

APPEAL from the Circuit Court of the United States for the District of Indiana to review a decree sustaining a de-
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murrer to a bill to restrain the enforcement of a state inspection law. Affirmed.

Statement by Mr. Justice Hughes:

This is an appeal from a decree of the circuit court, sustaining a demurrer to the bill for want of equity. The suit was brought by Marion W. Savage, a citizen of Minnesota, to restrain the defendant, the state chemist of Indiana, from taking proceedings to enforce an act of the general assembly of that state (Acts 1907, chapter 206) as applied to the sales of the complainant's product, a preparation for domestic animals known as "International Stock Food." The act is set forth in the margin. †

†Acts 1907, Chapter 206, Page 354, Indiana.

An Act to Provide for the Inspection and Analysis of, and to Regulate the Sale of, Concentrated Commercial Feeding Stuff in the State of Indiana; to Prohibit the Sale of Fraudulent or Adulterated Concentrated Commercial Feeding Stuffs; to Define the Term "Concentrated Commercial Feeding Stuffs;" to Provide for Guaranties of the Ingredients of Concentrated Commercial Feeding Stuffs; for the Affixing of Labels and Stamps to the Packages Thereof, as Evidence of the Guaranty and Inspection Thereof; to Provide for the Collection of an Inspection Fee from the Manufacturers of or Dealers in Concentrated Commercial Feeding Stuffs; to Fix Penalties for the Violation of the Provisions of This Act, and to Authorize the Expenditure of the Funds Derived from the Inspection Fees.

Section 1. Be it enacted by the general assembly of the state of Indiana, that before any concentrated commercial feeding stuff is sold, offered or exposed for sale in Indiana, the manufacturer, importer, dealer, agent, or person who causes it to be sold or offered for sale, by sample or otherwise, within this state, shall file with the state chemist of Indiana at the Indiana Agricultural Experiment Station, Purdue University, a statement that he desires to offer such concentrated commercial feeding stuff for sale in this state, and also a certificate, the execution of which shall be sworn to before a notary public or other proper official, for registration, stating the name of the manufacturer, the location of the principal office of the manufacturer, the name, brand, or trademark under which the concentrated commercial feeding stuff will be sold, the ingredients from which the concentrated commercial feeding stuff is compounded, and the minimum percentage of crude fat or crude protein, allowing 1 per cent of nitrogen to equal 6.25 per cent of protein, and the maximum percentage of crude fiber which the manufacturer or person offering the concentrated commercial feeding stuff for sale guarantees it to contain; these constituents to be determined by the methods recommended by the asso-

504] *The bill alleges that the complainant has for many years been engaged in Minnesota in the manufacture of medicinal 505]*preparations, one of which is called "International Stock Food," and is sold in 506]every state in the Union as *well as in many foreign countries; that he has invested large amounts of money in building 507]up a lucrative trade *in Indiana among the retail druggists, many hundreds of whom were "buying, carrying in stock, 508]and retailing to *the public" the complainant's preparations; that the complainant's gross annual sales in Indiana amount to many thousands of dollars; that the "International Stock Food" possesses effective curative properties for various diseases of domestic animals,

and is composed of medicinal roots, herbs, seeds, and barks, combined by a secret formula of great value; and that the disclosure to his competitors of the proportion of the ingredients and the manner of combination would seriously injure his business; that the commercial designation "International Stock Food" is not used by the complainant as descriptive of feed of any kind, and is not so understood by retail druggists and purchasers, but is well known to the public as a trade name of a medicine for domestic animals, protected under trademarks *in the United States; that on[509 investigations made by the United States Internal Revenue Department it was determined that the preparation was not feeding stuff nor a condimental stock food, but was

ciation of official agricultural chemists of the United States.

Sec. 2. Any person, company, corporation, or agent that shall sell or offer, or expose for sale, any concentrated commercial feeding stuff in this state, shall affix, or cause to be affixed, to every package or sample of such concentrated commercial feeding stuff, in a conspicuous place on the outside thereof, a tag or label which shall be accepted as a guaranty of the manufacturer, importer, dealer, or agent, and which shall have plainly printed thereon in the English language, the number of net pounds of concentrated commercial feeding stuff in the package, the name, brand, or trademark under which the concentrated commercial feeding stuff is sold, the name of the manufacturer, the location of the principal office of the manufacturer, and the guaranteed analysis, stating the minimum percentage of crude fat and crude protein, determined as described in § 1, and the ingredients from which the concentrated commercial feeding stuff is compounded. For each 100 pounds, or fraction thereof, the person, company, corporation, or agent, shall also affix a stamp purchased from the state chemist, showing that the concentrated commercial feeding stuff has been registered as required by § 1 of this act, and that the inspection tax has been paid. When concentrated commercial feeding stuff is sold in bulk a tag, as hereinbefore described, and a state chemist stamp, shall be delivered to the consumer with each 100 pounds, or fraction thereof: Provided, That for wheat bran a special stamp covering 50 pounds shall be issued on request, and one such stamp, attached to the tag hereinbefore mentioned, shall be delivered to the purchaser with each 50 pounds or fraction thereof.

Sec. 3. The state chemist shall register the facts set forth in the certificate required by § 1 of this act in a permanent record, and shall furnish stamps or labels showing the registration of such certificate to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered, at such times and in such numbers as the manufacturers or agents may desire:

Provided, That the state chemist shall not be required to sell stamps or labels in less amount than to the value of five dollars (\$5) or multiples of five dollars for any one concentrated commercial feeding stuff: Provided further, That the state chemist shall not be required to register any certificate unless accompanied by an order and fees for stamps or labels to the value of five dollars (\$5) or some multiple of five dollars: Provided further, That such stamps or labels shall be printed in such form as the state chemist may prescribe: Provided further, That such stamps or labels shall be good until used.

Sec. 4. On or before January 31st of each year, each and every manufacturer, importer, dealer, agent, or person, who causes any concentrated commercial feeding stuff to be sold or offered or exposed for sale in the state of Indiana shall file with the state chemist of Indiana a sworn statement, giving the number of net pounds of each brand of concentrated commercial feeding stuff he has sold or caused to be offered for sale in the state for the previous year, ending December 31st: Provided, That when the manufacturer, jobber, or importer of any concentrated commercial feeding stuff shall have filed the statement aforesaid, any person acting as agent for said manufacturer, importer, or jobber shall not be required to file such statement.

Sec. 5. For the expense incurred in registering, inspecting, and analyzing concentrated commercial feeding stuffs, the state chemist shall receive for stamps or labels furnished \$1 per hundred: Provided, That for wheat bran a special stamp as required by § 2 of this act shall be furnished at 50 cents per hundred. The money for said stamps, or labels, shall be forwarded to the said state chemist, who shall pay all such fees received by him to the director of the Indiana Agricultural Experiment Station, Purdue University, by whom they shall be paid into the treasury of said Indiana Agricultural Experiment Station, the board of control of which shall expend the same, on proper vouchers to be filed with the auditor of state in meet-

a proprietary or patent medicine within the meaning of the revenue laws of 1863 and 1898; and that subsequent to the enactment by Congress of the food and drugs act of 1906 [34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354], the administrative officers of the United States government duly determined that it was a medicine, and not a food, within the meaning of that act.

The bill then avers the passage of the act above mentioned by the legislature of Indiana, and sets forth the provisions of §§ 1, 2, 8, 9, and 11. It is alleged that the defendant, the state chemist of Indiana, is asserting that the complainant's manufacture is one of the concentrated commercial feeding stuffs covered by the act, and that

it is the duty of the complainant to comply with its provisions with reference to its sale in Indiana, "and has stated and declared to your orator, and now threatens, that unless your orator has attached in a conspicuous place on the outside of each package of your orator's said medicinal preparation offered for sale within the state of Indiana, a printed statement, clear and truthful, certifying, among other things, the name of the manufacturer and shipper, the place of manufacture, the place of business, and chemical analysis, stating the percentage of crude protein, crude fat, and crude fiber contained in said preparation, and have all its constituents determined by the methods adopted by the session of official agricultural chemists, and shall also

ing all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving results of the work of feeding-stuff inspection, as provided for by this act, and for any other expenses of said Indiana Agricultural Experiment Station as authorized by law. The director of said experiment station shall make to the governor, on or before February 15th of each year, a classified report showing the total receipts and expenditures of all fees received under the provisions of this act.

Sec. 6. Any person, company, corporation, or agent that shall offer for sale, sell, or expose for sale any package or sample, or any quantity of any concentrated commercial feeding stuff which has not been registered with the state chemist as required by § 1 of this act, or which does not have affixed to it the tag and stamp required by § 2 of this act, or which is found by an analysis made by or under the direction of the state chemist to contain a smaller percentage of crude fat or crude protein than the minimum guaranty, or which shall be labeled with a false or inaccurate guaranty, or who shall adulterate any concentrated commercial feeding stuff with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings, peanut shells, corn bran, corncorb meal, oat hulls, oat clippings, or other materials of less or of little or no feeding value, without plainly stating on the label hereinbefore described, the kind and amount of such mixture, or who shall adulterate with any substance injurious to the health of domestic animals, or who shall alter the stamp, tag, or label of the state chemist, or shall use the name and title of the state chemist on a stamp, tag, or label not furnished by the state chemist, or shall use the stamp, tag, or label of the state chemist the second time, or shall refuse or fail to make the sworn statement required by § 4 of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in the sum of \$50 for the first offense, and in the sum of \$100 for each subsequent offense. In all

litigation arising from the purchase or sale of any concentrated commercial feeding stuff in which the composition of the same may be involved a certified copy of the official analysis, signed by the state chemist, shall be accepted as prima facie evidence of the composition of such concentrated commercial feeding stuff: Provided, That nothing in this act shall be construed to restrict or prohibit the sale of concentrated commercial feeding stuff in bulk to each other by importers, manufacturers, or manipulators who mix concentrated commercial feeding stuff for sale, or as preventing the free, unrestricted shipment of these articles in bulk to manufacturers or manipulators who mix concentrated commercial feeding stuff for sale, or to prevent the state chemist, or the Indiana Agricultural Experiment Station, or any person or persons deputized by said state chemist, making experiments with concentrated commercial feeding stuffs for the advancement of the science of agriculture.

Sec. 7. The state chemist or any person by him deputized is hereby empowered to procure from any lot, parcel, or package of any concentrated commercial feeding stuff offered for sale or found in Indiana a quantity of concentrated commercial feeding stuff not to exceed 2 pounds: Provided, That such sample shall be drawn during reasonable business hours, or in the presence of the owner of the concentrated commercial feeding stuff, or of some person claiming to represent the owner.

Sec. 8. Any person who shall prevent or strive to prevent the state chemist, or any person deputized by the state chemist, from inspecting and obtaining samples of concentrated commercial feeding stuff, as provided in this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of \$50 for the first offense, and in the sum of \$100 for each subsequent offense.

Sec. 9. The state chemist is hereby empowered to prescribe and enforce such rules and regulations relating to concentrated commercial feeding stuff as he may deem necessary to carry into effect the full in-

state upon said package the names of each ingredient of which said preparation is composed, he will cause the arrest and prosecution of every person dealing or trading in the medicinal preparation of your orator within the state of Indiana." That the defendant has sent, or caused to be sent, 510]broadcast *throughout the state of Indiana to dealers and others who are customers, directly or indirectly, of complainant, many thousand circular letters warning them against the sale of said preparation, and threatening that prosecution will be instituted against all persons engaged in the sale thereof, unless and until the complainant shall have complied with the provisions of said act.

It is also alleged that the sales made by the complainant "in the state of Indiana are made at the city of Minneapolis, state of Minnesota, to be delivered free on board of cars at Minneapolis, Minnesota, and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." That unless restrained the defendant will continue to annoy and intimidate the numerous persons engaged in selling the preparation in Indiana, by threats of criminal prosecution, and will report to the various prosecuting attorneys of the state the sales that may come to his notice, and instigate prosecutions of the sellers as violators of the statute, thereby obstructing the complainant in the conduct of his business in the state of Indiana, and interfering with his property rights, to his irreparable injury, for which there is no

adequate legal remedy. That many hundreds of persons engaged in selling the preparation have already discontinued their purchases and sales because of the fear of criminal prosecution induced by the defendant's threats, and that large numbers of those who are still handling it will be induced by such threats to discontinue its sale.

The bill further avers that the complainant's preparation is not in any sense either concentrated commercial feeding stuff, or condimental stock feed, or a patent proprietary stock feed within the proper construction of the act of Indiana, and is not advertised as possessing nutritive properties or used except as medicine; that the complainant does not "claim that said medicinal preparation contains *any[511 crude protein or crude fat;" that it does not contain, nor is it claimed on behalf of the defendant that it contains, any ingredient that is deleterious or injurious to animal life or health; that it is prescribed and administered in small doses as medicine, and "that the only nutritive substance or ingredients . . . are employed as diluents in so small an amount as to produce no feeding effect whatever, but for the sole purpose of rendering medicinal bitter roots, herbs, barks, and seeds more acceptable to the animal stomach;" that directions for use accompany each package, and in every case there is a statement plainly showing that the preparation is to be used to cure disease, and not in place of or as a substitute for any grain or feed. That nevertheless, the defendant, who, in his official capacity, is charged by law with the en-

tent and meaning of this act, and to refuse the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commercial feeding stuffs. The state chemist is further empowered to refuse to issue stamps or labels to any manufacturer, importer, dealer, agent, or person who shall sell or offer or expose for sale any concentrated commercial feeding stuff in this state, and refuse to submit the sworn statement required by § 4 of this act.

Sec. 10. It shall be the duty of every prosecuting attorney to whom the state chemist shall report any violation of this act to cause proceedings to be commenced against the person or persons so violating the act, and the same prosecuted in the manner required by law.

Sec. 11. The term "concentrated commercial feeding stuff," as used in this act, shall include linseed meals, cocoanut meals, gluten feeds, gluten meals, germ feeds, corn feeds, maize feeds, dairy feeds, starch feeds,

sugar feeds, dried brewers' grains, malt sprouts, dried distillers' grains, dried beet refuse, hominy feeds, cerealine feeds, rice meals, rice bran, rice polish, peanut meals, oat feeds, corn and oat feeds, corn bran, wheat bran, wheat middlings, wheat shorts and other mill by-products not excluded in this section, ground beef or fish scraps, dried blood, blood meals, bone meals, tankage, meat meals, slaughter-house waste products, mixed feeds, clover meals, alfalfa meals, and feeds, peavine meal, cotton seed meal, velvet bean meal, sucrose, mixed feeds, and mixed meals made from seeds or grains, and all materials of similar nature used for food for domestic animals, condimental feeds, poultry feeds, stock feeds, patented proprietary or trade and market stock and poultry feeds; but it shall not include straw, whole seeds, unmixed meals made directly from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, and broom corn, nor wheat flours or other flours.

Sec. 12. All laws and parts of laws in conflict with this act are hereby repealed.

forcement of the statute, has construed it to apply to complainant's product.

That under § 3 of the statute of Indiana the state chemist is to register the facts set forth in the certificate required by § 1 as a permanent record, and to furnish stamps or labels, showing such registration, to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered in amounts not less than the value of \$5 or multiples of \$5 for any one such product; that by § 5 the state chemist is to receive \$1 for each one hundred stamps, and that the proceeds thus derived are to be paid into the treasury of the Indiana Agricultural Experiment Station, to be expended in carrying out the provisions of the statute and for any other expenses of such station, as authorized by law.

That the statute, and particularly §§ 1, 2, 7, 8, and 9, are repugnant to the 14th Amendment of the Constitution of the United States, in that they require manufacturers of proprietary stock feed and condimental feeds, arbitrarily, without compensation, 512]and without due process *of law, whether such preparation contain any poisonous or deleterious element or ingredient, to disclose the formulæ by which they are compounded, and the ingredients and proportions thereof, which embody valuable trade secrets; and that if the act is enforced against the complainant he will be deprived of his property contrary to the said Amendment.

That the statute also violates § 8 of article 1 of the Constitution of the United States as an unreasonable interference with interstate commerce in which the complainant is engaged.

That further, the statute is invalid under § 19 of article 4 of the Constitution of the state of Indiana in that the title does not express the requirement that manufacturers or dealers shall disclose the formulæ by which their products are manufactured, or the ingredients or proportions.

That for many years the complainant's preparation has been offered for sale in packages of different sizes, holding respectively 24 ounces, 3 pounds, 6 pounds, and 25 pounds; that under the terms of the statute the complainant would be required to pay the same amount of tax for a package of 24 ounces that other commodities and manufacturers thereof pay for a package of 100 pounds; and that this discrimination is unreasonable and unconstitutional.

That the enforcement of the requirement as to the affixing of stamps and payment therefor is a tax upon the complainant's property and business, and is not a license fee determined by any reasonable require-

ment, or for the purpose of carrying out the inspection required, but, on the contrary, under the guise of a police regulation, constitutes a measure for raising revenue for the general work and expense of the Indiana Agricultural Experiment Station. That the act is contrary to § 10 of article 1 of the Constitution of the United States, that no state shall, without the consent of Congress, lay any imposts or duties on imports, *except what may be absolute-513 ly necessary for executing its inspection law.

The bill prays that the defendant may be enjoined from taking any action against the complainant, interfering with his right to vend and convey his preparations in the state of Indiana, from instituting any proceedings to punish him for failure to comply with the defendant's demands, from giving out orally or in writing to the various prosecuting officers of the state, or to any other agents thereof charged with the enforcement of its law, or to the public, any threats of prosecution, or information upon which prosecutions are requested or may be based, and from otherwise seeking to prevent the conduct of the complainant's business in the state, or to discredit the reputation of his remedy.

The defendant demurred to the bill upon the ground that it was wholly without equity, and that the court was without jurisdiction. Upon the former ground the bill was dismissed.

Mr. M. H. Boutelle argued the cause and filed a brief for appellant:

The constitutional question presented establishes the right of direct appeal from the decree of the circuit court to this court.

Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Penn. Mut. L. Ins. Co. v. Austin, 168 U. S. 694, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; Holder v. Aultman, M. & Co. 169 U. S. 88, 42 L. ed. 671, 18 Sup. Ct. Rep. 269; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

Every question arising upon the record is open for consideration on the present appeal.

Carey v. Houston & T. C. R. Co. 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; Horner v. United States, 143 U. S. 576, 36 L. ed. 268, 12 Sup. Ct. Rep. 522.

The act is a direct regulation and consequent interference with commerce.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep.

674; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *West v. Kansas Natural Gas Co.* 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; *Asbell v. Kansas*, 209 U. S. 251, 254, 255, 52 L. ed. 778, 780, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania (Paul v. Pennsylvania)* 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

The law in question is not an inspection act.

Scott v. Donald, 165 U. S. 58, 93, 99, 41 L. ed. 632, 642, 645, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vanderook Co.* 170 U. S. 456, 42 L. ed. 1107, 18 Sup. Ct. Rep. 674; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; *Atlantic & P. Teleph. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1.

In considering this phase of the case, the self-characterization of the act is wholly immaterial. In the ascertainment of its natural effect and intendment, this court is neither concluded by its self-styled objects, or its local interpretation.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101.

The act in question as applied to interstate commerce is superseded and annulled by the act of Congress of June 30th, 1906, known as the pure food and drugs act.

Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; *Asbell v. Kansas*, 209 U. S. 251,

255, 52 L. ed. 778, 780, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Hall v. DeCuir*, 95 U. S. 485, 498, 24 L. ed. 547, 551; *The Roanoke*, 189 U. S. 185, 198, 47 L. ed. 770, 774, 23 Sup. Ct. Rep. 491.

Mr. Edwin Corr argued the cause, and, with Mr. Thomas M. Honan, filed a brief for appellee:

A party insisting on the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint.

Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594; *Hooker v. Burr*, 194 U. S. 419, 48 L. ed. 1050, 24 Sup. Ct. Rep. 706; *New York ex rel. Hatch v. Reardon*, 204 U. S. 160, 51 L. ed. 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 730.

It is only where the police power of a state law undertakes directly to regulate interstate commerce that it is invalid.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 50, 51 L. ed. 86, 27 Sup. Ct. Rep. 1; *Plumley v. Massachusetts*, 155 U. S. 471, 39 L. ed. 226, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

A state has a right to require that any article of commerce, whether harmful or not, be sold for just what it is; and may require it to be labeled, showing of what it is composed. In its regulations to prevent fraud and deceit and adulteration in the sale of articles, it may require an inspection not only of adulterated articles, but of those which may not be adulterated. Inspection laws are not founded on the theory that the things on which they act are dangerous or noxious in themselves.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 488, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 348, 43 L. ed. 191, 192, 18 Sup. Ct. Rep. 862; *Arbuckle v. Blackburn*, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

Unless the inspection fee is so unreasonably large as to show on its face the lack of good faith in the enactment of the law, the question of the amount of such inspection fee is a legislative, and not a judicial, question.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 55, 51 L. ed. 88, 27 Sup. Ct. Rep. 1; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 355, 43 L. ed. 195, 18 Sup. Ct. Rep. 862.

The Indiana law being a valid exercise of the police power to enact proper inspection laws, if the same were in conflict with the pure food and drugs act the latter would have to give way, as Congress has no right to pass laws prohibiting a state from exercising its police powers in enacting proper inspection laws.

Crossman v. Lurman, 192 U. S. 190, 48 L. ed. 402, 24 Sup. Ct. Rep. 234.

519] *Mr. Justice Hughes, after making the above statement, delivered the opinion of the court:

The principal contention in support of this appeal is that the statute of Indiana (Acts 1907, chapter 206), the provisions of which have been set forth, is an unconstitutional interference with the complainant's right to engage in interstate commerce.

A preliminary question arises with respect to the jurisdiction of this court, by reason of the allegation of the bill that the complainant's product is not a "concentrated commercial feeding stuff" within the true meaning of the act, and that so interpreted the statute would not apply. But it was also alleged that the state chemist, who was authorized to enforce the statute, had construed it to be applicable to the commodity which is commercially known as "International Stock Food;" and thus charged by the officer with the duty of obedience, the complainant in his bill challenged the constitutionality of the legislation. The grounds for the attack were not found in the conclusions reached by the officer as to the nature of the article, in administering an act otherwise conceded to be valid (*Arbuckle v. Blackburn*, 191 U. S. 405, 414, 48 L. ed. 239, 241, 24 Sup. Ct. Rep. 148), but in the provisions of the statute itself, as applied to the articles within its purview while in the course of interstate commerce. A general demurrer, for want of equity, was sustained, and in view of the substantial character of the contention, the case must be regarded as one in which the law of a state is claimed to be in contravention of the Constitution of the United States. Act of March 3, 1891, chap. 517, § 5, 26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *Loeb v. Columbia Twp.* 179 U. S. 472, 478, 45 L. ed. 280, 285, 21 Sup. Ct. Rep. 174; *Lampasas* 56 L. ed.

v. Bell, 180 U. S. 276, 282, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368.

It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. **Southern R. Co. v. King*, 217 U. S. 520 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594. The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods "to be delivered free on board of cars" at that point, "and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." In answer, it must again be said that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer*, 140 U. S. 545, 559, 560, 35 L. ed. 572, 575, 576, 11 Sup. Ct. Rep. 865; *Plumley v. Massachusetts*, 155 U. S. 461, 473, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 445, 42 L. ed. 1100, 1103, 1104, 18 Sup. Ct. Rep. 674; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 22-25, 43 L. ed. 49, 57, 58, 18 Sup. Ct. Rep. 757; *Heyman v. Southern R. Co.* 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales,—a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every

521] person dealing in the *article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott v. Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; *Ex parte Young*, 209 U. S. 125, 159, 160, 52 L. ed. 714, 728, 729, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441 14 Ann. Cas. 764; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 621, ante, 570, 32 Sup. Ct. Rep. 340.

We are thus brought to the examination of the statute. The question of its constitutional validity may be considered in two aspects: (1) independently of the operation and effect of the act of Congress of June 30, 1906, chap. 3915 (34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1911, p. 1354), known as "the food and drugs act," and (2) in the light of this Federal enactment.

First. The statute relates to the sale of various sorts of food for domestic animals, embraced in the term "Concentrated commercial feeding stuff," as defined in the act. It requires the filing of a statement and a sworn certificate, the affixing of a label bearing certain information, and a stamp.

By § 1 it is provided, in substance, that before any such feeding stuff is sold, or offered for sale, in Indiana, the "the manufacturer, importer, dealer, agent, or person" selling or offering it, shall file with the state chemist a statement that he desires to sell the feeding stuff, and also a sworn certificate, for registration, stating (a) the name of the manufacturer, (b) the location of the principal office of the manufacturer, (c) the name, brand, or trademark under which the article will be sold, (d) the ingredients from which it is compounded, and (e) the minimum percentage of crude fat and crude protein, allowing 1 522] per cent of nitrogen to equal 6.25 *per cent of protein, and the maximum percentage of crude fiber which the manufacturer or person offering the article for sale guarantees it to contain; these constituents to be determined by the methods recommended by the association of official agricultural chemists of the United States. The state chemist is to register the facts set forth in the certificate in a permanent record (§ 3).

Section 2 provides that there shall be affixed to every package or sample of the article a tag or label which shall be accepted as a guaranty of the manufacturer, importer, dealer, or agent, and shall have plainly printed thereon (a) the number of net pounds of feeding stuff in the package, (b) the name, brand, or trademark under which it is sold, (c) the name of the manufacturer, (d) the location of the principal office of the manufacturer, and (e) the guaranteed analysis, stating the minimum percentage of crude fat and crude protein, determined as described in § 1, and the ingredients from which the article is compounded.

A stamp purchased from the state chemist, showing that the article has been registered and that the inspection tax has been paid, is to be affixed for each 100 pounds or fraction thereof, special provision being made for the delivery of an equivalent number of stamps on sale in bulk. By an amendment of 1909, stamps are to be issued by the state chemist to cover 25, 50, and 100 pounds (Acts 1909, chapter 46). He is not required to sell stamps in less amount than to the value of \$5, or multiples thereof, for any one feeding stuff, or to register any certificate unless accompanied by an order and fees for stamps to the amount of \$5, or some multiple of that sum (§ 3). Sworn statements are to be filed annually of the number of net pounds of each brand of feeding stuff sold or offered for sale in the state (§ 4).

The price of the stamps under the original act was \$1 *per hundred; but by [523 the amendment of 1909 (*supra*) the charge was made 80 cents per hundred, for stamps to cover 100 pounds, and 40 cents and 20 cents respectively for stamps to cover 50 and 25 pounds. The fees received are to be paid into the treasury of the Indiana Agricultural Experiment Station, and expended "in meeting all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving the results of the work of feeding-stuff inspection, as provided for by this act, and for any other expenses of said Indiana Agricultural Experiment Station, as authorized by law." A classified report of the receipts and expenditures is to be made to the governor of the state annually (§ 5).

Anyone selling, or offering for sale, any feeding stuff which has not been registered and labeled and stamped, as required by the act, or which is found by an analysis made by the state chemist, or under his direction, to contain "a smaller percentage of crude fat or crude protein than the minimum

guaranty," or is "labeled with a false or inaccurate guaranty," and anyone who adulterates any feeding stuff "with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings," etc.," "or other materials of less or of little or no feeding value without plainly stating on the label hereinbefore described, the kind and amount of such mixture," or who adulterates with any substances injurious to the health of domestic animals, or alters the state chemist's stamp, or uses it a second time, or fails to make the sworn statement as to annual sales as required, is guilty of a misdemeanor and is subject to fine (§ 6).

The state chemist and his deputies are empowered to procure from any lot or package of the described feeding stuffs offered for sale or found in Indiana a quantity not exceeding 2 pounds, to be drawn during reasonable *business hours, or in the presence of the owner or his representatives (§ 7), and it is made a misdemeanor to interfere with such inspection and sampling (§ 8). He is also authorized to prescribe and enforce regulations as he may deem necessary to carry the act into effect; and he may refuse "the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commercial feeding stuffs."

The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food. The practice of selling feeding stuffs under general descriptions gave opportunity for abuses which the legislature of Indiana determined to correct, and to safeguard against deception it required a disclosure of the ingredients contained in the composition. The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question, in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand a statement of the ingredients, and also of the minimum percentage of crude fat and crude protein, and of the maximum percentage of crude fiber,—a requirement of obvious propriety in connection with substances purveyed as feeding stuffs.

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The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 474, 24 L. ed. 527, 531; **Walling v. Michigan*, 116 U. S. 446[525 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 485; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 13, 43 L. ed. 49, 53, 18 Sup. Ct. Rep. 757; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633. But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Patapco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 50, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; *Asbell v. Kansas*, 209 U. S. 251, 254-256, 52 L. ed. 778, 780, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

In *Plumley v. Massachusetts*, a law of that commonwealth was sustained which had been passed "to prevent deception in the

manufacture and sale of imitation butter." The article for the sale of which the plaintiff in error was convicted in the state court had been received by him from the manufacturers in Illinois, as their agent, and had been sold in Massachusetts in the original package. The court said (155 U. S. pp. 468, 472), referring to the purpose and effect of the statute: "He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. 526] It *compels the sale of oleomargarin for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practise a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? . . . Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the [several] states."

In *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, the court had before it a statute of North Carolina relating to fertilizing materials. It provided: "Every bag, barrel, or other package of such fertilizers or fertilizing materials as above designated, offered for sale in this state, shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, . . . and the said label or stamp shall truly set forth the name, location, and trademark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present: to wit, soluble and precipitated phosphoric acid, which shall not be less than 8 per cent; soluble potassa, which shall not be less than 1 per cent; ammonia, which shall not be less than 2 per cent, or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of 527] the law have *been complied with; and any such fertilizer as shall be ascertained by

analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation." A charge of 25 cents per ton on such materials was laid for the purpose of defraying the expenses connected with the inspection; and the department of agriculture was authorized to establish an experiment station and to employ an analyst, whose duty it was to analyze such fertilizers and products as might be required by the department, and to aid, so far as practicable, in suppressing fraud in their sale.

The court upheld the statute, saying (*supra*, p. 357): "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power." After referring to the decision in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, the court, continued (pp. 358, 361): "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope. . . . The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of 25 cents per ton as intended merely to defray the cost of such inspection. It being competent for the state to pass laws of this character, does the requirement *of inspection and payment of its cost[528 bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause 2 of § 10 of article 1 expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and 'the Constitution of the United States does not secure to anyone the privilege of defrauding the public.'"

It cannot be doubted that, within the principle of these decisions, and of the others above cited, the state of Indiana—assuming for the present that there was no conflict with Federal legislation—was entitled, in the exercise of its police power, to require the disclosure of the ingredients contained in the feeding stuffs offered for sale in the state, and to provide for their inspection and analysis. The provisions for the filing of a certificate, for registration and for labels, were merely incidental to these requirements, and were appropriate means for accomplishing the legitimate purpose of the act. It is said that the statute permits the state, through its officials, to set up arbitrary standards governing conditions of manufacture. But it does not appear that any arbitrary standard has been set up, or that there has been any attempt to enforce one against the complainant. See *Western U. Teleg. Co. v. Richmond*, 224 U. S. 160, 168, ante, 710, 32 Sup. Ct. Rep. 449. The complainant has declined to file the statement and to affix the labels containing the disclosure of ingredients for which the statute provides, and instead he resorts to this suit.

The contention is made that the statute is a disguised revenue measure; but on a review of its provisions we find no warrant for such a characterization of it. The bill sets forth no facts whatever to show that the charge for stamps is unreasonable in its relation to the costs of inspection, 529]*and certainly it cannot be said that aught appears "to justify the imputation of bad faith and change the character of the act." *Patapsco Guano Co. v. Board of Agriculture*, supra; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 393, ante, 240, 244, 32 Sup. Ct. Rep. 152. With respect to the requirement of an advance payment for stamps, to the value of \$5, to accompany the certificate, we need not say more than that the complainant is plainly not prejudiced, in view of the alleged extent of his sales.

Second. The question remains whether the statute of Indiana is in conflict with the act of Congress known as the food and drugs acts of June 30, 1906. For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation. *Reid v. Colorado*, 187 U. S. 137, 146, 147, 47 L. ed. 108, 113, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Asbell v. Kansas*, 209 U. S. 251, 256, 257, 52 L. ed. 778, 781, 782, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Northern P. R. Co. v. Washington*, 222 U. S. 56 L. ed.

S. 370, 378, ante, 237, 238, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 436, ante, 257, 260, 32 Sup. Ct. Rep. 140.

The object of the food and drugs act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any state from any other state "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold, or in original unbroken packages." *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54, 55 L. ed. 364, 366, 31 Sup. Ct. Rep. 364. To determine the scope of the act with respect to feeding stuffs we must examine its definitions of the adulteration and misbranding of food, the term "food" including "all articles used for food, drink, confectionary, or condiment by man or other animals, whether simple, mixed, or compound" (§ 6). *These definitions are found in §§ 7[530 and 8, which are set forth in the margin.†

*It will be observed that in its[531 enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances, where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article "for the purposes of this act" shall be deemed to be misbranded if the package

†Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated:

In case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, That when, in the preparation of food products for shipment, they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of such preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

532]or label bear any statement, *design, or device regarding it or the ingredients or substances it contains, which shall be false or misleading (§ 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain "any added poisonous or deleterious ingredients" shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8).

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.

Sec. 8. That the term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or meas-

Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that "nothing in this act shall be construed" as requiring manufacturers of *proprie-[533 tary foods which contain no unwholesome added ingredient to disclose their trade formulas "except in so far as the provisions

ure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be; is plainly stated on the package in which it is offered for sale: Provided, That the term "blend," as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

of this act may require to secure freedom from adulteration or misbranding" (§ 8). We have already noted the limitations of the provisions referred to. It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & P. R. Co. v. Albilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 378, ante, 237, 239, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 436, ante, 257, 260, 32 Sup. Ct. Rep. 140.

But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 379, ante, 237, 240, 32 Sup. Ct. Rep. 160; **Southern R. Co. v. Reid*, 222 U. S. 424, 442, ante, 257, 262, 32 Sup. Ct. Rep. 140.

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, the supreme court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the state certain cattle al-

leged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the state of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, chap. 60 (23 Stat. at L. 31, U. S. Comp. Stat. 1901, p. 299), known as the animal industry act, together with the act of March 3, 1891, chap. 544 (26 Stat. at L. 1044), appropriating money to carry out its provisions, and § 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), covered substantially the whole subject of the transportation from one state to another state of live stock capable of imparting contagious disease, and therefore that the state of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals, and for report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the Commissioner of Agriculture, and certified to the executive authority of each state and territory. Special investigation was to be made for the protection of foreign commerce, and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel, should receive for transportation, or transport, from one state to another, any live stock affected with any communicable disease, nor should anyone deliver for such transportation, or drive on foot or transport in private conveyance from one state to another, any live stock, knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act, were to be guilty of a misdemeanor punishable by fine or imprisonment.

The court held that this Federal legislation did not override the statute of the state; that the latter created a civil liability as to which the animal industry act of Congress had not made provision. The court said (*supra*, pp. 623, 624):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This

question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247. . . . Whether a corporation transporting, or the person causing to be transported, from one state to another, cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their state of such diseased cattle, is a subject about which the animal industry act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law under some state enactment for damages arising 536] out of the introduction into that state of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to anyone against such liability."

In *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the question arose under a statute of Colorado which had been passed to prevent the introduction into the state of diseased animals. The statute made it a misdemeanor for anyone to bring into the state between April 1 and November 1 any cattle or horses from a state, territory, or county south of the 36th parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to importation, or unless the owner or person in charge should procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases, and had not been exposed thereto at any time within the preceding ninety days. The expense of any inspection in connection therewith was to be paid by the owner.

The plaintiff in error had been convicted of bringing cattle into the state in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the 36th parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as

invalid legislation. When the plaintiff in error refused assent to the state inspection, he showed to the authorities a certificate signed by an assistant inspector of the Federal bureau of animal industry, who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the animal industry act of Congress, but the court sustained the state law for the *reason that, although the two stat- 537
utes related to the same general subject, they did not cover the same ground and were not inconsistent with each other.

The court thus emphasized the general principle involved (*supra*, p. 148): "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to affect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'" And in the course of its review of the subjects embraced in the Federal legislation the court said (pp. 149, 150):

"Still another subject covered by the act is the driving on foot or transporting from one state or territory into another state or territory, or from any state into the District of Columbia, or from the District into any state, of any live stock *known* to be affected with any contagious, infectious, or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one state to another. The owner of such stock, when bringing them into another state, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the state into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious, or communicable diseases. The act of Congress left the state free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an *offense 538
against the United States, for anyone *knowingly* to take or send from one state or territory to another state or territory, or into the District of Columbia, or from the District into any state, live stock affected

with infectious or communicable disease. The animal industry act did not make it an offense against the United States to send from one state into another live stock which the shipper did not know were diseased. The offense charged upon the defendant in the state court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the state veterinary sanitary board a certificate or bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the state enactment or under the charge made.

"Our conclusion is that the statute of Colorado, as here involved, does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress."

In *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101, the plaintiff in error had been convicted under a statute of the state of Kansas which made it a misdemeanor to transport cattle into the state from any point south of the south line of the state, except for immediate slaughter, without having first *caused them to be inspected and passed as healthy by the proper state officials or by the bureau of animal industry of the Interior Department of the United States. The court held that the statute was a valid exercise of the power of the state unless it were, in conflict with the act of Congress. It appeared that since the decision in *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, Congress had provided that where an inspector of the bureau of animal industry had issued a certificate that he had inspected live stock and found them free from communicable disease, they should be transported into any state or territory without further inspection or the exaction of fees of any kind, except such as might be required by the Secretary of Agriculture. But as the law of Kansas recognized the

Federal certificate, a conflict with the act of Congress was avoided, and hence the conviction under the state law was sustained.

Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That state has determined that it is necessary, in order to secure proper protection from deception, that purchasers of the described feeding stuffs should be suitably informed of what they are buying, and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity.

Other objections urged by the bill to the validity of the statute, save so far as they may be deemed to involve the questions that have already been considered, have not been pressed in argument and need not be discussed. *Recurring to the contention that the product of the complainant is not within the statute, it is evident that, assuming the validity of the enactment, the complainant showed no ground for resorting to equity, as the nature of the composition must be determined according to the fact, in the course of due proceedings for that purpose.

The demurrer was properly sustained.

Affirmed.

STANDARD STOCK FOOD COMPANY,
Appt.,
v.

H. R. WRIGHT, as State Food and Dairy
Commissioner of Iowa.

(See S. C. Reporter's ed. 540-550.)

Commerce — state regulation — inspection law.

1. The requirement that the name and percentage of the diluent or diluents or bases shall be stated in the labels, which is made by Iowa Code (Supp. 1907, §§ 5077-a6—5077-a24), relating to the sale within the state of concentrated commercial feeding stuffs, is a proper exercise of the police

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry*

power of the state, and does not, as applied to sales by importers in the original packages, amount to an unconstitutional regulation of interstate commerce.

[For other cases, see Commerce, VI. c., in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — inspection.

2. There is no conflict between the provisions of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), for the prevention of the adulteration and misbranding of foods and drugs when the subject of interstate commerce, and the requirement of Iowa Code (Supp. 1907, §§ 5077-a6—5077-a24), as applied to sales by importers in the original packages, that there shall be stated in the labels on concentrated commercial feeding stuffs offered for sale in the state the name and percentage of the diluent or diluents or bases.

[For other cases, see Commerce, VI. c., in Digest Sup. Ct. 1908.]

Commerce — state regulation — inspection charge.

3. The imposition by Iowa Code (Supp. 1907, §§ 5077-a6—5077-a24), governing the inspection and analysis of concentrated commercial feeding stuffs, of an inspection fee of 10 cents per ton on such products when sold or offered for sale within the state, or the exaction, in lieu thereof, in the case of "condimental, patented, proprietary, or trademark stock or poultry foods," of an annual license fee of \$100, does not render the statute invalid as applied to sales by importers in the original packages. [For other cases, see Commerce, 546, 547, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

4. Only those within the class injuriously affected by the alleged discriminatory features of a state statute can urge the invalidity of such statute under U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 222.]

Argued April 24, 1912. Decided June 10, 1912.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa to review a decree sustaining a demurrer to a bill in a suit to restrain

the enforcement of a state statute relating to the sale of concentrated commercial feeding stuffs. Affirmed.

The facts are stated in the opinion.

Mr. F. H. Gaines argued the cause, and, with Messrs. E. G. McGilton, Sidney W. Smith, and A. L. Hager, filed a brief for appellant:

Unless the tax imposed against complainant herein is one absolutely necessary for executing its inspection laws and to cover the cost thereof, it is void under the commerce clause of the Constitution.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

No inspection of complainant's products is required before sale, and hence the tax of \$100 cannot be sustained as an inspection fee.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

The specific questions involved have been decided adversely to the contentions of the state by the circuit court of the United States for the states of North Carolina and Kansas.

American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; George H. Lee Co. v. Webster, 190 Fed. 353.

Mr. George Cosson, Attorney General of Iowa, argued the cause, and, with Mr. Henry E. Sampson, filed a brief for appellee:

The validity of the act must be determined not by the casual use of any word or phrase, but by its necessary and obvious result, and the purpose for which it was framed.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Minnesota v. Barber, 136 U. S. 319, 34 L.

Co. v. Pennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; and Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041;

Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On inspection laws as regulations of commerce—see note to New Mexico ex rel. McLean v. Denver & R. G. R. Co. 51 L. ed. U. S. 78.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

ed. 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

This is not an act created for the mere purpose of taxing foreign or interstate commerce, or raising revenue; but is an act honestly and wisely passed by the state in the exercise of its police powers, for the purpose of protecting its citizens against fraud, imposition, and deception in the sale of adulterated and fraudulent stock foods, and the false labeling of same.

Clintsman v. Northrup, 8 Cow. 46; Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1.

Inspection laws passed pursuant to the police powers do not act on the subject before it becomes an article of commerce, when the articles transported are interstate commerce, and not foreign commerce.

Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091; Clintsman v. Northrup, 8 Cow. 46; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 600, 39 L. ed. 544, 548, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 350, 43 L. ed. 193, 18 Sup. Ct. Rep. 862.

The law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 350, 43 L. ed. 193, 18 Sup. Ct. Rep. 862; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 55, 51 L. ed. 88, 27 Sup. Ct. Rep. 1.

Conceding, for the purpose of argument, that the act discriminates against the manufacturer doing a small amount of business in the state, who is required to pay a fee equal to that paid by the large manufacturer, doing a large business, as complainant herein, this objection to the statute cannot be raised by the appellant, for the reason that it is to his advantage, and not disadvantage.

Turpin v. Lemon, 187 U. S. 51, 60, 61, 47 L. ed. 70, 74, 75, 23 Sup. Ct. Rep. 20; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Collins v. Texas, 223 U. S. 288, 295, ante. 439, 443, 32 Sup. Ct. Rep. 286; Quong Wing v. Kirkendall, 223 U. S. 59, ante, 350, 32 Sup. Ct. Rep. 192; People ex rel. 56 L. ed.

Stettaver v. Olsen, 215 Ill. 620, 74 N. E. 785.

The fact that each and every package is not inspected will not invalidate the act.

Frazier v. Warfield, 13 Md. 279; State v. Bixman, 162 Mo. 34, 62 S. W. 828; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 55, 51 L. ed. 88, 27 Sup. Ct. Rep. 1.

The statement in the act that the fee is in lieu of an inspection fee simply means that if the \$100 fee is paid, no other fee is to be expected or required.

Tennessee v. Bank of Commerce, 53 Fed. 735.

It is the ultimate result which is to govern; in the final analysis the fee must be paid by some person or corporation, and necessarily by either the seller or the purchaser; and therefore the form of the imposition of the fee should not, in and of itself, invalidate the act.

Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St. 245.

The manner in which inspection shall be made depends entirely upon the requirements of a statute and the nature of the merchandise.

22 Cyc. 1366.

Legislation is not void because it meets the exigencies of a particular situation.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

If the act bears a real relation to the object to be accomplished, the method of its accomplishment is for the legislature.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 295, 52 L. ed. 1068, 28 Sup. Ct. Rep. 616.

The act is not invalid because it requires, among other things, a labeling so as not to deceive the purchaser, and a setting forth of the percentage of the diluent or base of the product.

Savage v. Wheaton (Nov. 15, 1907, C. C. D. S. D.) American Food Journal, pp. 26, 29; State v. Snow, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429; State v. Aslesen, 50 Minn. 5, 36 Am.

St. Rep. 620, 52 N. W. 220; *State v. Sherod*, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; *Ileath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *Schollenberger v. Pennsylvania* (*Paul v. Pennsylvania*) 171 U. S. 1, 12, 43 L. ed. 49, 53, 18 Sup. Ct. Rep. 757; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *Arbuckle v. Blackburn*, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 626, affirmed in 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

The Iowa law is merely supplementary to the Federal law, and covers a field which is not covered by the act of Congress, and concerning which Congress would not have the power to legislate.

United States v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Crossman v. Lurman*, 192 U. S. 189, 198, 48 L. ed. 401, 405, 24 Sup. Ct. Rep. 234; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 405, 501, 31 L. ed. 700, 712, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

If there is any doubt as to the constitutionality of the act, the doubt should be resolved in the interests of the people of the state.

Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; *Sinking Fund Cases*, 99 U. S. 717, 25 L. ed. 500; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Mr. Justice Hughes delivered the opinion of the court:

The Standard Stock Food Company, a Nebraska corporation, brought this suit against the state food and dairy commissioner of Iowa to restrain the enforcement of a statute of Iowa, effective July 4, 1907 (Code of Iowa, Supplement 1907, §§ 5077-a6—5077-a24), relating to the sale within the state of "concentrated commercial feeding stuffs," upon the ground that it was repugnant to the interstate commerce clause (§ 8, article 1), and to the 14th Amendment of the Constitution of the United States. Demurrer to the bill was sustained by the circuit court and the complainant appeals.

It was alleged in the bill that the appellant's product was a "condimental stock food," sold in Iowa and other states under the trade name of "Standard Stock Food;" that it was prepared pursuant to a secret formula of great value, contained nothing deleterious or poisonous, and had "condimental and tonic properties and powers which aid animals in the digestion of food." It was further alleged that it was made in

Nebraska and shipped into Iowa, where it was sold in the original packages either by agents of the appellant or by dealers.

The act required that each package of the described articles should have affixed thereto, in a conspicuous place on the outside, a printed statement giving certain information. The substance of this requirement, with respect to its products, is thus stated in the appellant's argument:

"The package or container of such products shall have printed on the outside thereof:

"First. The number of net pounds of feeding stuffs in the package.

"Second. The name, brand, or [548] trademark under which the article is sold.

"Third. The name and address of the manufacturer, importer, dealer, or agent.

"Fourth. The place of manufacture.

"Fifth. The name and percentage of any deleterious or poisonous ingredient or ingredients.

"Sixth. The name and percentage of the diluent or diluents or bases." (Sections 1, 2.)

The statute also contains the following provision (§ 5):

"Before any manufacturer, importer, dealer, or agent shall offer or expose for sale in this state any of the concentrated commercial feeding stuffs defined in section three (3) of this act, he shall pay to the state food and dairy commissioner an inspection fee of ten cents per ton for each ton of such concentrated commercial feeding stuffs sold or offered for sale in the state of Iowa, for use within this state; except that every manufacturer, importer, dealer, or agent for any condimental, patented, proprietary, or trademarked stock or poultry foods, or both, shall pay to the state food and dairy commissioner, on or before the fifteenth day of July of each year, a license fee of one hundred dollars (\$100) in lieu of such inspection fee. Whenever the manufacturer or importer of such foods shall have paid the fee herein required, no other person or agent of such manufacturer or importer shall be required to pay such license fee."

The appellant challenges the constitutional validity of the statute in these two particulars: (1) The requirement that the name and percentage of the diluent or diluents or bases shall be stated, and (2) the exaction of the fee of \$100.

1. With respect to the first question the case in its essential features is not to be distinguished from that of *Savage v. Jones*, decided June 7, 1912 [225 U. S. 501, ante, 1182, 32 Sup. Ct. Rep. 715], and *noth-[549] ing need be added to what was there said. It was competent for the state, in the exercise

of its power to prevent imposition upon the public, to require the disclosure to which objection is made. The provision was not an unreasonable one and the effect upon interstate commerce was incidental only. *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361, 43 L. ed. 191, 197, 18 Sup. Ct. Rep. 862; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 50, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *Asbell v. Kansas*, 209 U. S. 251, 254, 256, 52 L. ed. 778, 780, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101. Nor is there any conflict with the food and drugs act of June 30, 1906, chap. 3915 (34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1911, p. 1354), *Savage v. Jones supra*.

2. The statute provides for inspection and analysis. Under § 6, it is the duty of the state food and dairy commissioner to "cause to be made analyses of all concentrated commercial feeding stuffs and agricultural seeds sold or offered for sale in this state." For this purpose, that officer is authorized "in person or by deputy, to take for analysis a sample from any lot or package of concentrated commercial feeding stuffs in this state," and further provision is made to assure the representative character of the sample. The results of the analyses are to be published from time to time in official bulletins. The state food and dairy commissioner is required to enforce the statute, and to this end is authorized to appoint, with the approval of the executive council, such analysts and chemists as may be necessary to carry it into effect. Violation of any of the provisions of the act is made a misdemeanor.

We are of opinion that the statute must be considered as an inspection law which it was within the power of the state to enact, and that its fair import is that the fees exacted by § 5, above quoted, are for the purpose of meeting the expenses of inspection. The bill alleges no facts warranting the conclusion that the charge is unreasonable as compared with this expense. *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 347, 354, 361, 43 L. ed. 191, 192, 194, 197, 18 Sup. Ct. Rep. 862; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 50, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 393, ante, 240, 32 Sup. Ct. Rep. 152; *Savage* 56 L. ed.

age v. Jones, 225 U. S. 501, ante, 1182, 32 Sup. Ct. Rep. 715.

The payment of the sum of \$100 in the case of "condimental, patented, proprietary, or trademarked stock or poultry foods" was required in lieu of the inspection charge of 10 cents a ton, and was in effect a commutation of that charge. The essential character of the exaction was not altered. If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant "sells to more than eight hundred dealers in the state of Iowa, besides a very large number of customers who buy direct from your orator or through its agents," and that it "has been enabled to sell in the state of Iowa during the past year and for a number of years preceding a quantity of its goods in an amount exceeding \$40,000 per annum."

The case in this aspect falls within the established rule that "one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Southern R. Co. v. King*, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594. See also *Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Collins v. Texas*, 223 U. S. 288, 295, ante, 439, 443, 32 Sup. Ct. Rep. 286.

The Circuit Court was right in sustaining the demurrer.

Affirmed.

*HENRY CLAIRMONT, Pff. in Err., [551 v.

UNITED STATES.

(See S. C. Reporter's ed. 551-560.)

Intoxicating liquors — bringing into Indian country — railway right of way.

The right of way through the Flathead Indian Reservation granted to the Northern Pacific Railway Company by the act of July 2, 1864 (13 Stat. at L. 365, 367, chap.

217), § 2, the Indian title to which was extinguished without reservation by the agreement of September 2, 1882, is not "Indian country" within the meaning of the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), making it an offense for any person to introduce intoxicating liquors into the Indian country, "which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States."

[For other cases, see Indians, 54-61, in Digest Sup. Ct. 1908.]

[No. 239.]

Submitted May 1, 1912. Decided June 10, 1912.

IN ERROR to the District Court of the United States for the District of Montana to review a conviction of introducing liquors into the Flathead Indian Reservation. Reversed and remanded, with directions to quash the indictment and discharge the defendant.

The facts are stated in the opinion.

Messrs. **O. W. McConnell** and **N. W. McConnell** submitted the cause for plaintiff in error:

The act of Congress granting the right of way conveyed both the fee and possession of the land to the railroad company.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *New Mexico v. United States Trust Co.* 172 U. S. 186, 43 L. ed. 413, 19 Sup. Ct. Rep. 881; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496.

The effect of the act of Congress granting the right of way over the Flathead Indian Reservation to the Northern Pacific R. Company was to withdraw such right of way from the operation of the former act of reservation.

Maricopa & P. R. Co. v. Arizona, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391.

Indian lands cease, without any further act of Congress, to be Indian country, after the Indian title has been extinguished.

Bates v. Clark, 95 U. S. 204, 208, 209, 24 L. ed. 471, 473.

It is a logical conclusion that the United States has no jurisdiction over the right of way of the Northern Pacific Railway Company across the Flathead Indian Reservation, by reason of the fact that it has granted and conveyed said land covered by the right of way to the railway company.

Ex parte Dick, 72 C. C. A. 667, 141 Fed. 5; *Re Heff*, 197 U. S. 505, 49 L. ed. 855, 25 Sup. Ct. Rep. 506; *United States v. Four Bottles Sour-Mash Whisky*, 90 Fed. 720; *Utah & N. R. Co. v. Fisher*, 116 U. S. 28, 29 L. ed. 542, 6 Sup. Ct. Rep. 246; *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Truscott v. Hurlbut Land & Cattle Co.* 19 C. C. A. 374, 44 U. S. App. 248, 73 Fed. 60; *King v. McAndrews*, 104 Fed. 434.

Assistant Attorney General **Denison** submitted the cause for defendant in error. Mr. **Louis G. Bissell** was with him on the brief.

Mr. Justice **Hughes** delivered the opinion of the court:

The plaintiff in error was indicted by the grand jury of the United States for the district of Montana for introducing intoxicating liquor into the Flathead Indian Reservation. It appeared upon the trial in the district court that he lived on the reservation, and at the time of the alleged offense was returning to his home from Missoula on a train of the Northern Pacific Railway Company, intending to leave the train at Ravalli. A special officer of the Interior Department boarded the train at Arlee, and, finding a pint of whisky on the person of the plaintiff in error, at once arrested him and took him back to Missoula. Both Arlee and Ravalli are points within the exterior limits of the reservation, which is crossed by the right of way of the railway company.

The jury rendered a verdict of guilty, whereupon it was urged by motion in arrest of judgment that the court was without jurisdiction. The motion was denied and the defendant was sentenced to imprisonment for sixty *days and to the pay-[554]ment of a fine of \$100. The case comes here on writ of error, the district judge certifying the question of jurisdiction. The conviction was had under the act of January 30, 1897, chap. 109† (29 Stat. at L. 506), which provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever . . . to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by the government, or to any Indian a ward of the

†This repealed, so far as it was inconsistent, the act of July 23, 1892, chap. 234 (27 Stat. at L. 260), which amended § 2139 of the Revised Statutes.

government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided, however, That the person convicted shall be committed until fine and costs are paid."

We are not here concerned with that portion of the statute which penalizes selling or giving intoxicating liquors to the Indians described, or with the authority of Congress to protect the Indian wards of the 555] Nation. *The indictment charged that the plaintiff in error "did, then and there, wrongfully and unlawfully introduce" a quantity of intoxicating liquor "into the Flathead Indian Reservation, in the state and district of Montana," the said reservation "being an Indian country." The offense alleged was the introduction of the liquor into the reservation, and not "attempting to introduce."

The Flathead Indian Reservation was established by the treaty of July 16, 1855, between the United States and the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians. 12 Stat. at L. 975. It comprised a district now included within the boundaries of the state of Montana. The enabling act of 1889, under which the state was formed, required the adoption of an ordinance, irrevocable in the absence of the consent of the United States, providing: "That the people inhabiting" the proposed state "do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits, owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of February 22, 1889, chap. 180, 25 Stat. at L. 676, 677.

By the act of July 2, 1864. chap. 217, § 2 56 L. ed.

(13 Stat. at L. 365, 367), Congress granted a right of way through the public lands to the Northern Pacific Railroad Company for the construction of a railroad and telegraph as proposed, "to the extent of two hundred feet in width on each side of said railroad," including all necessary ground for station buildings, workshops, etc. It was provided that the United States should "extinguish, as rapidly as may be consistent with public policy and the welfare of the said *In-[556] dians, the Indian titles, to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill." On July 5, 1882, the railroad company filed a map of definite location, showing its line of railroad across the southwestern part of the Flathead reservation. Thereupon, on September 2, 1882, the confederated tribes above mentioned entered into an agreement with the United States by which, after reciting the grant by Congress of the right of way, the treaties with the Indians, and the filing of the map of definite location, the Indians surrendered and relinquished to the United States "all the right, title, and interest which they now have under and by virtue of the aforesaid treaty of July sixteenth, eighteen hundred and fifty-five, in and to all that part of the Jocko (or Flathead) Reservation situate in the territory of Montana, and described as follows, namely: A strip of land not exceeding two hundred feet in width, that is to say, one hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned, wherever said line runs through said reservation." In consideration of the "surrender and relinquishment of lands as aforesaid," amounting in the aggregate to 1,430 acres, the United States agreed to pay to the Indians the sum of \$16,000. Ex. Doc. No. 15, 48th Cong. 1st sess.

Thus, by the grant of Congress, the railroad company obtained the fee in the land constituting the "right of way" (Buttz v. Northern P. R. Co. 119 U. S. 56, 66, 30 L. ed. 331, 334, 7 Sup. Ct. Rep. 100; Northern P. R. Co. v. Townsend, 190 U. S. 267, 271, 47 L. ed. 1044, 1046, 23 Sup. Ct. Rep. 671), and by virtue of the agreement between the United States and the Indians this land was freed from the Indian right of occupancy. As the government states in its brief: "Beyond question the Indian land title in this strip had been entirely extinguished."

The question, then, is whether a person having intoxicating liquor in his possession on a railroad train running *on this[557] strip can be deemed to have introduced the liquor "into the Indian country" within

the meaning of the act of 1897. Was the strip "Indian country," so that the district court of the United States can be said to have had jurisdiction of the alleged offense?

The act of June 30, 1834, chap. 161 (4 Stat. at L. 729), thus defined "the Indian country."

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

This portion of the act of 1834 was not re-enacted in the Revised Statutes, though other parts of the statute were, and hence was repealed by § 5596 of the revision (U. S. Comp. Stat. 1901, p. 3750). But, as has frequently been stated by this court, the definition may still "be referred to in connection with the provisions of its original context, which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca.*) 109 U. S. 556, 561, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *United State v. Le-Bris*, 121 U. S. 278, 280, 30 L. ed. 946, 7 Sup. Ct. Rep. 894.

The proper criterion to be applied was considered in *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471, where Mr. Justice Miller, delivering the opinion of the court, said (id. pp. 207, 208): "Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of states, and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet, during all this time, a large body of laws has been 558] in existence, *whose operation was confined to the Indian country, whatever that may be. . . .

"The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

It must be assumed that, in the act of 1897, Congress used the words "Indian country" in the accepted sense. And this is confirmed by the provision bearing witness to the policy which had been adopted looking to the dissolution of tribal relations and the distribution of tribal property in separate allotments. Thus, the act provides that the term "Indian country" "shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States." *United States v. Sutton*, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; *Hallowell v. United States*, 221 U. S. 317, 323, 324, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587.

That the effect of a cession by the Indians might be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a state, should retain its original status of Indian country so far as the introduction into it of intoxicating liquors was concerned, was decided in *United States v. 43 Gallons of Whisky* (*United States v. Lariviere*) 93 U. S. 188, 23 L. ed. 846, 108 U. S. 491, 27 L. ed. 803, 2 Sup. Ct. Rep. 906. But, as was pointed out in *Bates v. Clark*, *supra*, that decision proceeded upon the hypothesis that "when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule." The same principle of decision was recognized in *Dick v. *United States*, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399. There, the plaintiff in error had been convicted of introducing intoxicating liquor into the Nez Percé Indian Reservation within the state of Idaho. The offense was committed, if at all, in the village of Culdesae, which, although within the boundaries of the reservation, as established before Idaho was admitted into the Union, was, at the time specified in the indictment, an organized village of that state. The lands upon which the village was located were part of those ceded to the United States by an agreement with the Indians in which it was stipulated that the ceded lands, as well as those retained, should be subject for the period of twenty-five years to all Federal laws prohibiting the introduction of intoxicants into the Indian country. It was held that this was a valid stipulation, based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was "not inconsistent, in any substantial sense, with the constitutional principle that a new state comes into the Union upon entire equality with the original states." Upon this ground the judgment of conviction was affirmed.

While the Dick Case was thus found, owing to the stipulation in the agreement, to be within the exception, the court explicitly recognized the rule which governs in the absence of a different provision by treaty or by act of Congress. The court said: "If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case 560]of Culdesac) the jurisdiction *of the state, for all purposes of government, was full and complete. *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396."

In the present case there was no provision, either in the treaty with the Indians, or by act of Congress, which limited the effect of the surrender of the Indian title. We have been referred to certain statements made by the representative of the United States in the course of the negotiations with the Indians which preceded their agreement, but these were of an informal character and cannot be regarded as qualifying the agreement that was actually made. The Indian title or right of occupation was extinguished, without reservation; and the relinquished strip came under the jurisdiction of the then territory, and later under that of the state of Montana. It was not "unappropriated public land," or land "owned or held by any Indian or Indian tribe." Enabling act, *supra*.

To repeat, the plaintiff in error was not charged with "attempting to introduce" the liquor into Indian country, but with the actual introduction. If having the liquor in his possession on the train on this right of way did not constitute such introduction, it is immaterial, so far as the charge is concerned, whether or not he intended to take it elsewhere. Nor is it important that the plaintiff in error was an Indian. The statute makes it an offense for "any person" to introduce liquor into Indian country.

Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title, and that in accordance with the repeated rulings of this court, it was not Indian country. The District Court, therefore, had no jurisdiction of the offense charged, and the judgment must be reversed.

The judgment is reversed and the cause
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remanded, with directions to quash the indictment and discharge the defendant.

*ALBERT W. SHULTHIS, Appt., [561
v.

D. A. McDOUGAL et al. (No. 156.)

GEORGE FRANKLIN BERRYHILL,
Appt.,
v.

ALBERT W. SHULTHIS et al. (No. 157.)

(See S. C. Reporter's ed. 561-572.)

**Appeal — from circuit court of appeals
— jurisdiction below — diverse citizenship — intervention.**

1. The finality of a decision of a circuit court of appeals under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 6, on the theory that diverse citizenship was the sole ground of the jurisdiction of the circuit court, is not affected by a petition in intervention which was entertained and disposed of in virtue of the jurisdiction already invoked.

[For other cases, see *Appeal and Error*, 780-784, in *Digest Sup. Ct.* 1908.]

**Appeal — from circuit court of appeals
— jurisdiction below — diverse citizenship.**

2. Whether the jurisdiction of the Federal circuit court depended on diverse citizenship alone, within the meaning of the act of March 3, 1891, § 6, making the decrees of the circuit courts of appeals final in such cases, or was rested on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, without regard to any questions that might have been brought into the suit by the answers or in the course of the subsequent proceedings.

[For other cases, see *Appeal and Error*, 768-774, in *Digest Sup. Ct.* 1908.]

**Appeal — from circuit court of appeals
— jurisdiction below — diverse citizenship.**

3. A decree of a circuit court of appeals is none the less final under the act of

NOTE.—On the appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

As to Federal question as conferring jurisdiction on United States courts—see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; and *Earnhart v. Switzler*, 105 C. C. A. 262.

On citizenship of corporation for purposes of Federal jurisdiction—see notes to *Hope Ins. Co. v. Boardman*, 3 L. ed. U. S. 36; and *National S. S. Co. v. Tugman*, 27 L. ed. U. S. 87.

March 3, 1891, § 6, upon the theory that the jurisdiction of the circuit court depended upon diverse citizenship alone, because other grounds of jurisdiction may be inferred argumentatively from the statements in the bill.

[For other cases, see Appeal and Error, 780-784, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — Federal question.

4. A suit involving rights to land acquired under a law of the United States does not arise under that law for jurisdictional purposes unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends.

[For other cases, see Courts, 597-617, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — jurisdiction below — Federal question.

5. A suit to determine conflicting claims to a tract of land allotted to Creek Indians cannot be said to arise under the Federal statutes governing such allotments, so as to permit an appeal to the Federal Supreme Court under the act of March 3, 1891, § 6, from a decree of the circuit court of appeals, where the bill, although containing enough to indicate that those statutes constitute the source of the complainant's title or right, and that the defendants are in some way claiming the land, and particularly the oil and gas therein, adversely to him, makes no mention of those statutes or of any controversy respecting their validity, construction, or effect, and leaves the precise nature of the controversy unstated and uncertain.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — diverse citizenship — corporation.

6. A corporation originally incorporated in the Indian territory under the Arkansas statutes which were put in force therein by the act of Congress of February 18, 1901 (31 Stat. at L. 794, chap. 379), became an Oklahoma corporation when that state was admitted to the Union, and must be regarded for jurisdictional purposes as a citizen of that state.

[For other cases, see Courts, 637-675, in Digest Sup. Ct. 1908.]

[Nos. 156, 157.]

Argued January 23 and 24, 1912. Decided June 7, 1912.

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which affirmed a decree of the Circuit Court for the Eastern District of Oklahoma, dismissing on the merits a bill in equity, together with a petition in intervention in a suit to determine conflicting claims to a tract of land allotted

to Creek Indians. Dismissed for want of jurisdiction.

See same case below, 95 C. C. A. 615, 170 Fed. 529.

The facts are stated in the opinion.

Messrs. C. L. Thomas and James P. Harrold argued the case, and, with Mr. Edgar A. de Meules, filed a brief for Shulthis and Berryhill:

Whether the appellant has any such right or title as claimed by him involves the construction of the acts of Congress under which the patents issued, and, necessarily, of the effect of the patents, and presents a Federal question.

Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 66, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27.

An action brought against a corporation created by an act of Congress is a suit arising under the Federal Constitution or laws.

Osborn v. Bank of United States, 9 Wheat. 739, 6 L. ed. 204; Re Dunn, 212 U. S. 374, 53 L. ed. 658, 29 Sup. Ct. Rep. 299; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Union P. R. Co. v. Myers, 115 U. S. 1, 11, 29 L. ed. 319, 323, 5 Sup. Ct. Rep. 1113; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Butler v. National Home, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. Rep. 231; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; Supreme Lodge, K. P. v. Kalinski, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Wolff v. Choctaw, O. & G. R. Co. 133 Fed. 601; Supreme Lodge, K. P. v. England, 36 C. C. A. 298, 94 Fed. 369; Supreme Lodge, K. P. v. Hill, 22 C. C. A. 280, 42 U. S. App. 200. 76 Fed. 468; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769; Canary Oil Co. v. Standard Asphalt & Rubber Co. 182 Fed. 663.

An action brought jointly against a corporation chartered under an act of Con-

gress, and a local defendant, upon a joint liability, is a suit arising under the laws of the United States.

Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Re Dunn, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299.

Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the court may act judicially upon such admission.

Pittsburgh, C. & St. L. R. Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823.

Inasmuch as it appears from the face of the bill that the very life of the effectiveness of the right set up by the appellant in his bill is given it by the rules and regulations of the Secretary of the Interior,—laws of the United States,—this suit is one arising under the law of the United States, and consequently the jurisdiction of this court attaches.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Caha v. United States, 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 513; United States v. Bailey, 9 Pet. 253, 9 L. ed. 119.

It matters not that the defendants may set up a defense in their answer not involving the construction of the rules and regulations,—the law of the United States. The answer or plea does not determine the jurisdiction of this court (Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 139, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35), but it is the statement of facts in the original bill in the circuit court (Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 372, 48 L. ed. 484, 24 Sup. Ct. Rep. 325; Osborn v. Bank of United States, 9 Wheat. 824, 6 L. ed. 224; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654).

Where the original jurisdiction of the circuit court is invoked, that jurisdiction must appear upon the face of the bill by a statement of facts.

Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 372, 48 L. ed. 484, 24 Sup. Ct. Rep. 325; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 139, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 139, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

When the jurisdiction of the circuit court is so made to appear, the circuit court has jurisdiction over the whole case and over all questions of law and fact arising in such case.

Osborn v. Bank of United States, 9 Wheat. 823, 6 L. ed. 224; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 144, 26 L. ed. 99.

The jurisdiction of this court is dependent solely upon the question: Was the original jurisdiction of the circuit court dependent entirely upon the opposite parties to the suit being citizens of different states? If not, then the right of appeal to this court exists.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Howard v. United States, 184 U. S. 680, 46 L. ed. 757, 22 Sup. Ct. Rep. 543; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233. Third Street & Suburban R. Co. v. Lewis, 173 U. S. 460, 43 L. ed. 767, 19 Sup. Ct. Rep. 451; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 380, 48 L. ed. 488, 24 Sup. Ct. Rep. 325; Florida C. & P. R. Co. v. Bell, 176 U. S. 325, 44 L. ed. 488, 20 Sup. Ct. Rep. 399; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 142, 37 L. ed. 1031, 14 Sup. Ct. Rep. 35.

This court will not examine the opinion of either the circuit court for the eastern district of Oklahoma, or the circuit court of appeals, to determine the rationale of the decision in either court. If the jurisdiction of this court depended upon the result of the investigation as to whether or not the circuit court of appeals decided a Federal question either adversely to or in accordance with the contention of the parties, and determined its jurisdiction accordingly, what would become of the cases of Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; or that of Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; or the case of Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; or the case of Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703, in error to the same court?

There is no authority for the contention that if the plaintiff could state his case logically and in the form of good pleading, without disclosing a Federal question, then the fact that it may appear from the bill

that a Federal question may arise does not, however, confer upon the circuit court of the United States jurisdiction.

Mastin v. Chicago, R. I. & P. R. Co. 123 Fed. 827; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Supreme Lodge, K. P. v. Kalinski*, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; *Butler v. National Home*, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; *McGivra v. Ross*, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829; *Gage v. Kaufman*, 133 U. S. 473, 33 L. ed. 726, 10 Sup. Ct. Rep. 406.

Messrs. **George S. Ramsey** and **Preston C. West** argued the cause and filed a brief for appellees:

Whether or not the jurisdiction of the circuit court depended solely upon the diversity of citizenship must be determined from an examination of the plaintiff's bill to the exclusion of all other parts of the record.

Florida C. & P. R. Co. v. Bell, 176 U. S. 325, 44 L. ed. 488, 20 Sup. Ct. Rep. 399; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

If the plaintiff could state his case logically and in the form of good pleading, without disclosing a Federal question, then the fact that it may appear from the bill that a Federal question may arise does not, however, confer upon the circuit courts of the United States jurisdiction.

Bonin v. Gulf Co. 198 U. S. 116, 49 L. ed. 971, 25 Sup. Ct. Rep. 608; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 198 U. S. 293, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 374, 48 L. ed. 485, 24 Sup. Ct. Rep. 325; *Arbuckle v. Blackburn*, 191 U. S. 406, 48 L. ed. 240, 24 Sup. Ct. Rep. 148.

Jurisdiction cannot be conferred upon the circuit court by the defendants setting up a Federal question or making a claim to the title under some Federal law. The answer cannot be examined to aid the court in deciding this question.

Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 139, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35;

Ayres v. Polsdorfer, 187 U. S. 586, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 534, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 187, 46 L. ed. 145, 22 Sup. Ct. Rep. 47; *Devine v. Los Angeles*, 202 U. S. 315, 50 L. ed. 1047, 26 Sup. Ct. Rep. 652; *Press Pub. Co. v. Monroe*, 164 U. S. 107, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 322, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 491, 30 L. ed. 1049, 16 Sup. Ct. Rep. 869; *Spencer v. Duplan Silk Co.* 191 U. S. 527, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 633, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 458, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Shields v. Boardman*, 98 Fed. 455; *California Oil & Gas Co. v. Miller*, 96 Fed. 19.

Where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that the jurisdiction may be inferred argumentatively under averments on the pleadings. The averments and allegations showing the Federal question must be positive, and the exact Federal question or law of the United States involved must clearly appear.

Hanford v. Davies, 163 U. S. 274, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *State v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 425, 33 Fed. 391; *Manhattan R. Co. v. New York*, 18 Fed. 195.

Plaintiff's allegation that he bases title to the oil and gas in the land, and right to operate the same and have defendants enjoined from operating said land, upon an oil and gas mining lease made by a Creek Indian and approved by the Secretary of the Interior, does not present any Federal question.

Shoshone Min. Co. v. Rutter, 177 U. S. 508, 44 L. ed. 865, 20 Sup. Ct. Rep. 726; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 328, 329, 44 L. ed. 490, 20 Sup. Ct. Rep. 399; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; *Romie*

v. Casanova, 91 U. S. 379, 23 L. ed. 374; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; Bonin v. Gulf Co. 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608.

An appeal will not lie from the circuit court of appeals to this court on the ground that the suit arose under the Constitution or laws of the United States, where, if the judgment of the circuit court of appeals disposed of such question, its disposition and decision were in favor of the appellant.

Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 293, 49 L. ed. 1057, 25 Sup. Ct. Rep. 691; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 376, 48 L. ed. 227, 24 Sup. Ct. Rep. 92; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

A Federal question is not involved unless the pleadings clearly show that the construction or application of the Constitution or some law of the United States will necessarily be involved.

Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 373, 48 L. ed. 485, 24 Sup. Ct. Rep. 325; Devine v. Los Angeles, 202 U. S. 315, 50 L. ed. 1047, 26 Sup. Ct. Rep. 652; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 865, 20 Sup. Ct. Rep. 726.

The bill of intervention filed by George Franklin Berryhill, intervener, did not and could not import into the case a Federal question, so as to confer jurisdiction on the circuit court of the United States, or deprive the judgment and decree of the circuit court of appeals of finality.

St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510.

The allegation in the bill that the defendant Kiefer Oil & Gas Company is a corporation duly organized on the 26th day of April, 1907, under and by virtue of the laws of the United States in force in Indian territory, having its principal place of business in said territory, (and) that said defendant existed under the laws of said territory, and was a citizen of said territory up to and including November 16, 1907, (and) that at all times since the admission of Oklahoma as a state, said defendant has been and now is a citizen and resident of the state of Oklahoma, and a citizen and resident of the eastern district of Oklahoma, did not present a Federal question, and does not show that the controversy arises under the laws or Constitution of the United States.

Union P. R. Co. v. Harris, 158 U. S. 327, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; 56 L. ed.

Boyd v. Great Western Coal & Coke Co. 189 Fed. 115.

Mr. Justice Van Devanter delivered the opinion of the court:

These are appeals from decrees of the circuit court of appeals for the eighth circuit, affirming a decree of the circuit court for the eastern district of Oklahoma, dismissing on the merits a bill in equity, as also a petition in intervention, brought to determine conflicting claims to a tract of allotted land in the Creek Nation. The allegations of the bill may be summarized as follows:

The complainant, Shulthis, is a citizen of Kansas. One of the defendants, the Kiefer Oil & Gas Company, is a corporation organized in the Indian territory under the Arkansas statutes which were put in force therein by an act of Congress, and since the admission of Oklahoma as a state "has been and now is a citizen and resident of said state" and of the eastern district thereof. The other defendants are citizens of that state, resident in that district. The intervener, George Franklin Berryhill, is a member by blood of the Creek Nation, duly enrolled as such, and his wife is not a member.

A son, named Andrew J. Berryhill, was born to the *intervener and his wife [566 in May, 1901, and died in November following, leaving no brother or sister surviving. In October, 1902, the deceased son's name was placed on the roll of the Creek Nation by the Commission to the Five Civilized Tribes, and thereafter an allotment, including the tract in controversy, was made to his "heirs" from the lands of the Nation, and a deed or patent was issued to such heirs with the approval of the Secretary of the Interior. Subsequently, and in March, 1906, George Franklin Berryhill and his wife, claiming to be the sole heirs of Andrew J., and the owners in fee of this tract, executed to the complainant a lease thereof, granting to him the right to explore for and extract oil and gas from the land for the term of fifteen years. The lease was made conformably to regulations prescribed by the Secretary of the Interior, was filed with the United States Indian agent at Muskogee, in the Indian territory, March 21, 1906, and was approved by the Secretary of the Interior April 19, 1907. The complainant complied with the regulations, duly paid the advance royalty provided for in the lease, and claims the sole and exclusive right to prospect for and extract the deposits of oil and gas existing in and under the land, which are said to be extensive and to have a value many times

in excess of \$2,000. Respecting the claims and acts of the defendants the bill alleges:

"Your orator further shows that the defendants and each of them claim and assert some right, title, and interests in and to said lands, and particularly to the said oil and natural gas deposits, adverse to your orator, but the nature of said claims of said defendants is to your orator unknown; but your orator states that they have no such right, title, or interest in the said deposits of oil and natural gas or any part thereof; that whatever claimed rights the said defendants or any of them have therein were acquired long subsequent to the right 567] of *your orator, hereinbefore set forth; and further, were acquired with notice and knowledge of the lease to your orator so executed, filed, and approved as aforesaid; and also of facts and circumstances sufficient to put them and each of them upon inquiry with reference thereto.

"Your orator further states that the said defendant Kiefer Oil & Gas Company, combining and confederating with the other defendants named herein, have disregarded and still disregard the rights of your orator, and in violation thereof, and without right, unlawfully and wilfully, on or about the 1st day of April, 1907, entered upon the said above-described lands, and have stationed thereon divers agents, servants, and employees, whose names are to your orator unknown, and with force and arms exclude and have excluded your orator and his agents, servants, and employees therefrom; and further, that said defendants have bored and drilled oil and gas wells on said premises, and have and still are allowing large quantities of oil and natural gas to escape therefrom and be wasted. That by reason thereof your orator has been damaged in the sum of \$25,000. And further, said defendants threaten to, and will, unless restrained by this court, drill other and further wells on said land for oil and natural gas, and have and are threatening to, and will, unless restrained, by means of such wells, extract said oil and gas deposits from said land, and convert the same to their own use and benefit against the manifest right of your orator."

The prayer of the bill is that the defendants be decreed to have no interest or estate in the deposits of oil and gas, save as any defendant may have an interest in the land and be thereby entitled to the royalties secured by the lease; that the cloud cast upon the complainant's title and rights under the lease by the claims of the defendants be removed and his title and rights thereunder be quieted, and that a receiver be 568] appointed to take possession and *proceed with the extraction and disposal of the

oil and gas for the benefit of whomsoever may prove to be entitled to it. After the filing of the bill, a receiver was appointed, who took possession and proceeded as suggested. Thereafter George Franklin Berryhill, who had not been made a party to the bill, was permitted to file in the suit a petition in intervention, wherein he asserted full title in himself to the land, subject only to the lease to the complainant, specifically set forth the claims of the defendants, assailed those claims as invalid and clouds upon his title, and sought a decree establishing the latter as against the former. Answers and replications were filed, proofs were taken, and on the final hearing a decree was entered for the defendants. 162 Fed. 331. The complainant and the intervener separately appealed to the circuit court of appeals, where the decree was affirmed (95 C. C. A. 615, 170 Fed. 529), and then the case was brought here.

Our jurisdiction is challenged by a motion to dismiss the appeal. Section 6 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), declares that "the judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different states," and this refers to the jurisdiction of the Federal court of first instance. Thus, it becomes necessary to consider whether the jurisdiction of the circuit court depended entirely upon diversity of citizenship. If it did, the appeals must be dismissed.

The question is not affected by the petition in intervention, for it was entertained and disposed of in virtue of the jurisdiction already invoked; and if the decree is final in respect of the original suit, it is equally so in respect of the intervention. *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 217 U. S. 247, 250, 54 L. ed. 752, 754, 30 Sup. Ct. Rep. 510.

*In opposing the motion, the appel-569] lants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

1. Whether the jurisdiction depended on

diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Devine v. Los Angeles*, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652.

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051; *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 371, 383, 385, 48 L. ed. 484, 489, 490, 24 Sup. Ct. Rep. 325.

3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and west-
570]ern states would so arise, *as all titles in those states are traceable back to those laws. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Shoshone Min. Co. v. Rutter* 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes (Acts March 1, 1901, 31 Stat. at L. 861, chap. 676; June 30, 1902, 32 Stat. at L. 500, chap. 1323; April
56 L. ed.

26, 1906, 34 Stat. at L. 137, chap. 1876, § 22) relating to the allotment in severality of the lands of the Creek Nation, the leasing and alienation thereof after allotment, the making of allotments to the heirs of deceased children, and the rights of the heirs, collectively and severally, under such allotments; but the bill makes no mention of those statutes or of any controversy respecting their validity, construction, or effect. Neither does it by necessary implication point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived. So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358, a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress.

It next is insisted that the bill shows that the Kiefer Oil & *Gas Company, one of [571 the defendants, is a Federal corporation, and therefore that under the decisions of this court in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113, and *Re Dunn*, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299, the case was one arising under the laws of the United States. The bill states that this company was incorporated in the Indian territory under the Arkansas statutes, which were put in force therein by an act of Congress, and then adds that since the admission of Oklahoma as a state, the company "has been and now is a citizen and resident of said state." Evidently, the pleader did not anticipate the present insistence, but proceeded on the theory that the company became an Oklahoma corporation when that state was admitted into the Union.

The corporation laws of Arkansas were put in force in the Indian territory by the act of February 18, 1901 (31 Stat. at L. 794, chap. 379), which was but one of a series of acts of that character. Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to

the needs of the locality and its people in respect of matters of local or domestic concern. There being no local legislature, Congress alone could act. Plainly, its action was intended to be merely provisional, and not to encroach upon the powers which rightfully would belong to the prospective state. The situation, therefore, is practically the same as it would be had the corporation laws of Arkansas been adopted and put in force by a local or territorial legislature. *United States v. Pridgeon*, 153 U. S. 48, 52-54, 38 L. ed. 631, 633, 634, 14 Sup. Ct. Rep. 746.

In *Kansas P. R. Co. v. Atchison T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208, this court had occasion to consider the effect of the admission of a territory as a state on corporations existing at the time under the territorial laws, and it was there said:

"The admission of Kansas as a state into 572] the Union, *and the consequent change of its form of government, in no respect affected the essential character of the corporations or their powers or rights. They must, after that change, be considered as corporations of the state, as much so as if they had derived their existence from its legislation. As its corporations they are to be treated, so far as may be necessary to enforce contracts or rights of property by or against them, as citizens within the clause of the Constitution declaring the extent of the judicial power of the United States."

Adhering to the principle of that ruling, we hold that the corporate defendant here is an Oklahoma, and not a Federal, corporation, and therefore must be regarded as a citizen of that state for jurisdictional purposes.

It follows from what has been said that the case is one in which the jurisdiction of the Circuit Court depended entirely on diverse citizenship, and so the decrees of the Circuit Court of Appeals are final.

Appeals dismissed.

EASTERN CHEROKEES, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 572-582.)

Appeal — judgment — subsequent proceedings below.

The right of the attorneys for the Chero-

kee Nation to counsel fees payable out of the moneys recovered for the benefit of the Eastern Cherokees in a suit over a claim against the United States, arising out of treaty stipulations, cannot be challenged by a supplemental petition filed in the court of claims, where the decree of that court, as affirmed on appeal by the Supreme Court, has determined every question bearing upon the right of such attorneys to have their fees paid out of the award, save the single question of the amount of such fees.

[For other cases, see *Appeal and Error*, IX. 1, in *Digest Sup. Ct.* 1908.]

[No. 234.]

Argued April 30 and May 1, 1912. Decided June 7, 1912.

APPPEAL from the Court of Claims to review a decree which dismissed a supplemental petition in a suit over a claim against the United States, on the ground that the matter presented was foreclosed by a prior decree of that court, which had been affirmed in the Supreme Court of the United States. Affirmed.

See same case below, 45 Ct. Cl. 104.

The facts are stated in the opinion.

Messrs. **Charles Poe** and **Samuel A. Putman** argued the cause and filed a brief for appellants.

Assistant Attorney General **Thompson** argued the cause and filed a brief for appellee.

Mr. Justice **Van Devanter** delivered the opinion of the court:

The controversy here to be considered arises in this way: In recent years there was litigated in the court of claims and this court a claim against the United States, arising under treaties with the Cherokee Indians, and consisting of four items, one of which, designated as item 2, was for \$1,111,284.70, with interest at 5 per cent from June 12, 1838, to the date of payment. The litigation was conducted under § 68 of the act of July 1, 1902 (32 Stat. at L. 716, 726, chap. 1375), as construed and amplified by the act of March 3, 1903 (32 Stat. at L. 982, 996, chap. 994), and the parties were the Cherokee Nation, the Eastern Cherokees, and the United States. Most of the Eastern Cherokees were members of the Cherokee Nation, but some were not, as was the case with those who remained in North Carolina *and other[574 adjacent states; and most of the members of the Nation were Eastern Cherokees, but some were not, as was the case with those who were known as Old Settlers. The principal questions in controversy in the litiga-

NOTE.—On the jurisdiction of the lower court to rehear a cause or grant new trial after remand by appellate court—see note to *American Soda Fountain Co. v. Sample*, 70 C. C. A. 416.

tion, so far as they are now material, were (a) whether there could be a recovery against the United States on item 2; (b) whether the recovery should be in the name of the Cherokee Nation or in that of the Eastern Cherokees; and (c) whether, if the recovery were in the name of the Cherokee Nation, it should be for the benefit of the members of the Nation, whether Eastern Cherokees or otherwise, or for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise. These questions were all stoutly contested in both courts. As to the first, the Cherokee Nation and Eastern Cherokees made common cause against the United States, and as to the other two, they advanced opposing contentions. The jurisdictional acts, before mentioned, required that "both the Cherokee Nation and said Eastern Cherokees" be made parties to the suit, and provided that if the claim were sustained the judgment should be "in favor of the rightful claimant," and should determine, "as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part." The acts also provided that the Cherokee Nation should be represented by attorneys to be employed and compensated in the manner prescribed in Rev. Stat. §§ 2103-2106, and that the Eastern Cherokees should be represented by attorneys employed by them, whose compensation should be fixed by the court of claims upon the termination of the suit.

The litigation was started by the Cherokee Nation, which, on January 16, 1903, had entered into a contract, conformably to Rev. Stat. §§ 2103-2106, with the late Gustavus A. Finkelnburg and others, whereby the latter were to represent the Nation [575] as its attorneys in the prosecution *of the claim, and were to receive, as compensation for their services, 5 per cent of the first \$1,000,000, or part thereof, collected, and 2½ per cent of the amount collected over and above the first \$1,000,000, such compensation to be, by the proper officers of the United States, deducted from the amount recovered, and paid directly to such attorneys.

The court of claims held, and its decree was to the effect, that there should be a recovery against the United States on all the items of the claim; that the recovery on all should be in the name of the Cherokee Nation; and that the recovery on items 1, 3, and 4 should be for the benefit of the Nation, and on item 2 for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise; that the proceeds of items 1, 3, and 4 should be paid or credited to the Nation, less the percentage thereof contracted by the Nation to be paid as coun-

sel fees, and that the proceeds of item 2, "less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903," should be paid to the Secretary of the Interior, to be by him distributed directly to the Eastern Cherokees, inclusive of a class spoken of as Western Cherokees. The concluding portion of the decree declared: "So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of §§ 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter, by appropriate order or decree, shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive *the same upon the making of an ap-[576] propriation by Congress to pay this judgment. The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States." 40 Ct. Cl. 252, 365.

From that decree the parties severally appealed to this court, the United States complaining of the recovery against it on item 2, the Cherokee Nation claiming that the recovery on that item ought not to have been declared to be for the benefit of the Eastern Cherokees, and the latter insisting (a) that the recovery on that item should have been in their name, and not in that of the Nation, (b) that the Western Cherokees, so-called, ought not to have been included among those who were to participate in the *per capita* distribution, and (c) that "the court erred in charging the said fund of \$1,111,284.70 and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation." This court overruled all objections to the decree, save the one relating to the inclusion of the Western Cherokees, and, after directing that the provision for the *per capita* distribution be so modified as to confine it to the Eastern Cherokees, whether east or west of the Mississippi, exclusive of the Old Settlers, affirmed the decree, with that modification. 202 U. S. 101, 50 L. ed. 949, 26 Sup. Ct. Rep. 588.

In passing upon the question whether the recovery on item 2 was in the name of the rightful claimant, this court said: "The Cherokee Nation, as such, had no interest in

the claim, but officially represented the Eastern Cherokees." And again: "We concur with the court of claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it."

In disposing of the insistence that the 577]proceeds arising *from that item ought not to have been charged with any fee for the attorneys for the Cherokee Nation, this court said: "In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the court of claims in the allowance of fees and costs." And then, after noticing the arguments advanced by counsel for the Eastern Cherokees in support of a contrary conclusion, which were based upon the fact, among others, that the Nation had asserted a right to collect that item, not for the benefit of the Eastern Cherokees, but for the benefit of its members, whether Eastern Cherokees or otherwise, the court concluded the consideration of that insistence by saying: "Nevertheless, taking the entire record together, the various treaties and acts of Congress, and of the Cherokee Councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

On receipt of the mandate the court of claims modified its original decree so as to conform to the direction in respect to the persons who should participate in the *per capita* distribution, and, in pursuance of the reservation made before, entered a supplemental decree fixing the compensation of the attorneys for the Eastern Cherokees at 15 per cent of the amount of item 2, including interest. Thereafter, Congress made an appropriation to pay the original decree as modified (24 Stat. at L. 634, 664, chap. 3912), and the accounting officers of the Treasury computed the interest due on each item, thereby ascertaining that item 2 amounted to almost \$5,000,000. Finkelnburg and his associates, the attorneys for the Cherokee Nation, then presented to the Acting Commissioner of Indian Affairs a sworn statement of their services under the contract of January 16, 1903, conformably to the requirements of Rev. Stat. § 2104, upon which statement that officer and the Acting Secretary of the Interior determined 578]and certified *that such attorneys had fully complied with the contract, and were entitled to the compensation therein provided, including the stipulated percentage of the amount recovered on item 2; and,

upon the presentation of that certificate, the officers of the Treasury Department paid to such attorneys, out of the moneys applicable to the several items, the percentage named in the contract, and deducted the same from the proceeds of the several items, the amount so deducted from item 2 being \$147,527.01. The certification and payment, in so far as they affected that item, were made over the objection and protest of the Eastern Cherokees, who insisted at the time that no fees or compensation for the attorneys for the Cherokee Nation lawfully could be paid out of, or charged against, the moneys arising therefrom.

Shortly thereafter the Eastern Cherokees filed in the court of claims, in the original cause, a supplemental petition wherein they challenged (a) the right of the attorneys for the Cherokee Nation to receive any fees or compensation out of the moneys recovered on item, 2, and (b) the authority of the officers of the Treasury Department to make any payment or deduction therefrom by reason of the contract between the Nation and its attorneys, and alleged, in substance, that the decree furnished no warrant for any such payment or deduction; that the jurisdictional acts had not conferred upon the court of claims any power to hear or determine any question pertaining to the fees of the attorneys for the Nation; and that throughout the litigation the Nation's attorneys had contended that the amount due on item 2 should be awarded and paid to the Nation for its own benefit, to the exclusion of the Eastern Cherokees, save as most of them might, as members of it, be benefited indirectly. The prayer of the petition was that the court would pass a further decree "construing and enforcing its former decrees" in such manner that the entire proceeds of item 2, *less the fees and ex- 579 penses theretofore or thereafter allowed by the court to the attorneys for the Eastern Cherokees, would be distributed as before directed, but without any payment therefrom to the attorneys for the Cherokee Nation, or any deduction by reason of any such payment. After a hearing on the petition, the court of claims entered a decree dismissing it for the reasons assigned in the following excerpts from the opinion of that court, delivered by Chief Justice Peelle (45 Ct. Cl. 104, 130, 131):

"The litigation was over a fund arising from treaty stipulations, supposed to be in the Treasury in trust for the parties entitled thereto. Surely the fund which was the stake in controversy should bear the expense, and such was the conclusion of this court. . . . The decree clearly recognized the distinction between the fees

authorized by the separate acts. That is to say, the fees to be paid to the attorneys for the Cherokee Nation under the first act were to be governed by the contract made in accordance therewith, while under the second act the court was authorized to fix the fees of the attorneys for the Eastern Cherokees. . . . It was not until after the payment of the money under said contract that the Eastern Cherokees filed their supplemental petition herein, praying the court to so construe its decree as to provide that the sum of \$1,111,284.70 [with interest] should not be chargeable with the fees of the attorneys of the Cherokee Nation. But independent of their delay, such construction would not only be contrary to the language of the decree, but would, in effect, be changing the decree after its affirmance by the Supreme Court, and, too, after the contention here was presented there and denied. . . . The Cherokee Nation was the proper party to the suit under both jurisdictional acts, and it had contracted to pay its attorneys, with the approval of the Secretary of the Interior, in strict accordance with the law, all of which was recognized by the court and sanctioned and 580]provided *for in its decree; and the decree, in respect to the payment of said fees, having been affirmed and executed, the court is not at liberty to modify the decree, or to construe it contrary to the clear import of the language used."

It was from this last decree that the present appeal was taken.

We pass other questions discussed in the opinion of the court of claims and elaborately argued by counsel, and come directly to consider whether further controversy over the matter presented by the supplemental petition was foreclosed by the original decree and the proceedings had in this court on the prior appeal, because, if it was, that alone requires that the action of the court of claims in dismissing the petition be affirmed.

By rendering a decree on item 2 in favor of the Cherokee Nation, over the objection of the Eastern Cherokees, the court of claims necessarily recognized the Nation as the titular claimant, and as authorized to prosecute the item to a recovery, even although the recovery was for the ultimate benefit of the Eastern Cherokees. The latter so understood the decree and accordingly repeated their objection on the prior appeal, but this court sustained the action of the court of claims, saying, as we have seen: "The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees." Of course, that was an adjudication of the controverted question whether, in view of the 56 L. ed.

treaties and congressional enactments bearing on the subject, and of the attitude of the Cherokee Nation, the recovery should be in its name or in that of the Eastern Cherokees.

When the court of claims determined that question in favor of the Cherokee Nation, and also that the recovery should be for the benefit of the Eastern Cherokees, the question naturally arose, whether the attorneys for the Nation should be paid out of the proceeds. That matter was dealt with in two paragraphs of the decree. In one *it was directed, in respect of the [581 moneys recovered on item 2, "that such counsel fees as may be chargeable against the same under the provisions of the contract" between the Cherokee Nation and its attorneys should be deducted in advance of the distribution among the Eastern Cherokees, and in the other that "so much of any" item on which recovery was had "as the Cherokee Nation shall have contracted to pay as counsel fees" under Rev. Stat. §§ 2103-2106 should be paid by the Secretary of the Treasury to the attorneys entitled thereto, upon the making of an appropriation by Congress to pay the decree. In this there was a plain recognition of the services rendered by the Nation's attorneys in prosecuting item 2 and of their right to be compensated out of the moneys recovered, the amount of the compensation to be as provided in their contract. The Eastern Cherokees so understood the decree at the time, and on the prior appeal challenged it as unwarrantably charging a fund recovered for their benefit with fees for the Nation's attorneys. This court, as is manifest from its opinion, construed the decree as did the Eastern Cherokees, and affirmed it with that construction. And, while nothing was said about the power of the court of claims to provide for the payment of the Nation's attorneys out of the moneys recovered, the implication of the opinion was that the power existed; and, of course, the affirmance of the decree wherein the power was exercised was an affirmance of the power.

Thus it is apparent that the decree of the court of claims, as affirmed by this court, determined every question bearing upon the right of the attorneys for the Cherokee Nation to have their fees for the prosecution of item 2 paid out of the proceeds thereof, save the single question of the amount of the fees. That was left to be determined by the terms of the contract and the certification contemplated by Rev. Stat. § 2104. It is not charged that the amount actually paid was not the true amount under *the terms of the con-[582 tract, or that it was not duly certified under § 2104, and so it does not appear that

the payment was not in accordance with the decree as construed on the prior appeal.

What really was sought by the supplemental petition was a modification of the decree in a particular wherein it had been affirmed by this court. But the court of claims was without power to grant any such relief, for it, like any other court whose judgment or decree has been reviewed by this court, was bound to give effect to the rule stated in *Re Sanford Fork & Tool Co.* 160 U. S. 247, 255, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

Decree affirmed.

L. P. KINDRED et al., Appts.,

v.

UNION PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 582-597.)

Public lands — railroad land grant — right of way — Indian lands.

1. Congress did not infringe any rights of the Indians to whom the lands in the Delaware Diminished Indian Reservation were assigned in severalty under the treaty of May 30, 1860 (12 Stat. at L. 1129), in which it was agreed that a specified railway company should have the perpetual right of way over any of the lands so assigned on the payment of a just compensation to those whose lands were crossed by its railroad, by the grant to such railway of a right of way 400 feet in width through the public lands, made by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), which provided that the United States would, as rapidly as might be, extinguish the Indian titles to all lands required for such right of way, since the provisions of the statute and the treaty, taken together, mean that the right of way was granted not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be justly compensated.

[For other cases, see *Public Lands*, 202-208, in *Digest Sup. Ct.* 1908.]

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

Public lands — railroad land grant — right of way — Indian lands.

2. Lands in the Delaware Diminished Indian Reservation which had been assigned in severalty under the treaty of May 30, 1860, must be deemed included in the term "public lands," as used in the act of July 1, 1862, granting a right of way to the Leavenworth, Pawnee, & Western Railroad Company through the public lands, in view of the provision of that act that the United States should extinguish as rapidly as might be the Indian titles to all lands required for the right of way, and of the action of the Land Department in so interpreting the statute.

[For other cases, see *Public Lands*, 202-208, in *Digest Sup. Ct.* 1908.]

Vendor and purchaser — purchaser's rights — existing burden — railroad right of way.

3. A vendee of land upon which a railroad company, entitled to enter and build its road thereon, on condition that compensation be made, had constructed and put into operation its road without any objection from the then owner to its failure to comply with such condition as to compensation, takes the land subject to the burden of the right of way, and the right to exact payment therefor belongs to the owner at the time the company entered and constructed the road.

[For other cases, see *Vendor and Purchaser*, IV. a, in *Digest Sup. Ct.* 1908.]

[No. 51.]

Argued November 9, 1911. Decided June 10, 1912.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree enjoining the entry upon, and interference with, a railway right of way. Affirmed.

See same case below, 94 C. C. A. 112, 168 Fed. 648.

The facts are stated in the opinion.

Mr. Edward D. Osborn argued the cause, and, with Messrs. A. M. Harvey and Frank Doster, filed a brief for appellants:

The treaty-making power is competent to vest a legal title in severalty to Indian lands, and in the lack of restrictions on alienation the phrases "set apart to," "reserved to," "assigned to," etc., sufficiently evidence an intent to pass a fee-simple title.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Francis v. Francis*, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129.

Where a grant is made to one "and his heirs," a restriction on alienation, either partial or entire, does not debase the grant to a mere right of occupancy, but a vested interest passes thereby under the

cover and protection of the constitutional guaranties of property right.

Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; *United States v. Paine Lumber Co.* 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965.

Congressional grants of land are not to be regarded as including lands which have been reserved or appropriated by the United States for any purpose whatever, even though they be not expressly excepted by the language of the grant.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; *Missouri, K. & T. R. Co. v. United States*, 92 U. S. 760, 23 L. ed. 645; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Spokane Falls & N. R. Co. v. Ziegler*, 9 C. C. A. 548, 15 U. S. App. 472, 61 Fed. 392; *United States v. Sioux City & St. P. R. Co.* 46 Fed. 502; *Scott v. Carew*, 196 U. S. 100, 49 L. ed. 403, 25 Sup. Ct. Rep. 193.

It follows that grants of lands or rights out of the "public lands" are to be construed as excluding lands otherwise reserved or appropriated, unless a contrary intent is clearly and positively expressed.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; *Bardon v. Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; *Northern Lumber Co. v. O'Brien*, 71 C. C. A. 598, 139 Fed. 614, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249.

A treaty of the United States, whether made with a foreign nation or with an Indian tribe, has the force of law equally with an act of Congress. Congress may abrogate such treaties, as it may repeal statutes, but in neither case is repeal or abrogation by implication favored. Unless the intent of Congress to abrogate the treaty is clear and undoubted from the language of the act, unless it admits of no other reasonable construction, it will not be construed as abrogating the treaty.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *Turner v. American Baptist Missionary Union*, 5 McLean, 349, Fed. Cas. No. 14,251.

Grants of public lands to railways do
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not apply to Indian reservations, even though such reservations be not expressly excepted from the grant.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; *Bardon v. Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; *Northern Lumber Co. v. O'Brien*, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; *Atlantic & P. R. Co. v. Mingus*, 165 U. S. 413, 41 L. ed. 770, 17 Sup. Ct. Rep. 348; *King v. McAndrews*, 50 C. C. A. 29, 111 Fed. 860; *United States v. Oregon Cent. Military Road Co.* 103 Fed. 554; *Northern P. R. Co. v. Maclay*, 9 C. C. A. 609, 15 U. S. App. 438, 61 Fed. 554.

The settled rule of construction applies to right-of-way grants as well as to grants of land in aid of construction.

Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; *Union P. R. Co. v. Harris*, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138, 76 Kan. 255, 91 Pac. 68.

Extinguishment clauses extend the grant to wild, unceded Indian lands occupied by the Indians under their original right of occupancy, but not to lands expressly reserved for their occupation or use by treaty.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Northern P. R. Co. v. Hinchman*, 53 Fed. 523; *Dellone v. Northern P. R. Co.* 16 Land Dec. 229; *Northern P. R. Co. v. Warren*, 28 Land Dec. 494; *Warren v. Northern P. R. Co.* 22 Land Dec. 568; *Northern P. R. Co. v. Eberhard*, 19 Land Dec. 532; *Northern P. R. Co. v. Haynes*, 20 Land Dec. 90; *Northern P. R. Co. v. Maclay*, 26 Land Dec. 43; *Northern P. R. Co. v. Clark*, 5 Land Dec. 138; *Whitney v. Northern P. R. Co.* 5 Land Dec. 343; *Phelps v. Northern P. R. Co.* 1 Land Dec. 368; *Re Maclay*, 2 Land Dec. 675; *Re Atlantic & P. R. Co.* 13 Land Dec. 373; *Atlantic & P. R. Co. v. Tiernan*, 17 Land Dec. 587.

The construction given to a statute by those charged with its execution has much weight, and ought not to be overruled without cogent reasons. The decisions of the Department of the Interior in regard to the construction and effect of statutes relating to congressional grants of the public domain, especially when followed consistently for many years, will be accepted by the courts as correct, unless obviously wrong.

United States v. Hammers, 221 U. S. 220, 55 L. ed. 710, 31 Sup. Ct. Rep. 593; *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *Edwards v. Darby*, 12 Wheat. 206, 6

L. ed. 603; *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 25 L. ed. 198; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *McFadden v. Mountain View Min. & Mill. Co.* 38 C. C. A. 354, 97 Fed. 670.

Mr. Maxwell Evarts argued the cause and filed a brief for appellee:

At the time of the Pacific Railroad act of July 1, 1862, the Delaware Indians were the wards of the nation, and had only a right of occupancy in the lands in the Delaware Reservation, and such lands were at the time public lands of the United States, within the meaning of the 2d and 9th sections of the act of 1862.

Johnson v. M'Intosh, 8 Wheat. 543, 585, 5 L. ed. 681, 691; *Jones v. Meehan*, 175 U. S. 1, 8, 44 L. ed. 49, 52, 20 Sup. Ct. Rep. 1; *Veale v. Maynes*, 23 Kan. 1; *Cherokee Nation v. Georgia*, 5 Pet. 1, 15-17, 8 L. ed. 25, 30, 31; *Grinter v. Kansas P. R. Co.* 23 Kan. 642; *State v. Horn*, 34 Kan. 556, 9 Pac. 208, 35 Kan. 717, 12 Pac. 148; *Union P. R. Co. v. Kindred*, 43 Kan. 135, 23 Pac. 112.

The Indians to whom the allotments were made under the treaty of 1860 have already been paid for the right of way granted to the Leavenworth Company, and they and their successors in title have no claim of any kind to the lands in question.

United States v. Union P. R. Co. 28 C. C. A. 688, 49 U. S. App. 778, 84 Fed. 1022, 168 U. S. 505, 42 L. ed. 559, 18 Sup. Ct. Rep. 167.

Equity has jurisdiction to protect a railroad company in the use and enjoyment of its right of way.

Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 1; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L.R.A. 527, 62 Fed. 129; *Pennsylvania R. Co. v. Freeport*, 138 Pa. 91, 20 Atl. 940.

Mr. Justice Van Devanter delivered the opinion of the court:

The ultimate question to be decided on this appeal is whether the appellee, the Union Pacific Railroad Company, has a right of way 400 feet in width across certain lands in the state of Kansas, formerly 591] within the Delaware *Diminished Indian Reservation. The facts out of which the question arises are these:

By the treaty of 1829 (7 Stat. at L. 327) with the Delaware Indians, it was provided

that certain lands in the fork of the Kansas and Missouri rivers should be "conveyed and forever secured" to those Indians "as their permanent residence." By the treaty of 1854 (10 Stat. at L. 1048) parts of the reservation so established were relinquished and the remainder retained for a "permanent home." Article 11 of this treaty declared that at the request of the Delawares the diminished reservation should be surveyed and each person or family assigned such portion as the principal men of the tribe should designate, the assignments to be uniform; and article 12 provided that railroad companies, when their lines of railroad necessarily passed through the diminished reservation, should have a right of way on payment of a just compensation. The treaty of 1860 (12 Stat. at L. 1129), after reciting such a request as was contemplated by the preceding treaty, provided that 80 acres of the diminished reservation should be assigned and set apart for the exclusive use and benefit of each Delaware and his heirs; that the tracts assigned should not be alienable in fee, leased, or otherwise disposed of, except to the United States or to other members of the tribe, and should be exempt from levy, taxation, sale, or forfeiture until otherwise provided by Congress; and that if any Delaware should abandon the tract assigned to him, the Secretary of the Interior should take such action in respect of its disposition as in his judgment might seem proper. Article 3 of this treaty gave to the Leavenworth, Pawnee, & Western Railroad Company, a Kansas corporation, a preferred right to purchase the unassigned lands in the reservation, and declared: "It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation *therefor, in money. to[592 the respective parties whose lands are crossed by the line of railroad."

The act of July 1, 1862 (12 Stat. at L. 489, chap. 120), relating to the location, construction, and maintenance of the Union Pacific and other railroads, authorized the Leavenworth, Pawnee, & Western Railroad Company, before mentioned, to locate, construct, and maintain a railroad from the Missouri river, at the mouth of the Kansas river in Kansas, to a connection with the Union Pacific Railroad on the 100th meridian of longitude in Nebraska, and granted to it, as also to other companies named in the act, a right of way in the following terms:

"Sec. 2. . . . That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph

line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

Other portions of the act required the Leavenworth, Pawnee, & Western Railroad Company to file with the Secretary of the Interior within six months after the date of the act an acceptance of its conditions, and within two years after such date a map of the general route of its road, and to complete 100 miles, commencing at the mouth of the Kansas river, within two years after such acceptance, and 100 miles per year thereafter until completion; and made provision for an official examination and approval of the completed road in sections of 40 consecutive miles. The company seasonably filed an acceptance of the conditions of the act and a map of the general route of its road, showing that the route extended from the mouth of the Kansas river to and across the Delaware Diminished Reservation. That part of the road was constructed on that route and put into operation within two years from the date of the act, and was duly examined and approved by the proper officers of the United States. Under Congressional authority the route for the remaining part of the road was subsequently changed so that the connection with the Union Pacific Railroad would be made at a point farther west than was originally intended, and the later construction conformed to this change, but this has no bearing here. The appellee, the Union Pacific Railroad Company, became in 1898, and now is, the successor in interest and title of the Leavenworth, Pawnee, & Western Railroad Company.

By the treaty of 1866 (14 Stat. at L. 793), provision was made for the removal of the Delawares from their home on the diminished reservation to lands secured for them in the Indian territory, and for the sale by the United States of the lands in the reservation, whether held in common or assigned in severalty, with the qualification that assignees electing to dissolve their tribal relations and become citizens of the United States might retain the tracts as-

signed to them and ultimately receive patents in fee simple with power of alienation. On receiving payment for the lands sold, the United States was to issue patents therefor to the purchaser or his assigns, and apply the proceeds to the benefit of the tribe or the assignees, depending upon whether the particular lands were held in common or had been assigned in severalty. The intended removal was effected, the reservation was extinguished, and the lands therein, including most of those assigned in severalty, were sold as intended.

*The lands through which the asserted right of way here in controversy extends were within diminished reservation at the date of the act of 1862, had then been assigned in severalty to individual Delawares under the treaty of 1860, were sold by the United States under the treaty of 1866, and are now claimed by the appellants through mesne conveyances under the patents issued to the purchaser at that sale. The railroad was located and constructed across these lands without the payment of any compensation for the right of way. But, so far as appears, no attempt was made by the tribe, the individual assignees, or the United States, to prevent the location and construction, and no controversy arose between them and the railroad company, save as there was a dispute as to whether the assignees were entitled to compensation, and, if so, as to who should pay it. See *Grinter v. Kansas P. R. Co.* 23 Kan. 642, 659; *United States v. Union P. R. Co.* 168 U. S. 505, 42 L. ed. 559, 18 Sup. Ct. Rep. 167. In 1892 Congress recognized the right of the assignees to be compensated for the right of way, and made an appropriation to pay them, accompanying it with a direction to the Attorney General to institute proceedings against the railroad company to compel it to reimburse the government. See 27 Stat. at L. 120, 126, chap. 164; *United States v. Union P. R. Co.* supra.

The circuit court and the circuit court of appeals sustained the railroad company's claim to a right of way 400 feet in width (94 C. C. A. 112, 168 Fed. 648), and the present owners of the tracts affected prosecute this appeal.

It was contended in the courts below, and the contention is repeated here, that the individual Indians to whom the lands were assigned in severalty obtained no better or different right in them than the tribe had in the lands held in common; in other words, that the right was one of possession or occupancy only, the United States remaining the real proprietor and having full power to terminate the Indian right at will. But, without passing upon that contention,

we think it may well be assumed for the purposes of this case that the assignees, although not possessing the legal title, and not promised a conveyance of it, had something more than the ordinary right of possession or occupancy of tribal Indians in lands set apart for tribal use. We say this, because the right of the assignees, whatever it may have been, was acquired and held under the treaty of 1860, wherein it was agreed that the Leavenworth, Pawnee, & Western Railroad Company should have a perpetual right of way over any of the lands assigned in severalty, on the payment of a just compensation to those whose lands were crossed by its railroad. It therefore is not as if Congress had undertaken to grant a right of way through these lands without either the assent of the assignees or any provision for compensating them. As respects these lands, the right-of-way section in the act of 1862 did not stand alone, but was to be taken in connection with the treaty provision. The two, together, meant that the right of way was granted, not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be justly compensated. The only uncertainty, if any, introduced into the situation, arose from the presence in the right-of-way section of the promise on the part of the United States that it would, as rapidly as might be, extinguish the Indian title to all lands required for the right of way. This seems to have given rise to a question whether the United States was to bear the burden of extinguishing the title, as by compensating the Indians therefor, or only to assist in obtaining it, as by conducting negotiations with the Indians in respect of the compensation to be paid to them. But we are not here concerned with that question, because the right under the treaty to have the compensation seasonably ascertained and paid by whomsoever was liable therefor was not insisted upon. No 596]steps to that end *were taken, but, on the contrary, the construction of the railroad was permitted to proceed and the road was completed and put into operation as a public highway at least three years before the lands were sold under the treaty of 1866.

But it is said that the right-of-way section was inapplicable because it was confined to "public lands," a term used to designate such lands as are subject to sale or other disposal under general laws. No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here; first, because the provision in the same section, that

the United States should extinguish as rapidly as might be the Indian title to all lands required for the right of way, implies that Indian lands as to which Congress properly could grant a right of way were intended to be included, and, second, because the section was so interpreted by the executive department charged with the administration of the act, as also of affairs pertaining to the Indians and public lands, and rights acquired thereunder ought not lightly to be disturbed after the lapse of so many years.

It results that the sole irregularity in respect of the acquisition of the right of way contemplated by the treaty provision and the statute, taken together, was the failure to make compensation therefor to the Indian assignees when the railroad was constructed, or until after the lands had been sold for their benefit to the remote grantor of the appellants. The railroad was in existence and being operated across the land at the time of the sale, as ever since, and therefore there can be no claim that that or any subsequent purchase was made without notice of the right of way.

So, if the appellants be regarded as claiming under the Indian assignees, which is the most favorable view for the appellants, the case still falls within the general rule that where a railroad company enters upon the land of another *and con-[597]structs a railroad thereover under a statute entitling it so to do on condition that compensation be made to the owner, and the latter permits the road to be constructed and put into operation without a compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time the company entered and constructed the road. *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756, and cases cited.

At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession; but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; and *Northern P. R. Co. v. Ely*, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302, it need not be considered.

We conclude that the decree of the Circuit Court of Appeals was right.

Decree affirmed.

JOHN FLANNELLY and Mary Ellen Flannelly, Petitioners,

v.

DELAWARE & HUDSON COMPANY.

(See S. C. Reporter's ed. 597-604.)

Railroads — accident at highway crossing — contributory negligence.

A person attempting to drive across the tracks at a highway crossing without awaiting the further movements of a freight train which, after passing between her and the passenger tracks, had come to a full stop some 150 feet beyond the crossing, partly obstructing her view, is not, as a matter of law, guilty of such contributory negligence as will bar a recovery for the damages resulting from a collision with a rapidly moving passenger train not giving the usual warning signals,—especially where it was the rear wheel of the wagon which was struck, and the unexpected behavior of the horse delayed her forward progress.

[For other cases, see Railroads, 164-167, in Digest Sup. Ct. 1908.]

[No. 132.]

Argued December 19 and 20, 1911. Decided June 10, 1912.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the Circuit Court for the Middle District of Pennsylvania, in favor of plaintiffs in an action against a railroad company to recover damages for injuries received at a highway crossing. Reversed.

See same case below, 97 C. C. A. 112, 172 Fed. 328.

The facts are stated in the opinion.

Messrs. Frank W. Hackett and Paul J. Sherwood argued the cause and filed a brief for petitioners.

Mr. James H. Torrey argued the cause, and, with Messrs. W. S. Opdyke and Lewis E. Carr, filed a brief for respondent.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover damages for injuries and loss occasioned, as was alleged, by negligence of a railroad company, resulting in the collision of one of its trains with a vehicle passing over a grade crossing in Pennsylvania. The negligence charged against the defendant was the failure to give due and timely warning of the approach of the train, and the defense inter-

posed was the freedom of the defendant from the negligence charged, and the failure of one of the plaintiffs, who was driving the vehicle, to take reasonable precautions, before attempting to drive over the crossing, to ascertain whether she could do so in safety. In the circuit court there was a verdict and judgment for the plaintiffs, and the defendant took the case on a writ of error to the circuit court of appeals. That court treated the record as presenting, in substance, two questions: First, whether there was any substantial evidence of actionable negligence on the part of the defendant, and, second, whether the evidence conclusively established the defense of contributory negligence. Upon examining the evidence purporting to be set out in the record, the circuit court of appeals answered the first question favorably to the plaintiffs and the second favorably to the defendant, and accordingly reversed the judgment. 97 C. C. A. 112, 172 Fed. 328. The case was then brought here on a writ of certiorari granted on the petition of the plaintiffs.

*Assuming, but without so deciding, [602 that the state of the record was such as to justify the circuit court of appeals in examining the evidence and determining whether it conclusively established the defense of contributory negligence, we come to consider whether that question was rightly decided.

As is often true in such cases, some matters were not disputed at the trial, while others were the subject of conflicting testimony or of testimony from which different inferences reasonably could be drawn. The matters not disputed were these: The injury occurred in the daytime, at a grade crossing in a small country village. The defendant's tracks, which were three in number, ran in a northerly and southerly direction and crossed the highway at right angles. About 700 feet south of the crossing the tracks curved to the west, and when cars were occupying the east track south of the crossing a traveler on the highway east of the crossing could not see a train approaching from the south on either side of the other tracks. Mrs. Flannelly, one of the plaintiffs and wife of the other, had occasion to drive along the highway from her home, a few miles east of the railroad, to a point on the other side of it. Seated in the vehicle with her were two small boys. As she neared the crossing a freight train was approaching on the east track from the north. She stopped about 40 feet from that track

NOTE.—On fright of team as excuse for omission to look and listen at railroad crossing—see note to *Sarles v. Chicago, M. & St. P. R. Co.* 21 L.R.A.(N.S.) 415.
56 L. ed.

On duty of traveler approaching railway crossing as to place and direction of observation—see note to *Wallenburg v. Missouri P. R. Co.* 37 L.R.A.(N.S.) 135.

and waited for the train to pass, which took some time, as it was long and moving slowly. Before this train obscured the view she looked along the tracks to the south, and observed that no train was in sight, coming from that direction. After the rear of the freight train passed about 150 feet beyond the crossing she drove to the first track, or near it, and, on looking in both directions and seeing no train approaching, started to drive over the tracks. Her view at that time extended 300 feet or more to the south along the second track. As she 603] was passing over that *track a passenger train approaching thereon from the south sounded a sharp danger signal, and soon struck a rear wheel of her vehicle, thereby wrecking the latter, inflicting bodily injuries on her, and killing one of the boys. The train was moving at a rate of from 50 to 60 miles an hour, or from 73 to 88 feet per second. There was also testimony, more or less disputed, from which the jury reasonably could have found that no whistle was sounded by the passenger train at the place where such a warning of its approach was usually and properly given; that the freight train came to a stop before Mrs. Flannelly drove on the tracks; that she listened attentively for signals given by approaching trains, but heard none, other than the danger signal, which came too late to be of avail; that her horse became restive and nervous before she advanced to the crossing; that when the danger signal was sounded by the passenger train the horse halted, reared, and delayed their progress between five and ten seconds; and that as that signal was sounded she saw the passenger train emerge from a volume of smoke or steam which was hanging over the tracks to the south.

The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it.

We think the evidence in this case, when tested by these standards, required that the defense of contributory negligence be submitted to the jury as a question of fact, as was done by the circuit court. The conclusion to the contrary in the circuit court 604] of appeals was rested upon *the theory that the freight train did not stop after clearing the crossing, but continued in a southerly direction, thereby giving prom-

ise that the obstruction to the view along the tracks on that side of the crossing would quickly disappear. But a careful examination of the record satisfies us that there was evidence from which the jury could well have found that the train came to a full stop about 150 feet south of the crossing before Mrs. Flannelly started to cross over. If it did, she hardly could be declared negligent for failing to await its further movements, of which she knew nothing. Besides, if the action of her horse was as described, she ought not to be charged with negligence in not anticipating it.

Other questions were discussed at bar and in the briefs, but as, in the view which we take of the evidence examined by the Circuit Court of Appeals, the judgment of the Circuit Court should have been affirmed, the other questions need not be considered.

Judgment reversed. .

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, Petitioner,

v.

WAGNER ELECTRIC & MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 604-623.)

Damages — in patent case — commingled profits.

1. Such part only of the commingled profits as are attributable to the use of his invention can be recovered by the patentee in a suit against an infringer who has added noninfringing and valuable improvements contributing to the profits.

[For other cases, see Damages, 293-312, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — patent case — separation of profits.

2. A patentee suing to recover profits from an infringer who has added noninfringing and valuable improvements discharges the burden resting upon him of showing what part of the commingled profits are attributable to the use of his invention by proving the existence of such profits and the impossibility of accurately or approximately separating them from those arising out of defendant's additions, and the defendant must then carry the burden of such separation if he is to escape liability for the entire profits.

[For other cases, see Evidence, 782-789, in Digest Sup. Ct. 1908.]

[No. 179.]

NOTE.—On damages for infringement of patents, copyrights, or trademarks as affected by loss of profits—see note to *Rose v. Hirsh*, 51 L.R.A. 801.

Argued March 1, 1912. Decided June 7, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern Division of the Eastern District of Missouri, awarding nominal damages only in a suit by a patentee to recover the profits attributable to the use by an infringer of his invention. Reversed and remanded for further proceedings.

See same case below, 97 C. C. A. 621, 173 Fed. 361.

Statement by Mr. Justice Lamar:

The current produced by an electric generator is of relatively low pressure, and for that reason it is impracticable to utilize it, for power purposes, more than 5 or 6 [606]*miles from the central station. It was found, however, that this pressure, or voltage, could be increased by the use of a transformer or converter, consisting of a metal core, through and around which are wound primary insulated wires leading from the generator. Secondary wires, also insulated, are wound through and around the same core, and carried thence to the point of application. The voltage is increased or decreased according as the secondary wires are wrapped around the core more or less frequently than the primary wires.

One of the consequences of thus transforming the current is the generation of heat. In small machines this is corrected by radiation, but in large ones the heat "ages" the iron, lessens the efficiency of the transformer, and, in time, deteriorates the insulation around the wires. This latter result causes short circuits, makes it impracticable to take advantage of the increased voltage, and thus again restricts the area in which currents of more than 10 K. W. can be used for producing light and power. 112 Fed. 418.

Many efforts were made to overcome this difficulty, but without success until July 12, 1887, when George Westinghouse, Jr., secured patent 366,362 for an "Electrical Converter," which, his application stated, was intended to prevent the converter becoming "overheated when employed for a long time in transforming currents of high electro motive force." Extracts from the specification and claims are copied in the margin.†

†"The core is preferably composed of thin plates of soft iron . . . separated individually or in pairs from each other by thin sheets of paper or other insulating material. . . . The plates are preferably constructed with two rectangular openings

*Referring specially to the specifications and claim 4, which is here involved, and speaking generally rather than technically, it will be seen that the transformer consisted of a core, composed of groups of thin metal plates, so plugged apart as to leave (a) open spaces in the core. The primary and secondary wires were wound through rectangular openings near the ends of these plates. The entire apparatus was then placed in a case filled with nonconducting oil, which, when heated, circulated in and around the transformer, being cooled by contact with the exterior surface of the inclosing box or receptacle. This invention proved to be of immense value and made it possible (112 Fed. 418, 422, 55 C. C. A. 230, 117 Fed. 498) to transmit and apply powerful currents so as to produce power and light at a great distance from the generating plant. The patent was utilized by the Union Carbide Company, and on May 10, 1900, the Westinghouse Electric & Manufacturing Company, as assignee of George Westinghouse, sued that company for infringing claim 4. The transformers which the Carbide Company was using had been sold by the Wagner Company. As vendor and *warrantor the latter there-[608 fore defended, and admits that the decree (112 Fed. 417) of November 11, 1901, sustaining the validity of claim 4, is, as to it, *res judicata*. That decree was affirmed May 29, 1902 (55 C. C. A. 230, 117 Fed. 495), and on June 24, 1902, the Westinghouse Company brought this suit (129 Fed. 604) against the Wagner Company, praying for damages and profits, and also for an injunction against further infringement.

It appeared that after the decree in the Carbide Case the Wagner Company had instructed its experts to build a transformer that would not infringe the Westinghouse patent. They thereupon devised one, referred to herein as type M, which omitted the (a) open spaces in the core, but substituted (b) spaces between the coil, and (c) spaces between the coil and the core.

The court held that these type M transformers, eliminating spaces in the core, were not an infringement of claim 4, and thereupon refused the injunction. 129 Fed. 604. But the defendant in its answer admitted that it had infringed claim 4 by the manufacture of transformers which, as it subsequently developed, contained openings (a) in the core, and also (b) openings between

through which the wires pass. . . . Each group of—say five or six plates—is preferably separated from the succeeding group by air spaces. These may be produced by passing tubes, which may be of soft iron or other metal, or of vulcanized

the coils, and (c) between the coil and core. The case was therefore referred to a master to state an account of damages and profits arising from the infringement of claim 4 prior to June 24, 1902.

On the hearing it appeared that the Wagner Company manufactured various electrical appliances that had been made in the same shop, by the same workmen, and under the same general superintendence as that employed in making the transformers. No account had been kept which would show the cost of labor and shop expenses attributable to these transformers. Nor was there anything on the books indicating what, if any, profit had been realized from their sales.

The gross receipts of \$2,314,744.75 were mingled. The books only showed a gross profit of about 8 per cent, but it appeared that the plant had grown and the business had extended during the period covered by the accounting. There was testimony that the company had the general policy of fixing prices at a figure which would net 25 per cent. The master made an elaborate analysis of the data as to flat cost of labor and material, shop expenses, and commissions applicable to the transformers. From this data and the policy of the company he ultimately reached the conclusion that the company had made a profit of \$132,433 on the \$955,271.76 which the books showed had been received from the sale of several thousand infringing transformers. But at the close of the plaintiff's testimony the defendant demurred to the evidence on the ground that it failed to show that any profit had been made in the sale of the infringing transformers. The demurrer was overruled. The defendant then claimed that the infringing transformers contained elements of the patent which were not embraced in claim 4, for which alone this suit was proceeding, and that no profit due to those elements could be recovered in this case, unless the plaintiff apportioned the gains due solely to claim 4. It also offered

evidence, including a heat test, tending to support its contention that a transformer containing only the elements covered by claim 4 was of little utility; that it operated mainly to reduce the heat in the core, when it was much more important to keep the coils cool; that the infringing transformers contained spaces (b) between the coils and (c) between coil and core which, it contended, were additions and noninfringing improvements, contributing to the profits, if any had been made.

In reply and to disprove the defendant's contention, the plaintiff relied, among other things, on the fact that, upon the hearing of the application to enjoin the defendant from manufacturing transformers containing only (b) spaces between the [610 coil and (c) between coil and core, the Wagner Company had contended that these grooves or channels had been used to avoid infringement, although they "crippled the coils" and actually "lessened the electrical efficiency of the transformers."

At the conclusion of the lengthy testimony, the substance of which is barely outlined above, the master found from the evidence and under the decision in 55 C. C. A. 230, 117 Fed. 498, binding on defendant, that claim 4 was an entirety, covering not only open spaces in the core, but the use of the oil in a closed receptacle for cooling the transformer; that all the commercial value of those sold by the defendant was due to the use of claim 4 of plaintiff's patent, and not to additions made by the defendant. He recommended that a decree should be entered against the defendant for \$132,433.35, "being approximately 25 per cent on the net amount of the sales of infringing transformers after deducting commissions and fixing the factory cost at 40 per cent."

The defendant filed many exceptions, among others:

"That the complainant has not shown what was the profit made by defendant on its transformers, due to the patented invention of claim 4, as distinguished and

fiber, along the lengths of the plates. It may be sufficient in other cases to block the group of plates apart at intervals instead of extending the tubes the entire length. Preferably also the primary and secondary coils are separated from each other in a similar manner."

Where the converter is to be used in the open air, the tube will permit a free circulation of air and thus aid in keeping the converter cool.

It may be preferred in some instances to surround the converter with some oil, or paraffin or other suitable material, which will assist in preserving insulating and will not be injured by heating. This material,

when in a liquid form, circulates through the tubes and intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture, and cools the converter.

The entire converter may be sealed into an inclosing case . . . which may or may not contain a nonconducting fluid or gas.

"I claim as my invention . . . 1 . . . ; 2 . . . ; 3 . . .

"4. The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case, adapted to circulate through said spaces and about the converter."

segregated from the other features contained in said transformers."

There were also numerous exceptions as to the master's method of stating the account. These and others were not specifically passed on because the circuit court and the circuit court of appeals (one judge dissenting) held (97 C. C. A. 621, 173 Fed. 361) that claim 4 was a limited, detailed claim; that the additions made by the defendant were noninfringing and valuable improvements which contributed to the profits; that the burden of apportionment was upon plaintiff, and, having failed to separate profits, it was only entitled to a decree for nominal damages. The court (one judge dissenting) also affirmed 611]*the decree that type M was not an infringement of claim 4.

Messrs. **Thomas B. Kerr** and **Paul Bakewell** argued the cause and filed a brief for petitioner:

The burden of proof was on respondent to show what profits, if any, were due to the additional spaces.

Elizabeth v. American Nicholson Pav. Co. 97 U. S. 141, 24 L. ed. 1006; *Hurlbut v. Schillinger*, 130 U. S. 456, 472, 32 L. ed. 1011, 1016, 9 Sup. Ct. Rep. 584; *Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co.* 141 U. S. 454, 35 L. ed. 815, 12 Sup. Ct. Rep. 49; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 203, 26 L. ed. 980; *Brennan & Co. v. Dowagiac Mfg. Co.* 89 C. C. A. 392, 162 Fed. 475; *Orr & L. Hardware Co. v. Murray*, 89 C. C. A. 492, 163 Fed. 55.

Where the infringer has confused the profits made in the manufacture and sale of the infringing article with the general profits of his business, the master is warranted in estimating the profits to which complainant is entitled. And in estimating profits made by an infringer a compensation is granted, computed and measured by the same rules that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage.

Tilghman v. Proctor, 125 U. S. 148, 31 L. ed. 668, 8 Sup. Ct. Rep. 894; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 214, 215, 26 L. ed. 975, 984; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *The Idaho*, 93 U. S. 575, 585, 586, 23 L. ed. 978, 981, 982; *Providence Rubber Co. v. Goodyear*, 9 Wall. 302-304, 19 L. ed. 570, 571; *Callaghan v. Myers*, 128 U. S. 617, 665, 666, 32 L. ed. 547, 562, 9 Sup. Ct. Rep. 177; *Gould's Mfg. Co. v. Cowing*, 105 U. S. 255, 26 L. ed. 988.

56 L. ed.

Mr. Melville Church argued the cause and filed a brief for respondent:

The burden of proof is on complainant to show profit due to improvement covered by claim 4.

Mosher v. Joyce, 2 C. C. A. 322, 6 U. S. App. 107, 51 Fed. 441; *Tomkinson v. Willets Mfg. Co.* 34 Fed. 536; *Robbins v. Illinois Watch Co.* 27 C. C. A. 21, 53 U. S. App. 404, 81 Fed. 957; *Brickill v. New York*, 50 C. C. A. 1, 112 Fed. 65; *Lattimore v. Hardsocg Mfg. Co.* 58 C. C. A. 287, 121 Fed. 986; *Cary Mfg. Co. v. De Haven*, 71 C. C. A. 388, 139 Fed. 262; *Westinghouse v. New York Air Brake Co.* 72 C. C. A. 61, 140 Fed. 545; *Force v. Sawyer-Boss Mfg. Co.* 75 C. C. A. 102, 143 Fed. 894; *Canda Bros. v. Michigan Malleable Iron Co.* 81 C. C. A. 420, 152 Fed. 178; *Illinois C. R. Co. v. Turrill*, 94 U. S. 695, 24 L. ed. 238; *Goulds Mfg. Co. v. Cowing*, 105 U. S. 253, 26 L. ed. 987; *Garretson v. Clark*, 111 U. S. 120, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; *Black v. Thorne*, 111 U. S. 122, 28 L. ed. 372, 4 Sup. Ct. Rep. 326; *Dobson v. Hartford Carpet Co.* 114 U. S. 439, 29 L. ed. 177, 5 Sup. Ct. Rep. 945; *McCreary v. Pennsylvania Canal Co.* 141 U. S. 459, 35 L. ed. 817, 12 Sup. Ct. Rep. 40.

That almost all of the value of defendant's transformers was attributable to that which was open and free to the defendant to use was thoroughly well proved by the defendant before the master, and no effort was made on the part of the complainant to show the value of the slight difference, though, as to this, the burden of proof was upon complainant.

Garretson v. Clark, 111 U. S. 120, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; *Keystone Mfg. Co. v. Adams*, 151 U. S. 145, 38 L. ed. 104, 14 Sup. Ct. Rep. 295.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The statute makes the decision of the circuit court of appeals final in patent cases, and the plaintiff's petition for the writ of certiorari herein was not granted for the *purpose of re-examining the [614 court's ruling that defendant's type M transformer was not an infringement of claim 4 of the Westinghouse patent. The writ was issued in view of the holding that, though the master found that the defendant had made a profit of \$132,000 from the sale of infringing transformers, the plaintiff could yet only recover \$1, because it failed to separate the profits made by its patent from those made by the defendant's addition.

1. The question as to who has the burden

of proof in cases like this is one of great practical importance, and constantly arises in patent cases. There has been much controversy on the subject and a conflict in the decisions. The authorities cited in the briefs of the two litigants, and others bearing on the subject, have been examined, but we shall not undertake to separately review them, for they disagree not so much as to the rule as to its application. It will be sufficient for the present purposes to say that—

(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits.

(b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. *Hurlbut v. Schillinger*, 130 U. S. 472, 32 L. ed. 1016, 9 Sup. Ct. Rep. 584.

(c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits “unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.” *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 127, 24 L. ed. 1002.

(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the [615]infringer, and each may have *jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must therefore “give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.” *Garretson v. Clark*. 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291.

The real controversy arises in applying this principle to those cases where it is impossible to separate the single profit into its component parts.

2. In considering the question presented by the record here, it is to be borne in mind that Congress has legislated (Rev. Stat. § 4921, U. S. Comp. Stat. 1901, p. 3395) with a view of affording the patentee ample re-

dress against the infringer. It not only makes the latter liable for damages,—sometimes three-fold damages,—but for all profits derived from the use or sale of plaintiff's invention. The rule as to the burden of proof has, however, been so applied that this statutory right has been often nullified by those infringers who had ingenuity enough to smother the patent with improvements belonging to themselves or to third persons. In such cases the greater the wrong, the greater the immunity; the greater the number of improvements, the greater the difficulty of separating the profits. And if that difficulty could only be converted into an impossibility, the defendant retained all of the gains, because the injured patentee could not separate what the guilty infringer had made impossible of separation.

Manifestly such consequences demonstrate that either *the rule or its applica-[616]tion is wrong. The rule is sound, for it but announces the general proposition that the plaintiff must prove its case and carry the burden imposed by law upon every person seeking to recover money or property from another. But the principle must not be pressed so far as to override others equally important in the administration of justice. It may serve to illustrate the rule and its limitations, if, at the risk of stating the obvious, we apply it to the various steps of this case.

The plaintiff proved its patent, and that it had been infringed by the defendant in the manufacture of several thousand transformers, which sold for \$955,000. The patent was itself evidence of the utility of claim 4, and the defendant was estopped from denying that it was of value. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. ed. 939. But no matter how great its presumptive or actual value, it did not follow that the defendant had made a profit by the sale of the infringing transformers. And so, having sued for profits, the Westinghouse Company was under the burden of showing they had been made. This it did to the satisfaction of the master, who found that the defendant had netted \$132,000 from their sale.

The defendant then had the right either to disprove the plaintiff's case, or to offer evidence in mitigation, or both. Accordingly it submitted evidence tending to show that the spaces added by the defendants were noninfringing and valuable improvements which had contributed to the making of the profits. In reply the Westinghouse Company insisted that claim 4 was an entirety, covering a circulatory system in and around a transformer placed in an oil-filled receptacle; that it embraced the “intervening spaces in the coil” because at least

a part of the coil was in the core; that if these spaces were held not to be infringements, they had in fact, as employed by the defendant, added nothing to the profits, but, on the contrary, had crippled the coil 617]and lessened the electrical *efficiency of the transformer. 129 Fed. 607. For that reason the plaintiff contended that it had shown that all the gains were "legally attributable to the patented feature." *Garretson v. Clark*, 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; *Elizabeth v. American Nicholson Pav. Co.* 97 U. S. 127 (6), 24 L. ed. 1002; *Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co.* 141 U. S. 454, 35 L. ed. 815, 12 Sup. Ct. Rep. 49; *Keystone Mfg. Co. v. Adams*, 151 U. S. 144, 145, 38 L. ed. 104, 105, 14 Sup. Ct. Rep. 295. This view was sustained by the master. But if it be assumed, as was found to be the fact by the court, that the spaces were noninfringing and valuable improvements, it may then have prima facie appeared that these changes had contributed to the profits. If so, the burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention.

3. *Lindley, L. J.*, said in *Siddell v. Vickers*, 9 Rep. Pat. Cas. 162, that there "was no form of account more difficult to work out than an account of profits." But that is no reason why the plaintiff should be denied its rights. The problem here, though different, was in many respects analogous to that presented in those cases in which it is necessary to separate the interstate from the intrastate earnings made by a railroad where the same track, rolling stock, depots, and labor are employed at the same time in making gross receipts. These commingled expenses must be apportioned between the two classes of earnings in order to determine whether the intrastate rate is confiscatory. The courts, "while recognizing the impossibility of reaching a conclusion that is mathematically exact," have, in addition to all the other evidence bearing on the question, received "the testimony of experts as to the relative costs of doing a local and through business." *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 178, 44 L. ed. 422, 20 Sup. Ct. Rep. 336. The converse is true. What is permissible in an effort to separate costs may also be done in a patent case where it is necessary to 618]separate profits. *Root v. Lake* **Shore & M. S. R. Co.* 105 U. S. 198, 26 L. ed. 978. See also *Providence Rubber Co. v. Goodyear*, 9 Wall. 802, 19 L. ed. 570. In effect, this was attempted in the present case. Witnesses who had been in the employment of the defendant, and who had kept the

books, purchased the material, superintended the construction, and fixed the price of the transformers, were not able to show that profits had been made, and consequently were not able to show what part of the profits was attributable to the patent and what to the additions, if found to be noninfringing and valuable improvements.

4. Having, by books and other data, proved to the satisfaction of the master the existence of profits, the plaintiff had carried the burden imposed by law, and established every element necessary to entitle it to a decree, except one. As to that, the act of the defendant had made it not merely difficult but impossible to carry the burden of apportionment. But plaintiff offered evidence tending to establish a legal equivalent. It had proved the existence of a fact which, whether treated as a rule of evidence or as a matter of substantive law, would entitle it to a decree for all the profits. The method was different from that mentioned in the second branch of the rule in the *Garretson Case*, 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291, but the plaintiff had now presented proof to demonstrate its right to the whole of the fund because of the fact that the defendant had inextricably commingled and confused the parts composing it. This result would not be in conflict with the principle which, in the first instance, imposed the burden of proof on the plaintiff, but merely gave legal effect to a new fact which, as a matter of law, entitled the patentee to a particular judgment. It presented a case where the court was called on to determine the liability of a trustee *ex maleficio*, who had confused his own gains with those which belonged to the plaintiff. One party or the other must suffer. The inseparable profit must be given to the patentee or infringer. *The loss had to fall 619 on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer.

5. It is said, however, that the rule does not apply to patent cases. Why it should be limited does not appear. It is admitted that an injunction may be granted against selling infringing devices, even though the result will be to prevent the defendant from using valuable appliances confused with the patented device. And Lord Eldon treated this conceded right to enjoin as an application of the rule relating to the confusion of goods. He therefore restrained the publication of a book, a large portion of which was original, because copyright matter was incorporated therein, saying in *Mawman v. Tegg*, 2 Russ. Ch. 390:

"As to the hard consequences which would follow from granting an injunction when a very large proportion of the work is un-

questionably original, I can only say that if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequence of so doing."

This case was cited and approved in *Callaghan v. Myers*, 128 U. S. 658, 32 L. ed. 559, 9 Sup. Ct. Rep. 177, where the infringer, who had blended his own with copyright matter, in a volume which sold for a profit, was made to "abide the consequences on the same principle that he who has wrongfully produced a confusion of goods must alone suffer." In one of these cases the original matter was less, and in the other more, than that unlawfully appropriated. In both, as in patent cases, the infringer was a "trustee for the plaintiff in respect of profits." *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 214, 26 L. ed. 984. And the liability is not lessened because the confusion is due to a wrongful appropriation by a trustee *de son tort*, instead of carelessness of a trustee lawfully appointed. Nor [620] is it limited to those cases where *the patented device is shown to have preponderated in the creation of the profits. The owner of a small part of the fund is as much entitled to the protection of the law as the owner of a larger share. The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony, or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. *Lupton v. White*, 15 Ves. Jr. 432-440, 10 Revised Rep. 94, 2 Mor. Min. Rep. 430. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits.

6. But when a case of confusion does appear,—when it is impossible to make a mathematical or approximate apportionment,—then, from the very necessity of the case, one party or the other must secure the entire fund. It must be kept by the infringer or it must be awarded by law to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong. The fact that he

may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee and by judicial decree repeal the provision of Rev. Stat. § 4921, U. S. Comp. Stat. 1901, p. 3395, which declares that, in case of infringement, the complainant shall be entitled to recover the "profits to be accounted for by the defendant."

This conclusion is said to be in conflict with the *Garretson* *and other deci-[621] sions, which, it is claimed, justify the conclusion that the defendant is entitled to retain all of the profits, even where the patentee is unable to make an apportionment. *Warren v. Keep*, 155 U. S. 265, 39 L. ed. 144, 15 Sup. Ct. Rep. 83. An analysis of the facts of those cases will show that they do not sustain so extreme a doctrine. For they deal with instances where the plaintiff apparently relied on the theory that the burden was on the defendant, and for that, or other reasons, made no attempt whatever to separate the profits. None of the cases cited discuss the rights of the patentee who has exhausted all available means of apportionment, who has resorted to the books and employees of the defendant, and by them, or expert testimony, proved that it was impossible to make a separation of the profits. This distinction between difficulty and impossibility is involved in the ruling by the circuit court of appeals of the sixth circuit in *Brennan & Co. v. Dowagiac Mfg. Co.* 89 C. C. A. 396, 162 Fed. 476, where the *Garretson* Case was distinguished, and the court said:

"In the present case the infringer's conduct has been such as to preclude the belief that it had derived no advantage from the use of the plaintiff's invention. . . . In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest upon the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the court to say to the innocent party, 'You have failed to make the necessary proof to enable us to decide how much of these profits are your own;' for the party knows, and the court must see, that such a requirement is impossible to be complied with. The proper remedy to be

applied in such cases is that stated by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108 where he said: 'The rule of law and equity is strict and severe on such occasion. . . . All the inconveniences of the confusion is thrown upon the 622]*party who produces it, and it is for him to distinguish his own property or lose it.'"

It may be argued that, in its last analysis, that is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention, and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant, it is one which justly should be borne by him, as he wrought the confusion.

7. This conclusion would apparently result in a decree in favor of the appellant. But such an order, under the peculiar facts of this case, would operate to deprive the defendant of the right to a ruling on the exceptions filed to the report. The master held that the entire commercial value of the transformer was due to the invention covered by claim 4, and that therefore all the profits belonged to the Westinghouse Company. The court, on the other hand, found that the defendant's additions were not infringements, and had contributed to the profits, and that because of the failure to make a separation the plaintiff was entitled only to nominal damages. For this reason it did not specifically pass on defendant's exceptions. Other questions of law and fact involved in the accounting were not considered. Neither the court nor the master discussed the question of apportionment, and the record does not afford satisfactory data for entering a final decree. This no doubt arises from the fact that both parties relied so entirely upon their theory that the burden was on the other, that facts were not proved which might otherwise have been established. The decree is therefore reversed and the case remanded, with power to hear and determine motions to amend the pleadings, and with directions that the case be recommitted to a master 623]for a new hearing on *all the questions involved in the original reference, and, on evidence already submitted and such additional testimony as may be offered, for further proceedings not inconsistent with this opinion.

Reversed.

56 L. ed.

J. L. MURPHY, Plff. in Err.,

v.

PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 623-631.)

Constitutional law — police power — prohibiting billiard or pool rooms.

1. The police power of a state justifies a municipal ordinance prohibiting the keeping of billiard or pool tables for hire or public use, but permitting hotel keepers to maintain a billiard or pool room in which their regular and registered guests may play.

[For other cases, see Constitutional Law, 881-890, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — property rights — prohibiting billiard or pool rooms.

2. The proprietor of an existing billiard and pool room is not deprived of his property without due process of law, contrary to U. S. Const., 14th Amend., by the passage of a municipal ordinance prohibiting the keeping of billiard or pool tables for hire or public use.

[For other cases, see Constitutional Law, 441-489, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — prohibiting billiard or pool rooms.

3. A municipal ordinance prohibiting the keeping of billiard or pool tables for hire or public use does not deny the equal protection of the laws because hotel keepers are permitted to maintain a billiard or pool room in which their regular and registered guests may play.

[For other cases, see Constitutional Law, 183-196, 337-339, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

4. Only hotel keepers having less than twenty-five bedrooms are in a position to assail the validity of a discrimination made

NOTE.—For a discussion of police power generally—see notes to *State v. Marshall*, 1 L.R.A. 51; *Electric Improv. Co. v. San Francisco*, 13 L.R.A. 131; *State v. Schlemmer*, 10 L.R.A. 135; and *Barbier v. Connolly*, 28 L. ed. U. S. 923.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621; and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to *Pugh v. Pugh*, 32 L.R.A. (N.S.) 954.

in favor of larger hotels by a municipal ordinance forbidding the keeping of billiard or pool tables for hire or public use, but permitting hotel keepers having twenty-five or more bedrooms to maintain a billiard or pool room in which their regular and registered guests may play.

[For other cases, see Statutes, I. d. 3, in Digest Sup. Ct. 1908.]

[No. 204.]

Argued March 11, 1912. Decided June 7, 1912.

IN ERROR to the Superior Court of Los Angeles County, State of California, to review a judgment which affirmed a conviction in the Recorder's Court in the City of South Pasadena, in that state, of keeping billiard or pool tables for hire or public use. Affirmed.

The facts are stated in the opinion.

Mr. Alfred S. Austrian argued the cause, and, with Mr. Levy Mayer, filed a brief for plaintiff in error:

The police power may be exercised to protect the public health, morals, safety, and the general welfare, but it is, at all times, subject to the constitutional limitations that it may not arbitrarily take away the lawful rights of a citizen.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question.

Dobbins v. Los Angeles, 195 U. S. 223, 235, 49 L. ed. 169, 174, 25 Sup. Ct. Rep. 18; Mugler v. Kansas, 123 U. S. 622, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Lochner v. New York, 198 U. S. 45, 60, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

If a business may be so conducted as to be harmful to the public welfare, but is not necessarily so, the legislature, under its police power, may regulate, but it cannot prohibit, such business.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup.

Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Lochner v. New York, 198 U. S. 45, 60, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; State v. Hall, 32 N. J. L. 159; Pfingst v. Senn, 94 Ky. 556, 21 L.R.A. 569, 23 S. W. 358; State ex rel. McMonies v. McMonies, 75 Neb. 443, 106 N. W. 454; also Zanone v. Mound City, 103 Ill. 558.

If a thing is not in fact a nuisance *per se*, it cannot be made so by a mere declaration of the legislative will, expressed in an ordinance.

Yates v. Milwaukee, 10 Wall. 497, 505, 19 L. ed. 984, 986; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; Opelousas v. Norman, 51 La. Ann. 736, 25 So. 401; Hume v. Laurel Hill Cemetery, 142 Fed. 565.

A billiard and pool room is not a nuisance *per se*; it is not necessarily harmful to the public welfare.

State ex rel. McMonies v. McMonies, 75 Neb. 443, 106 N. W. 454; Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199; Ex parte Meyers, 7 Cal. App. 528, 94 Pac. 870; Pfingst v. Senn, 94 Ky. 556, 21 L.R.A. 569, 23 S. W. 358; State v. Hall, 32 N. J. L. 159; State, Breninger, Prosecutor, v. Belvidere, 44 N. J. L. 350; Morgan v. State, 64 Neb. 369, 90 N. W. 108.

Even if an ordinance prohibiting all billiard and pool rooms were valid, the present ordinance is unconstitutional, in that it confers privileges and immunities on some citizens which it denies to others; and the distinctions and classification sought to be drawn by the ordinance are arbitrary, are not based on natural grounds of reasonableness or public policy, and do not tend to promote the public welfare; for (a) it permits owners and managers of hotels, and no others, to conduct pool and billiard rooms; (b) it permits guests of such hotels, and no others, to participate in the game of pool and billiards; (c) it in effect gives such hotel owners a monopoly in this regard; (d) it vests in the board of trustees of South Pasadena an arbitrary discretion, uncontrolled by any rules or conditions governing the granting or refusing of the right to conduct such business.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Connolly v. Union Sewer-Pipe

Co. 184 U. S. 540, 558, 563, 46 L. ed. 679, 689, 691, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; Re Yot Sang, 75 Fed. 983; Nichols v. Walter, 37 Minn. 271, 33 N. W. 800; State ex rel. McCue v. Ramsey County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; Lappin v. District of Columbia, 22 App. D. C. 78; Fiscal Court v. F. & A. Cox Co. 132 Ky. 738, 21 L.R.A. (N.S.) 83, 117 S. W. 296; Bailey v. People, 190 Ill. 37, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 165, 41 L. ed. 666, 668, 669, 671, 17 Sup. Ct. Rep. 255; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669.

Mr. John E. Carson argued the cause, and, with Mr. Lynn Helm, filed a brief for defendant in error:

Municipalities in the state of California, in the exercise of the police power conferred upon them by § 11, article 11, of the Constitution of California, may either regulate or prohibit, and under such power they may prohibit a thing which is not a nuisance *per se*.

Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411.

The conducting and keeping of billiard halls and pool rooms for hire or public use is a constant menace to the public peace and morals, and such places have a tendency to weaken and deprave public morals; and anything which is a menace to the public peace and morals, and which tends to weaken and deprave public morals, may be regulated by control and regulation, or entirely prohibited.

Goytino v. McAleer, 4 Cal. App. 655, 88 Pac. 991; Ex parte Meyers, 7 Cal. App. 528, 94 Pac. 870; Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199; Tarkio v. Cook, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; Ex parte Shrader, 33 Cal. 279; Ex parte Tuttle, 91 Cal. 589, 27 Pac. 933; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Clearwater v. Bowman, 72 Kan. 92, 82 Pac. 526; State v. Williams (State v. Thompson) 160 Mo. 333, 54 L.R.A. 950, 83 Am. St. Rep. 468, 60 S. W. 1077; Tanner v. Albion, 5 Hill, 121, 4 Am. Dec. 337; Cooley, Const. Lim. 56 L. ed.

7th ed. p. 884; Hall v. State, — Tex. Crim. Rep. —, 34 S. W. 122; Webb v. State, 17 Tex. App. 205; State v. Jackson, 39 Mo. 420; Rex v. Hall, 2 Keble, 846; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Mugler v. Kansas, 123 U. S. 669, 31 L. ed. 213, 8 Sup. Ct. Rep. 273; Crowley v. Christensen, 137 U. S. 87, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Cooley, Const. Lim. 6th ed. 705; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Corinth v. Crittenden, 94 Miss. 41, 47 So. 525.

A broad distinction is recognized between useful and nonuseful business in the exercise of the police power by municipalities, and the billiard and pool-room business is not a useful business.

Freund, Pol. Power, § 59; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199; Goytino v. McAleer, 4 Cal. App. 655, 88 Pac. 991; Tarkio v. Cook, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; Ex parte Shrader, 33 Cal. 279; Ex parte Tuttle, 91 Cal. 589, 27 Pac. 933; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Re Smith, 143 Cal. 368, 77 Pac. 180.

The ordinance prohibits the public pool and billiard business, making no exceptions; hence it is not discriminative or class legislation.

Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199, 155 Cal. 322, 100 Pac. 1134; Ex parte Koser, 60 Cal. 177; Goytino v. McAleer, 4 Cal. 655, 88 Pac. 991; People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964; Sonora v. Curtin, 137 Cal. 587, 70 Pac. 674; California Reduction Co. v. Sanitary Reduction Works, 61 C. C. A. 91, 126 Fed. 29; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ex parte Tuttle, 91 Cal. 589, 27 Pac. 933; State v. Williams (State v. Thompson) 160 Mo. 333, 54 L.R.A. 950, 83 Am. St. Rep. 468, 60 S. W. 1077; Re Kelso, 147 Cal. 609, 2 L.R.A. (N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725.

Mr. Justice Lamar delivered the opinion of the court:

In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a

hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.

The plaintiff in error was arrested on the 628] charge of *violating this ordinance. His application for a writ of habeas corpus was denied by the court of appeals and supreme court of the state. *Ex parte Murphy*, 8 Cal. App. 440, 97 Pac. 199, 155 Cal. 322, 100 Pac. 1134. Thereafter the case came on for trial in the recorder's court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted; and "that there was nothing in the conduct of the business which had any tendency to immorality, or could in the least affect the health, comfort, safety, or morality of the community or those who frequented said place of business." This evidence was, on motion, excluded, and testimony of other witnesses to the same effect was rejected.

The defendant was found guilty and sentenced to pay a fine, or, in default thereof, to be imprisoned in the county jail. The conviction was affirmed by the superior court of the county, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the 14th Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance *per se*, and which therefore could not be absolutely prohibited.

The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the 629] *useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the supreme court of California on plaintiff's application for habeas corpus,

a nuisance *per se*. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game, but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, *the pur-[630 suit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner v. Albion*, 5 Hill, 121, 40 Am. Dec. 337; *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; *Clearwater v. Bowman*, 72 Kan. 92, 82 Pac. 526; *Corinth v. Crittenden*, 94 Miss. 41, 47 So. 525; *Cole v. Culbertson*, 86 Neb. 160, 125 N. W. 287; *Re Jones*, 4 Okla. Crim. Rep. 74, 31 L.R.A. (N.S.) 548, 140 Am. St. Rep. 655, 109 Pac. 570.

Indeed, such regulations furnish early instances of the exercise of the police power

by cities. For Lord Hale in 1672 (*Rex v. Hall*, 2 Keble, 846) upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

Under the laws of the state, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain for the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from so doing, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with twenty-five rooms and those with twenty-**631**four rooms or less, the plaintiff *in error is not in position to complain, because, not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

There is no contention that these provisions permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire, he would be guilty of a violation of the ordinance, and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant.

Affirmed.

D. L. HENDERSON, Trustee in Bankruptcy of Joseph Burns, Bankrupt, Petitioner,

v.

SAMUEL MAYER.

(See S. C. Reporter's ed. 631-640.)

Bankruptcy — preference — landlord's lien — levy.

The general lien of a landlord for rent, given by Ga. Code, § 2795, to "date from the time of the levy of a distress warrant **56 L. ed.**

to enforce the same," is not created by judgment, nor obtained through legal proceedings, within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450), § 67f, and is therefore not defeated by the provisions of that section, although the levy was made within four months of the filing of the petition in bankruptcy against the tenant.

[For other cases, see Bankruptcy, 202-204, in Digest Sup. Ct. 1908.]

[No. 219.]

Argued April 19, 1912. Decided June 7, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Western Division of the Southern District of Georgia, sustaining a landlord's general lien over the objection that it was obtained by legal proceedings within four months before the filing of the petition in bankruptcy against the tenant. Affirmed.

Statement by Mr. Justice Lamar:

Samuel Mayer owned a plantation in Dooley county, Georgia, which he rented to Joseph Burns for one year. The rent not having been paid at maturity, Mayer, on November 13, 1908, made an affidavit in conformity with the statute, and a justice of the peace thereupon issued a distress warrant, which, on the same day, was levied upon the cotton, corn, and other products of the place. The crops found on the premises being, apparently, insufficient to pay what was due, the sheriff, at the same time, levied upon other property by virtue of § 2795 of the Code of Georgia, which declares that "landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, . . . and shall also have a general lien on the property of the debtor liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

Three days after the levy a petition in bankruptcy was filed against Burns, the tenant, who was subsequently adjudged a bankrupt. The trustee, when elected, obtained possession of all the property seized by the sheriff, and subsequently sold it in the due administration of the estate. The proceeds of the cotton and corn were paid over to Mayer, it being conceded that the landlord's *special lien on the crops **[633** had not been affected by the bankruptcy proceedings.

Mayer also claimed that, by virtue of

his general lien, he was entitled to have the balance of the rent paid out of the proceeds arising from the sale of the other property levied on, and filed his intervention to secure such an order. The trustee's objection was sustained by the referee on the ground that the landlord's general lien was discharged because it had been "obtained by legal proceedings" or levy made three days before the filing of the petition in bankruptcy. His ruling was reversed by the district court (175 Fed. 633). That judgment was affirmed by the circuit court of appeals without opinion. The case was then brought here by writ of certiorari, granted at the instance of the trustee, who claims that under the Georgia Code the landlord had no lien on the property prior to the levy of the distress warrant, and that whatever right had been acquired by that seizure was discharged by § 67f, which declares that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450.]

Mr. Orville A. Park argued the cause, and Messrs. George S. Jones, Merrel P. Callaway, Isaac Hardeman, and E. P. Johnston filed a brief for petitioner:

The Georgia law must govern the bankruptcy court sitting in that state as to what liens are recognized in Georgia and how and when they arise or are obtained.

Collier, Bankr. 8th ed. p. 741.

The landlord's general lien is created by, begins with, and is obtained through, the levy of the distress warrant, which, in Georgia, is a legal proceeding.

Hobbs v. Davis, 50 Ga. 214; Johnson v. Emanuel, 50 Ga. 590; Elam v. Hamilton, 69 Ga. 736; Re D. H. Dougherty Co. 109 Fed. 480; Re M. C. Vandiver, October 5, 1908, Fed.; Thornton v. Wilson, 55 Ga. 608; Jones v. Howard, 99 Ga. 451, 59 Am. St. Rep. 231, 27 S. E. 765. See also Morgan v. Campbell, 22 Wall. 381 22 L. ed. 796.

Mr. Arthur H. Coddington argued the cause and filed a brief for respondent:

The statutes of Georgia relating to the security of the landlord for rent are analogous to such statutes of other states. The essential nature of all is the creation of a lien or right in the landlord, to perfect which requires certain legal proceedings for its enforcement.

2 Tiffany, Land. & T. p. 1925; Austin

v. O'Reilly 2 Woods, 670, Fed. Cas. No. 665, 18 Am. & Eng. Enc. Law, 2d ed. 426-432.

The right of the landlord against the goods and chattels of his tenant inheres in the relationship of the parties, and the statutes themselves, which are designed to protect, enforce, or enlarge the ancient common-law right of distraint. This lien or right under such statutes is not founded upon the legal proceedings, which are merely the machinery for its enforcement.

24 Cyc. 1249, 1250; Sims v. Price, 123 Ga. 97, 50 S. E. 961; Cohen v. Broughton, 54 Ga. 296; Tyner v. Slappey, 74 Ga. 364; Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665, 2 Tiffany, Land. & T. p. 1925.

The bankrupt act preserves and gives effect to all priorities and liens which are not preferential or in fraud of the act, and which are recognized by the several states.

Collier, Bankr. 7th ed. 741, 742, 761; Humphrey v. Tatman, 198 U. S. 91, 92-95, 49 L. ed. 956-959, 25 Sup. Ct. Rep. 567; Hauselt v. Harrison, 105 U. S. 401-408, 26 L. ed. 1075-1077; York Mfg. Co. v. Cassell, 201 U. S. 344, 351-353, 50 L. ed. 782, 784-786, 26 Sup. Ct. Rep. 481; Bacon v. International Bank, 131 U. S. cxxvi Appx. and 26 L. ed. 439; Longstreth v. Pennock, 20 Wall. 576, 22 L. ed. 452.

The uniform construction by the courts of § 67 (f) of the bankrupt act, which alone is relied upon in the case at bar, has been to invalidate only such "levies" and "liens" as, under the strict terms of the statute, are "obtained through legal proceedings," by persons who occupy under general law or state statutes no other relationship and have no other right than that of common creditors suing a debtor for his indebtedness. Such provisions of the act have been consistently held not to apply to those liens or rights which, although strictly they may be regarded as inchoate until perfected by enforcement, are yet regarded by the laws and policies of the states where particular rights of the landlord exist as created and obtained by the contract or relationship of the parties; and where such contract or relationship was made and begun beyond the four months period before bankruptcy, the priority given thereunder will be protected and enforced in the national courts.

Re Robinson v. Smith, 83 C. C. A. 121, 154 Fed. 343; Re West Side Paper Co. 89 C. C. A. 110, 162 Fed. 110, 15 Ann. Cas. 384; Re Hoover, 113 Fed. 136; Wilson v. Pennsylvania Trust Co. 52 C. C. A. 374, 114 Fed. 742; Re Duble. 117 Fed. 794; Re Pittsburg Drug Co. 164 Fed. 482; Re Byrne, 97 Fed. 762; Re Mitchell, 116 Fed. 87; Re Bishop, 153 Fed. 304; Malcomsson v.

Wappoo Mills, 85 Fed. 916; Re Hersey, 171 Fed. 1001; Re Bayley, 177 Fed. 522; Re Bourlier Cornice & Roofing Co. 133 Fed. 958; Re Seebold, 45 C. C. A. 117, 105 Fed. 910; Collier, Bankr. 7th ed. 742, 743; 1 Remington, Bankr. §§ 1160, 1163; Loveland, Bankr. 3d ed. 368; Longstreth v. Pennock, 20 Wall. 575, 577, 22 L. ed. 451, 452; Marshall v. Knox, 16 Wall. 551, 554, 555, 21 L. ed. 481, 483, 484; Schall v. Kinsella, 117 La. 687, 42 So. 221; Re Wynne, Chase, 227, Fed. Cas. No. 18,117; Re Trim, 2 Hughes, 355, Fed. Cas. No. 14, 174; Re Appold, 6 Phila. 469, Fed. Cas. No. 499; Re Bowne, 1 N. Y. Week. Dig. 100, Fed. Cas. No. 1,741; Re Dunham, 7 Phila. 611, Fed. Cas. No. 4,145; Re Hoagland, Fed. Cas. No. 6,545; Re Rose, Fed. Cas. No. 12,043; Lambert v. De Saussure, 4 Rich. L. 248; Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665; Re Bennett, 82 C. C. A. 531, 153 Fed. 673; Central Trust Co. v. Richmond N. I. & B. R. Co. 41 L.R.A. 458, 15 C. C. A. 273, 31 U. S. App. 675, 68 Fed. 90; Re Laird, 48 C. C. A. 538, 109 Fed. 550; Re Falls City Shirt Mfg. Co. 98 Fed. 592; Re Emslie, 42 C. C. A. 350, 102 Fed. 291; Duplan Silk Co. v. Spencer, 53 C. C. A. 321, 115 Fed. 689; Re Kerby-Dennis Co. 36 C. C. A. 677, 95 Fed. 116; Re Lewis, 99 Fed. 935; Re Grissler, 69 C. C. A. 406, 136 Fed. 754; Re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871; Re Georgia Handle Co. 48 C. C. A. 571, 109 Fed. 632; John P. Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619; Loudon v. Blandford, 56 Ga. 153; Hight v. Fleming, 74 Ga. 592; Davis v. Meyers, 41 Ga. 95; Boehm v. Nelson, 61 Ga. 441; Taliaferro v. Pry, 41 Ga. 622; Crine v. Davis, 68 Ga. 138; Andrews Mfg. Co. v. Porter, 112 Ala. 384, 20 So. 475; Abraham v. Nicrosi, 87 Ala. 175, 6 So. 293; Gibson v. Gautier, 1 Mackey, 35; Harris v. Dammann, 3 Mackey, 90; Webb v. Sharp, 13 Wall. 14, 20 L. ed. 478; Fowler v. Rapley, 15 Wall. 328, 335, 21 L. ed. 35, 37; Fox v. Jones, 26 Fla. 276, 8 So. 449; Weed v. Standley, 12 Fla. 166; Finney v. Harding, 136 Ill. 580, 12 L.R.A. 605, 27 N. E. 289; Gilbert v. Greenbaum, 56 Iowa, 211, 9 N. W. 182; Scully v. Porter, 57 Kan. 324, 46 Pac. 313; Grant v. Whitwell, 9 Iowa, 152; Loth v. Carty, 85 Ky. 596, 4 S. W. 314; Carroll v. Bancker, 43 La. Ann. 1078, 10 So. 187; Bazin v. Segura, 5 La. Ann. 718; Merrick v. La Hache, 27 La. Ann. 88; Silliman v. Short, 26 La. Ann. 512; Bacon v. Howell, 60 Miss. 362; Richardson v. McLaurin, 69 Miss. 70, 12 So. 264; Paine v. Aberdeen Hotel Co. 60 Miss. 360; Rosenberg v. Shaper, 51 Tex. 138.

56 L. ed.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The provisions of the bankruptcy act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, *whether the lien dates from the[637 entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

Liens in favor of laborers, mechanics, and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been "obtained through legal proceedings," even when it is necessary to enforce them by some form of legal proceeding. The statutes of the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or "all the property involved in the business." Re Bennett, 82 C. C. A. 531, 153 Fed. 673.

In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as "a right to a lien." Re Bennett, 82 C. C. A. 531, 153 Fed. 677; Re Laird, 48 C. C. A. 538, 109 Fed. 554. But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and therefore are not defeated by § 67f, even where the registration, foreclosure, or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy.

Similar rulings have been made where the landlord has only a common-law right of distress. Re West Side Paper Co. 89 C. C. A. 110, 162 Fed. 110, 15 Ann. Cas. 384. This is often referred to as a lien, *but[638 it is "only in the nature of security." 3 Bl. Com. 18. The pledge, or quasi pledge, which the landlord is said to have, is, at most, only a power to seize chattels found on the rented premises. These he could take into

possession and hold until the rent was paid. Doe ex dem. Gladney v. Deavors, 11 Ga. 84. But before the distraint the landlord at common law has "no lien on any particular portion of the goods, and is only an ordinary creditor, except that he has the right of distress by reason of which he may place himself in a better position." Sutton v. Rees, 9 Jur. N. S. 456, 1 New Reports, 464, 8 L. T. N. S. 343, 11 Week. Rep. 413. A right fully as great is created by the Georgia statute here in question. For while giving the owners of agricultural lands a special lien on the crops, there was no intention to deprive the proprietor of urban and other real estate of the lien for rent which there, as in other states, is treated as an incident growing out of the relation of landlord and tenant.

The Code (§ 2787) expressly "establishes liens in favor of landlords." It (§ 3124) gives them "power to distrain for rent as soon as the same is due." It declares (§ 2795) that landlords "shall have a general lien on the property of the tenant, liable to levy and sale . . . which dates from the levy of the distress warrant to enforce the same." It is true that prior to levy it covers no specific property, and attaches only to what is seized under the distress warrant issued to enforce the lien given by statute. But in this respect it is the full equivalent of a common-law distress—the lien of which is held not to be discharged by § 67f. *Re West Side Paper Co. supra*; *Austin v. O'Reilly*, 2 Woods. 670, Fed. Cas. No. 665.

The fact that the warrant could be levied upon property which had never been on the rented premises does not change the nature of the landlord's right, though it may increase the extent of his security. The statutory restrictions as to date, rank, and priority may be important in a controversy with 639] other lienholders, but was wholly *immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. As against them the landlord had, from the beginning of the tenancy, the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially. *Savage v. Oliver*, 110 Ga. 638, 36 S. E. 54. The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the pur-

pose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor "obtained through legal proceedings."

Decisions to the same effect were made under the bankruptcy act of 1867 (14 Stat. at L. 522, § 14, chap. 176), which dissolved attachments or mesne process within four months prior to the filing of the petition. In *Austin v. O'Reilly*, *supra*, decided in 1875, it appeared that in Mississippi the landlord had no lien, but, as in Georgia, was authorized to seize (but by attachment) the tenant's goods wherever found. Justice Bradley, presiding at circuit, said that the landlord's right to a distress at common law was not a strict lien, but "being commonly called a lien, and being a peculiar right in the nature of a lien, . . . the Supreme Court of the United States, and most of the district and circuit courts, have regarded it as fairly to be classed as a lien, within the true intent and meaning of the bankrupt act," and that the statutory attachment being in the nature of a common-law distress was not nullified or discharged by the bankruptcy proceedings.

There is nothing in the act of 1898 opposed to this conclusion. On the contrary, its general provisions indicate a *pur-[640 pose to continue the same policy, and an intent, as against general creditors, to preserve rights like those given by the Georgia statute to landlords, even though the lien was enforced and attached by levy of a distress warrant within four months of the filing of the petition in bankruptcy.

Affirmed.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 640-650.)

Postoffice — railway mail service — regulation.

1. The authority of the Postmaster General under the act of March 2, 1907 (34 Stat. at L. 1212, chap. 2513, U. S. Comp. Stat. Supp. 1911, p. 1148), to name any rate for additional compensation for railway postoffice car service not exceeding the statutory maximum, which varies in proportion to the length of the car, extends to fixing the same price for the longer as for the shorter cars, and to abolishing "full lines" or establishing "half lines," and adjusting the rates accordingly.

[For other cases, see Postoffice, IV., in Digest Sup. Ct. 1908.]

Postoffice — railway mail service — compensation — implied contract.

2. The United States is not liable as on an implied contract to pay the reasonable value of the railway postoffice car service furnished and actually used by the Postoffice Department, consisting of "full lines" of cars 60 feet in length, where the railway company, being under no obligation to carry the mails or to supply postoffice cars, chose to furnish such service after being informed that the Department only needed and would only pay for 50-foot cars on the return trip, and had established "half lines" consisting of 60-foot cars going and 50-foot cars returning, instead of exercising its right to decline to supply the service on the conditions named.

[For other cases, see Postoffice, IV., in Digest Sup. Ct. 1908.]

[No. 716.]

Argued April 30, 1912. Decided June 7, 1912.

IN ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment dismissing the complaint in a suit to recover the reasonable value of railway postoffice car service furnished to, and actually used by, the Postoffice Department. Affirmed.

The facts are stated in the opinion.

Mr. Robert Dunlap argued the cause, and, with Messrs. William R. Smith, Lee F. English, and James L. Coleman, filed a brief for plaintiff in error:

The parties were agreed upon the value of 60-foot postal car lines as the maximum rate prescribed by Congress, and as such car lines were in fact used by the government, it must be held as having agreed to pay that value.

Thompson v. Sanborn, 52 Mich. 141, 17 N. W. 730; *Griffin v. Knisely*, 75 Ill. 417; *Conway v. Starkweather*, 1 Denio, 113.

The half lines R. P. O. cars order made by the Postmaster General, effective July 23, 1907, was made without authority, is evidently contrary to the act of Congress, is oppressive and unreasonable, and therefore invalid.

Morrill v. Jones, 106 U. S. 466, 467, 27 L. ed. 267, 268, 1 Sup. Ct. Rep. 423; *Bruhl Bros. v. Wilson*, 123 Fed. 958; *Hoover v. Salling*, 49 C. C. A. 26, 110 Fed. 43; *United States v. Utah, N. & C. Stage Co.* 199 U. S. 422, 423, 50 L. ed. 254, 255, 26 Sup. Ct. Rep. 69; *United States v. Bostwick*, 94 U. S. 66, 24 L. ed. 66; *United States v. Symonds*, 120 U. S. 46, 48, 49, 30 L. ed. 557, 558, 7 Sup. Ct. Rep. 414; *United States v. Barnette*, 165 U. S. 174, 178, 179, 41 L. ed. 675-677, 17 Sup. Ct. Rep. 286; 2 *Willoughby*, Const. p. 1326.

56 L. ed.

If there was no express agreement fixing the price for each car line, yet, inasmuch as the government in fact accepted and used 60-foot cars for the round trips, it was bound to pay the reasonable value thereof, and the record shows the government to have admitted such value of such car line to be the maximum fixed by Congress, and the railway company was entitled to demand and receive that maximum unless and until it agreed to lease its cars for a less sum, which was not either claimed or shown.

Manchester, S. & L. R. Co. v. Brown, L. R. 8 App. Cas. 715, 53 L. J. Q. B. N. S. 124, 50 L. T. N. S. 281, 32 Week. Rep. 207, 48 J. P. 388; *Great Western R. Co. v. McCarthy*, L. R. 12 App. Cas. 235, 56 L. J. P. C. N. S. 33, 56 L. T. N. S. 582, 35 Week. Rep. 429, 51 J. P. 532; *Beals v. Amador County*, 35 Cal. 624; *Archibald v. Thomas*, 3 Cow. 289; *Horton v. Cooley*, 135 Mass. 589; *Vail v. Jersey Little Falls Mfg. Co.* 32 Barb. 564; *Sidener v. Fetter*, 19 Ind. 310; *Smithmeyer v. United States*, 147 U. S. 343, 359, 360, 37 L. ed. 197, 201, 203, 13 Sup. Ct. Rep. 321; *The Albert Dumois*, 177 U. S. 255, 44 L. ed. 760, 20 Sup. Ct. Rep. 595; *Wolcott v. Yeager*, 11 Ind. 87.

On *quantum meruit*, where the contract has been varied or departed from by the parties during performance, such contract is admissible as containing admission of the standard of value, etc.

Reynolds v. Jourdan, 6 Cal. 109; *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127; *Shirk v. Brookfield*, 77 App. Div. 295, 79 N. Y. Supp. 225; *Boyd v. Vale*, 84 App. Div. 414, 82 N. Y. Supp. 932; *Schulze v. Farrell*, 142 App. Div. 13, 126 N. Y. Supp. 678.

Messrs. Robert Dunlap, William R. Smith, and Gardiner Lathrop filed a brief in opposition to the motion to dismiss the writ of error.

Mr. Joseph Stewart argued the cause, and, with Assistant Attorney General Thompson and Mr. S. S. Ashbaugh, filed a brief for defendant in error:

The United States is the employer, and, like any other employer, has the right to state the terms upon which the employment shall arise. Where the railroad company accepts the terms fixed by the United States, whether by express words or by acquiescence and performance, an agreement is effected upon the terms proffered by the government, and the railroad company cannot be heard to urge a contract with other and different terms of its own making.

Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 65 L.R.A.

397, 54 C. C. A. 608, 117 Fed. 434; *Texas & P. R. Co. v. United States*, 28 Ct. Cl. 379; *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. Cl. 350.

The orders of the Postmaster General and the business of carrying the mails are subject to the statutes and regulations of the Department, which, with the usual and ordinary customs and practices of the Department in relation to railroads and mail service, constitute the terms of the contract.

Minneapolis & St. L. R. Co. v. United States, 24 Ct. Cl. 350.

The plaintiff was under no obligation to the government to carry the mails or furnish the space in cars for railway postoffice service, but was free to carry the mails or to decline to carry them, or to contract with the government for the performance of such services, or to decline to contract.

Eastern R. Co. v. United States, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; *Minneapolis & St. L. R. Co. v. United States*, supra.

The Postmaster General had power to make the order complained of, authorizing "half car lines," and subsequently to fix the pay for the railway postoffice car service at a rate below the maximum provided by law for full lines of railway postoffice cars.

Eastern R. Co. v. United States, 20 Ct. Cl. 23, affirmed in 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. Cl. 350; *Texas & P. R. Co. v. United States*, 28 Ct. Cl. 379.

The orders were offers of business, which were, in effect, accepted by furnishing the cars and performing the service.

Chicago & N. W. R. Co. v. United States, 15 Ct. Cl. 232; *Eastern R. Co. v. United States*, 20 Ct. Cl. 23, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. Cl. 350; *Texas & P. R. Co. v. United States*, 28 Ct. Cl. 379.

Assistant Attorney General Thompson and Mr. P. M. Cox filed a brief in support of the motion to dismiss the writ of error.

Mr. Justice Lamar delivered the opinion of the court:

The Atchison, Topeka, & Santa Fé Railroad had a four-year contract with the Postoffice Department to carry *the mail between Chicago and Kansas City. Payment was made on the basis of weight hauled and the speed with which the service was per-

formed. The company also furnished sufficient "railway postoffice cars," 60 feet in length, to make three round trips each twenty-four hours. This constituted three "car lines," for which the plaintiff received the maximum additional compensation then allowed by Rev. Stat. § 4004 (U. S. Comp. Stat. 1901, p. 2721), under which the pay varied in proportion to the length of the car.

This contract was to expire June 30, 1907, by limitation; and, with a view of obtaining data, and proposing terms for a new arrangement to begin July 1st, 1907, the postal authorities, in February, mailed to the company a "Distance Circular," which, among other things, stated that the company was "to accept and perform mail service under the conditions prescribed by law and the regulations of the Department." The form was filled out and signed by an agent of the company. He, however, noted exceptions to certain postal orders previously promulgated, and "future regulations which, in the company's opinion, might be unjust or unfairly reduce its compensation for services." The circular, with these objections, was not received by the Department until July 24th, but the company, in the meantime, and without any express contract, continued to carry the mails and to furnish the three car lines. Payment therefor was made at the maximum rate allowed by the act of March 2, 1907 (34 Stat. at L. 1212, chap. 2513, U. S. Comp. Stat. Supp. 1911, p. 1148), which declared:

"Additional pay allowed for every line comprising a daily trip each way of railway postoffice cars shall be at a rate not exceeding \$25 per mile per annum for cars forty feet in length . . . \$32.50 per mile per annum for fifty-foot cars, and \$40 per mile per annum for cars fifty-five feet or more in length."

The reports and returns as to the amount of mail carried *over plaintiff's road [648 during the spring of 1907 indicated that the quantity of east-bound matter was less than that going west from Chicago to Kansas City. Accordingly the Department, on July 18, 1907, "authorized 'three half lines' R. P. O. cars 50 feet in length . . . to supersede three 'half lines' of such cars 60 feet in length over route 135,098, Chicago to Kansas City." As the distance between the two cities was about 450 miles this change would largely reduce the rate of pay, and the company at once objected, claiming in the lengthy correspondence and subsequent suit which followed, that the statute did not authorize "half car lines;" that the

order would require the company to furnish 60-foot cars in one direction and 50-foot cars on the return, thus involving an empty haul one way, or forcing the company to furnish 60-foot cars both ways, without corresponding or adequate compensation.

The Department, on the other hand, insisted that under the statute, regulations, and long-continued practice it had the right to establish "half lines;" that "no contract would be made with any railroad by which it could be excepted from the postal laws and regulations," and that compensation would only be made in accordance with the orders of the Department establishing the three half lines.

The warrant in settlement of the September quarter was made out on this basis. It was accepted by the Company, but under protest. In answer the Department again repeated the statement that any service performed by the company must be with the distinct understanding that payment was to be made in accordance with the orders for space, facilities, and car service required by the postal authorities. The plaintiff continued to protest and to furnish the three full lines. They were daily used by the Department for postal purposes, but payment was made only for half lines.

The plaintiff thereupon brought suit, under the Tucker Act [24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752], claiming that even though there was no express agreement, it was entitled, as under an implied contract, to recover the reasonable value of the three car lines authorized by law, furnished by the company, and actually used by the Postoffice Department. This contention should have been sustained but for the fact that neither party was bound to continue the indefinite relation begun July 1, 1907, and under which the rights and liabilities of each arose, from day to day, as the facilities were furnished by the one and used by the other. Whatever may be the rule between private parties where both are demanding performance, and each is insisting on different terms (Thompson v. Sanborn, 52 Mich. 141, 17 N. W. 730; Jenkins v. National Mut. Bldg. & L. Asso. 111 Ga. 734, 36 S. E. 945), no such question arises in a controversy like this between the railroad on the one hand and the postoffice on the other. For public policy requires that the mail should be carried subject to postal regulations, and that the Department, and not the railroad, should, in the absence of a contract, determine what service was needed and under what conditions it should be performed. The company, in carrying the

mails, was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the Postoffice.

The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate, not to exceed the statutory maximum. By virtue of that authority he could have made the same price for 60-foot cars as for 50-foot cars, and, as the greater includes the less, he could abolish full lines, or establish "half lines," and adjust the rates accordingly. Such had been the practice before the passage of the act of 1907, and there is nothing in its language indicating any intent to change the construction previously given Rev. Stat. § 4004, U. S. Comp. Stat. 1901, p. 2721.

The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. For Congress had not legislated so as to require compulsory service, at adequate compensation, to be judicially determined, or in a method provided by statute. And as the plaintiff's road between Chicago and Kansas City had not been aided by a land grant, it was, under existing law, not obliged to carry the mails when tendered, nor to supply R. P. O. cars when demanded. Eastern R. Co. v. United States, 129 U. S. 395, 396, 32 L. ed. 731, 732, 9 Sup. Ct. Rep. 320; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306. It may have been impracticable to furnish long cars one way and short ones the other. But there was in that fact no hardship imposed by law. The company could have protected itself against onerous terms or inadequate compensation by refusing to supply the facilities on the conditions named by the Department. But if, instead of availing itself of that right, it preferred to furnish 60-foot cars after having been informed that the Department only needed and would only pay for those 50 feet in length, the company cannot recover for more than the Department ordered; nor, under the statute, can it demand compensation for full lines, when the Postmaster General had established "half lines" consisting of cars of one length going and of another returning on the route between Chicago and Kansas City.

There was no error in dismissing the complaint, and the judgment is affirmed.

651] *THOMAS H. PICKFORD and John H. Walter, Appts.,
v.
HENRY M. TALBOTT.

(See S. C. Reporter's ed. 651-662.)

Injunction — against judgment — newly discovered evidence.

1. A court of equity will not restrain the enforcement of a judgment at law on a showing that by reason of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, the defeated party would probably have a better prospect of success on a retrial. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment.

[For other cases, see Injunction, I. 1, 2, in Digest Sup. Ct. 1908.]

NOTE.—On general equitable jurisdiction in regard to injunctions against judgments—see notes to *Jarrett v. Goodnow*, 32 L.R.A. 321, and *Davis v. Tileston*, 12 L. ed. U. S. 366.

On injunction against judgment for matters arising subsequently to its rendition—see note to *Little Rock & Ft. S. R. Co. v. Wells*, 30 L.R.A. 560.

On injunctions against judgments for defenses existing prior to their rendition—see note to *Norwegian Plow Co. v. Bollman*, 31 L.R.A. 747.

On loss of defenses by reason of negligence or unskilfulness of attorney as ground for enjoining judgment—see note to *Donovan v. Miller*, 9 L.R.A. (N.S.) 524.

Injunction against judgment for newly discovered evidence.

An injunction will be granted against a judgment at law on the ground of newly discovered evidence which is material, and which could not have been had on the trial at law by the use of diligence. *Billups v. Sears*, 5 Gratt. 31, 50 Am. Dec. 105; *Rust v. Ware*, 6 Gratt. 50, 52 Am. Dec. 100; *Winthrop v. Lane*, 3 Desauss. Eq. 310; *Venum v. Davis*, 35 Ill. 568.

An injunction will be granted, on the discovery after judgment that a partnership note sued upon was not one for which the defendant was liable, because not given by firm during the time of partnership, where complainant had used due diligence in making his defense, and obtained evidence since the trial that he was in no way responsible for its payment. *Venum v. Davis*, 35 Ill. 568.

In *Baltzell v. Randolph*, 9 Fla. 366, where a judgment was taken against complainant on a note made in the firm name long after he had left the firm, and he was unable to make the defense for the reason that the party who had executed the note was sick, and no information could be had because the clerk of the firm had left for parts unknown, and a continuance was prevented for the same reason, because it was not known what could be proved, and in-

Injunction — against judgment — newly discovered evidence.

2. The enforcement of a judgment for damages recovered in an action of libel will not be restrained in equity on the ground of newly discovered evidence as to the truth of the libel which not only does not conclusively establish that fact, but does not render it clear beyond a reasonable doubt that such evidence would produce a different verdict on a retrial.

[For other cases, see Injunction, I. 1, 2, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — establishing allegations — diligence.

3. Complainants urging newly discovered evidence as to the truth of a libel as a ground for enjoining the enforcement of a judgment for damages recovered in an action for the libel, in which justification was not pleaded, must prove that their failure

junction against an execution and proceedings on the judgment, was allowed. Complainant in this case had acted under a delusion, until a short time before the term of court at which the judgment was rendered, that his former partner would attend to the matter, and being then powerless to defend himself, withdrew his pleas and suffered judgment by default.

Injunctive relief will be granted where a corporation was in ignorance of its equitable title to lands recovered from it in ejectment, and had used diligence to ascertain the fact, and failed to discover the same until after the expiration of the time for a new trial. *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 507, 10 N. E. 29, 34.

And such relief will be granted on discovery after judgment of defects of title, where the judgment was obtained on purchase-money notes, and complainant had been deceived by false representations of the vendor. *Fitch v. Polke*, 7 Blackf. 564.

Injunctive relief will be granted on a discovery that the plaintiff had obtained a decree for a greater sum than he was entitled to, of which he had knowledge, and of which complainant was ignorant. *Basye v. Beard*, 12 B. Mon. 581.

A judgment in covenant obtained on a tender of "M. & N.'s" notes was enjoined where the notes were signed by N. and indorsed by M., and therefore not the notes of "M. and N.," and M. had become bankrupt, which was not known at the time of the judgment. *Armstrong v. Hickman*, 6 Munf. 287.

An injunction will be granted on the ground of fraud, where a note indorsed for accommodation, to be used in a particular manner, was given to another party, subject to equities, and the note was used in a different manner, and the fraud was not known at the time of judgment, as the complainant believed the note to have been properly used. *Hickerson v. Raiguel*, 2 Heisk. 329.

Injunctive relief will be granted for new material evidence consisting of the confessions of a party, deliberately and volun-

to discover such evidence and plead it by way of defense was not attributable to their own want of diligence, where the answer calls for strict proof of the averments of the bill that they made diligent but unsuccessful efforts to discover such evidence both before and after the filing of their plea.

[For other cases, see Evidence, II. b, in Digest Sup. Ct. 1908.]

Injunction — against judgment — new defense.

4. A defense in an action at law is not to be deemed newly discovered or lost by accident or mistake, for the purpose of invoking equitable relief against the enforcement of the judgment, if such defense was or should have been within the knowledge of the party when called upon for his defense in the action.

[For other cases, see Injunction, I. 1, 2, in Digest Sup. Ct. 1908.]

tarily made, repeated at different times and to different persons, and where the evidence at the trial on which the judgment was obtained was of the same character, consisting principally of declarations. *Colyer v. Langford*, 1 A. K. Marsh. 237.

New evidence discovered after judgment—such as that a surety was released by an extension—will entitle to relief against the same where it could not have been discovered by due diligence. *Cox v. Mobile & G. R. Co.* 44 Ala. 611.

An affidavit of a witness that he had given testimony erroneously by mistake will authorize an injunction on the ground of accident, against proceedings on a judgment, where a sudden and unlooked-for adjournment of the court prevented a motion for a new trial. *Tarver v. McKay*, 15 Ga. 550.

A judgment will be enjoined on the discovery of evidence showing payment, where such evidence could not have been discovered by the use of diligence. *Winehester v. Jackson*, 3 Hayw. (Tenn.) 305; *Hubbard v. Hobson*, Breese (Ill.) 147; *Harvey v. Seashol*, 4 W. Va. 115; *Wales v. Bank of Michigan*, Harr. Ch. (Mich.) 308; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *McGehee v. Gold*, 68 Ill. 215.

This is true where complainant was only surety (*McGehee v. Gold*, 68 Ill. 215); or an administrator (*Terrill v. Southall*, 3 Bibb, 458).

And where the evidence of payment through an agent was destroyed by fire, and could not be discovered with reasonable diligence until after the judgment at law, an injunction against proceedings on the judgment should be granted. *Brown v. Luehrs*, 79 Ill. 575.

So, in *Price v. Fuqua*, 4 Munf. 68, where an executor found evidence of a receipt against the debt after the judgment, and had failed to make a defense of the statute of limitations under the mistake of counsel, and there was misconduct of the jury, an injunction was granted.

And in *Gainsborough v. Gifford*, 2 P. Wms. 424, it was said that if, after a judgment,

Injunction — against judgment — new defense.

5. Newly discovered evidence of the truth of a libel will not justify equitable relief against the enforcement of a judgment for damages recovered in the libel action, on the theory that the failure to plead justification was through accident or mistake, where that defense was considered by the defendants and their counsel and deliberately and advisedly rejected, first, because it could not be sustained, and second, because a failure to sustain it would probably result in increasing the damages.

[For other cases, see Injunction, I. 1, 2, in Digest Sup. Ct. 1908.]

[No. 512.]

Argued April 29, 1912. Decided June 7, 1912.

ment, a receipt is found under the plaintiff's own hand for the debt, equity will grant relief.

The discovery after judgment that the plaintiff knew that a blank note was filed in with too large an amount, and that the bank suing as usee had only a nominal interest, but the suit was in pursuance of a conspiracy to cut off defenses, will authorize an injunction against proceedings on the judgment, where the same could not have been discovered by the use of diligence. *Goad v. Hart*, 8 Smedes & M. 787.

And a judgment in favor of bank B on a note payable to bank A will be enjoined where it is discovered after judgment that bank B did not own the note or authorize the suit, and that the same was a fraudulent transaction to prevent a set-off against bank A in favor of the defendant. *Stovall v. Northern Bank*, 5 Smedes & M. 17.

The discovery of a lost agreement after judgment at law by which the defendant can establish the defense of fraud in the consideration, which was not made at law, justifies injunctive relief against the judgment, where complainant has not been negligent, and alleges that the indorsee of a note in whose favor the judgment was rendered took it with notice of fraud. *Vatthir v. Zane*, 6 Gratt. 246.

And newly discovered evidence of the existence of a contract in the possession of adverse parties, which was concealed by them during the trial, and which would have changed the result, will authorize an injunction against the judgment, where the complainant has not been guilty of negligence, although such facts might possibly have been elicited on cross-examination. *Cairo & F. R. Co. v. Titus*, 28 N. J. Eq. 269, reversing 27 N. J. Eq. 102.

So, where defense was not made at law because it was believed that the bill upon which suit was brought was a genuine one, and after time for a new trial had passed it was discovered that it was a forged one, relief was granted by injunction against the judgment. *Ferrell v. Allen*, 5 W. Va. 43.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the enforcement of a judgment for damages recovered in an action for libel, and remanded the cause with directions to dismiss the bill. Affirmed.

See same case below, 36 App. D. C. 289.

The facts are stated in the opinion.

Mr. Henry E. Davis argued the cause, and, with Messrs. Samuel Maddox and H. Prescott Gatley, filed a brief for appellants:

Where a defendant is prevented by fraud or accident, unminged with any fault or negligence in himself, from availing himself

of a proper defense, he will be justified in applying to a court of chancery for relief.

Marine Ins. Co. v. Hodgson, 7 Cranch, 336, 3 L. ed. 363; *Williams v. Lee*, 3 Atk. 223; *Ocean Ins. Co. v. Fields*, 2 Story, 72, Fed. Cas. No. 10,406; *Gardiner v. Hardey*, 12 Gill. & J. 365; *Fitch v. Polke*, 7 Blackf. 564; *Reed v. Harvey*, 23 Ark. 44; *Iglehart v. Lee*, 4 Md. Ch. 514; *Taylor v. Nashville & C. R. Co.* 86 Tenn. 228, 6 S. W. 393; *Powers v. Butler*, 4 N. J. Eq. 471; *Fidelity Mut. L. Ins. Co. v. Clark*, 203 U. S. 64, 51 L. ed. 91, 27 Sup. Ct. Rep. 19.

As distinguished from fraud, accident, within the meaning of equity, is a wholly different thing, and is not easily to be defined; largely for the reason that, as in the case of fraud in general, equity hesi-

Discovery of new material evidence after a sentence in admiralty court will authorize an injunction against the judgment, when, at the time of trial, such evidence could not have been received according to the practice in that court, and the judgment was unjust. *Jarvis v. Chandler*, 1 Turn. & R. 319.

In *Texas & P. R. Co. v. Smith*, 91 Ark. 362, 121 S. W. 282, the court, in denying a motion for a new trial, based upon newly discovered evidence which was not relevant to any issue in the original case, and would therefore not have been admissible at the trial without an amendment of the pleadings, said that the defendant was not without remedy, but had his remedy in equity.

The cases all being very insistent upon the exercise of due diligence to discover the evidence in time for use at the trial, and usually attaching the other conditions that the judgment attacked be wrong or unjust, and that the newly discovered evidence be such as will change the result, it naturally follows that where some or all of these conditions are not fulfilled, relief will be refused.

An injunction will not be granted for newly discovered evidence unless it is shown that the judgment is wrong, that the evidence has been discovered since the trial, that diligence has been used, and that such new evidence will make a different result. *Holmes v. Stateler*, 57 Ill. 209.

In order to enjoin a judgment on the ground of new evidence, the evidence should be stated, must be material, must be such as would change the result, and complainant must have been diligent. *Smith v. McLain*, 11 W. Va. 654; *Burnley v. Rice*, 21 Tex. 171; *Cadwalader v. Atchison*, 1 Mo. 659.

Newly discovered evidence will not furnish ground for enjoining the enforcement of a judgment in the absence of fraud, accident, or mistake, or other adventitious circumstances preventing the introduction of such evidence at the trial. *Farmers' & S. Leaf Tobacco Warehouse Co. v. Pride-more*, 55 W. Va. 451, 47 S. E. 258.

Newly discovered evidence that would

not have changed the result is not ground for enjoining the judgment. *Graham v. Roberts*, 1 Head, 56; *Turley v. Taylor*, 6 Baxt. 376.

The collection of a judgment on a promissory note should not be enjoined for newly discovered evidence of payment which is insufficient to sustain that plea. *Ludington v. Handley*, 7 W. Va. 269.

Newly discovered evidence which is quite generally impeaching, cumulative, and inconclusive in character, is insufficient to justify injunctive relief against a judgment entered after a trial at law, and in the regular course of judicial procedure. *Sargent Co. v. Ives*, 156 Ill. App. 446.

When additional evidence was discovered and could not be used in a court at law by obtaining a new trial, an injunction was refused, where it was not shown that such evidence was material, relevant, and not cumulative. *Hannon v. Maxwell*, 31 N. J. Eq. 318.

In *Bloss v. Hull*, 27 W. Va. 503, it was said that an injunction will not be granted for newly discovered evidence, when it goes merely to impeach the testimony of a witness, to let in cumulative evidence as to matter which was principally controverted at the former trial; but if the newly discovered evidence is sufficient utterly to destroy the former testimony by showing it was false, or founded on perjury, then a new trial will be granted.

In order to obtain an injunction against a judgment on the ground of newly discovered evidence, the complainant must show that he has not been guilty of laches in making the discovery; that the evidence is material to the issue; that it is not merely cumulative, or in addition to other evidence of like import, heard at the trial. *Harnsbarger v. Kinney*, 13 Gratt. 511; *Akers v. Akers*, 83 Va. 633, 8 S. E. 260; *Forsythe v. McCreight*, 10 Rich. Eq. 308.

Notes and policies against plaintiff, found among the papers of a debtor after a judgment rendered against his administrator, will not authorize an injunction against the judgment, where such debts were paid by decedent out of money in his

tates to hamper itself by a definition of a head of its jurisdiction so varying, elastic, and salutary.

Pom. Eq. Jur. § 836.

Every attempt to define "accident" in its judicial acceptation, even in modern times, has failed.

1 Am. & Eng. Enc. Law, 2d ed. 277, note 2, p. 278 and notes.

A good definition is indicated in the statement that the word ordinarily imports something outside of a party's own control, or, at least, something which a reasonably prudent man would not be expected to guard against or to provide for.

Pickering v. Cassidy, 93 Me. 139, 44 Atl. 683.

hands belonging to plaintiff, and not with his own money. Segond v. Remy, 3 La. Ann. 126.

And the discovery of proposals for marriage settlement after a decree will not authorize enjoining the decree on the ground of reformation of settlement on account of mistake, where complainant is not entitled to such relief on the evidence. Breadalbane v. Chandos, 2 Myl. & C. 711, 7 L. J. Ch. N. S. 28, 4 Clark & F. 43.

Newly discovered evidence is not of itself sufficient to enjoin a judgment and execution sale, where such matters were in issue and determined by the trial court and have become *res judicata*. Gusman v. DePoret, 33 La. Ann. 333.

A bill of complaint for an injunction against a judgment on the ground of newly discovered evidence must set forth the evidence in the bill, so that its materiality may be seen. Miller v. McGuire, Morris (Iowa) 150.

And such bill must be supported by the affidavits of the witnesses and the complainant must have used diligence. Fuller v. Little 69 Ill. 229.

To justify enjoining the collection of a judgment for newly discovered evidence it must appear to the court that all proper diligence has been employed by the party seeking injunctive relief to discover or obtain the evidence upon which he now relies. Ludington v. Handley, 7 W. Va. 269.

And an injunction will not be granted if the newly discovered evidence is not material, or complainant has not exercised diligence. Ibid.; Titcomb v. Potter, 11 Me. 218; Holmes v. Stater, 57 Ill. 209; Hill v. Harris, 42 Ga. 412; Peace v. Nailing, 16 N. C. (1 Dev. Eq.) 289; Cunningham v. Buchanan, 10 Grant, Ch. (U. C.) 523; Levan v. Patton, 2 Heisk. 108; Lebanon Mut. Ins. Co. v. Erb, 16 W. N. C. 113.

And an injunction will not be granted where complainant is guilty of negligence, and does not show that the evidence could not have been discovered by the use of diligence. Greenfield v. Frierson, 7 Heisk. 633; Fuller v. Little, 69 Ill. 229; Kirby v. Pascault, 53 Md. 531; Munn v. Worrall, 16 56 L. ed.

Another definition is that, though not necessarily synonymous with surprise when used as a ground of a new trial, accident has substantially the same meaning in legal practice, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or neglect of his own, which ordinary prudence could not have guarded against.

McGuire v. Drew, 83 Cal. 229, 23 Pac. 312; Zimmerer v. Fremont Nat. Bank, 59 Neb. 661, 81 N. W. 849.

Mr. John Ridout argued the cause and filed a brief for appellee:

As matter of law and under settled legal principles the court below ought not to have

Barb. 221; Glover v. Hedges, 1 N. J. Eq. 113; Faulkner v. Harwood, 6 Rand. (Va.) 125; Hevener v. McClung, 22 W. Va. 81; De Lima v. Glassell, 4 Hen. & M. 369; Cantev v. Blair, 1 Rich. Eq. 41.

The same was held on the discovery of evidence showing payment of the debt (Semple v. McGatagan, 10 Smedes & M. 98; Slack v. Wood, 9 Gratt. 40; Floyd v. Jayne, 6 Johns. Ch. 479); or showing that the consideration was contrary to public policy (Green v. Robinson, 5 How. [Miss.] 80).

A judgment for medical services should not be enjoined for newly discovered evidence consisting of the opinions of physicians to the effect that the plaintiff was entirely mistaken in his diagnosis of the disease from which the defendant was suffering, without showing any reasons why such physicians were not consulted at an earlier period, since an ordinary degree of diligence would have brought such opinions to light before the trial quite as well as after. Lee v. Hooker, 7 Smedes & M. 601.

A judgment in ejectment, founded upon a deed executed pursuant to a sale and foreclosure, will not be enjoined because of the subsequent discovery that the sale was made without the requisite publication of notice, since, even if this could be regarded as new matter, the exercise of anything like a reasonable degree of diligence would have accomplished the discovery in time for the original trial. Peyton v. Kruger, 77 Ind. 486. The court said: The appellant and his counsel had no right to rest upon a presumption that the sale was regular. The appellee's action depended entirely on the regularity of that sale, and the bringing of the action put or ought to have put the plaintiff on immediate inquiry into every possible ground for challenging the validity of the conveyance; and the failure to make the inquiry, whether attributable to himself or another, can be characterized only as culpable carelessness. Equity affords no relief in such cases.

The failure to use due diligence was held fatal in Leggett v. Morris, 6 Smedes & M. 723, where the note sued on was executed by complainant's partner after a settle-

enjoined the collection of a judgment approved by three courts.

Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; *New York v. Brady*, 115 N. Y. 599, 22 N. E. 237.

Mr. Justice Pitney delivered the opinion of the court:

This was an equity action, brought by the appellants against the appellee and others, in the supreme court of the District of Columbia, to obtain an injunction restraining the enforcement of a judgment theretofore recovered by the appellee against the appellants in an action for libel. That action was on the law side of the supreme court of the District, and resulted in a verdict and judgment for \$8,500 damages, which on review was affirmed by the court of appeals (28 App. D. C. 498), and by this court (211 U. S. 199, 53 L. ed. 146, 29 Sup. Ct. Rep. 75).

The present action was commenced after the final affirmance of the judgment at law. Upon the filing of the bill of complaint herein, with accompanying exhibits, the court made a temporary restraining order. This was continued until the final hearing, and that hearing resulted in a decree granting a perpetual injunction against the enforcement of the judgment. The defendants in the equity action, other than the present appellee, were joined for reasons not now material. He alone appealed from the final decree to the court of appeals of the District and dissolution, and fraudulently antedated.

An injunction will not be allowed against a judgment in trespass, obtained by a fraudulent grantee, for levying upon his property, where the fraud in his obtaining title had been tried at law, and there is no showing but what the newly discovered evidence could have been obtained by due diligence. *Bishop v. Duncan*, 3 Dana, 15.

Where a party has reason to expect that evidence on behalf of the issue will be offered, he cannot obtain an injunction on the ground of surprise, and if he was not ready for a trial, or was surprised, he should have moved for a new trial; and the fact that he took an appeal, and was disappointed that evidence was not permitted on the appeal, will not justify an injunction, as ignorance or mistake of law will not excuse a party in a case like this, nor tend to show either fraud or surprise on the testimony which had already been heard. *Turley v. Taylor*, 6 Baxt. 376.

An injunction will not be granted against a judgment on the ground of newly discovered evidence, or of a defense of which

trict, which reversed the decree, and ordered the cause to be remanded to the court below, with direction to dismiss the bill of complaint (36 App. D. C. 289). From the decree of reversal Pickford and Walter have appealed to this court, thus presenting for our decision the question whether, upon the pleadings and proofs, they are entitled to an injunction restraining the enforcement of Talbott's judgment against them.

*The equitable jurisdiction is invoked upon the ground that after the conclusion of the litigation at law the appellants discovered certain evidence which, if known at the time, might and would have enabled them to make a different defense in the court of law, and which it is alleged would assuredly have led to a different result there; it being insisted that the appellants were not at fault in failing to discover the evidence referred to.

A brief history of the controversy between the parties is essential to an understanding of the questions presented.

In the month of March, 1901, while the appellee, Talbott, was state's attorney for Montgomery county, Maryland, an indictment was returned by the grand jury of that county charging Pickford and Walter, the appellants, and two others named in the indictment, with having unlawfully, wilfully, and maliciously set fire to and burned a certain untenanted dwelling house, the property of said Pickford and Walter. A dwelling house owned by them, situate in Montgomery county, had in fact been destroyed by fire in the latter part of the year 1897, and the fire insurance companies,

complainant was ignorant until the judgment was rendered, unless he shows that, by the exercise of ordinary diligence, he could not have discovered such evidence or defense, or that he was prevented from obtaining the same by fraud, accident, or the act of the opposite party, unmixed with laches or negligence on his part. *Bloss v. Hull*, 27 W. Va. 503.

Failure to show that relief could not have been obtained at law will prevent an injunction. *Hintarger v. Sumbargo*, 54 Iowa, 604, 7 N. W. 92; *Hamel v. Grimm*, 10 Abb. Pr. 150.

And an injunction will not be granted on newly discovered evidence where the facts on which the complaint is founded, although discovered since the trial, might have been established at the trial upon cross-examination. *Taylor v. Sheppard*, 1 Younge & C. Exch. 271.

The enforcement of a judgment at law will not be enjoined for newly discovered evidence which was discovered in time to have been used upon a motion for a new trial in the legal action. *Snider v. Rinehart*, 20 Colo. 448, 39 Pac. 408.

after some demur, had paid to the owners sums aggregating \$22,500. It is said to have been the purpose of the indictment to attribute to the defendants named therein an attempt to defraud the insurance companies. Three of those defendants (including Walter, but not Pickford) being arrested in the District of Columbia, where they resided, sued out writs of habeas corpus in the District, and were released on the ground that the indictment did not set forth any crime. Pickford surrendered himself in Montgomery county, and gave bail to answer the indictment, and his trial was set down for a day in the following November before the circuit court. He duly appeared, but Talbott, as state's attorney, asked for a postponement on the ground that he was not ready for trial. The court strongly intimated that there ought to be no postponement, and upon this intimation 654] (and *perhaps partly because of the question that had been raised about the sufficiency of the indictment) Talbott entered a *nolle prosequi* as to Pickford. Later, he did the same with respect to Walter.

Thereafter, and in the month of December, 1901, Pickford and Walter procured to be published in the columns of a newspaper in Washington an article concerning Talbott which was the ground of his action against them for libel. A copy of the article was included in the declaration in that suit, and was attached to and made a part of the bill of complaint herein. Through some inadvertence it was omitted in the printing of the record, but upon the argument we were, by consent of counsel, referred for information as to its contents to the record that was here on the former occasion (211 U. S. 199, 53 L. ed. 146, 29 Sup. Ct. Rep. 75). The article purported to show "the true inwardness of the criminal scheme that culminated in this nefarious indictment," and declared that "we shall state the facts as we have learned them after a thorough investigation." It charged Talbott, as state's attorney, with participation in an alleged conspiracy to force Pickford and Walter, by means of an unfounded indictment, to repay to the insurance companies the moneys that had been paid by them to Pickford and Walter for the fire loss.

The libel suit was commenced in the year 1902. The final affirmance of the judgment therein was on November 30, 1908. The present action was begun in the following month of January.

The bill of complaint avers that at the time of the filing of the declaration in the libel suit the complainants believed it to be true (the ground of that belief is not distinctly averred) that Talbott had caused

the indictment to be procured for the purpose of obtaining from the insurance companies certain large sums of money, and had thus used his public office for his personal gain; that they so informed their counsel before the filing of their pleas, *but[655 were advised by counsel that should they attempt to justify the publication of the article by pleading the truth thereof, and fail to make good such plea by evidence to the satisfaction of the court and jury, the attempt at justification would be held to be a repetition and republication of the libel, and would aggravate the damages to be recovered in the action; that they were, on the other hand, advised by their counsel that if they should plead "not guilty" to the declaration, they would probably be excluded from endeavoring to prove the truth of the alleged libel; and that the complainants, being unable, after due diligence, to procure and submit to their counsel evidence which, in the opinion of counsel, might properly and safely be offered on the trial of the action in justification of the alleged libel and in proof of the truth thereof, were compelled to confine, and did confine, their defense to the general issue, and were thereby deprived of the opportunity to offer evidence tending to prove its truth; but that upon the trial they were permitted to introduce, and did introduce (not in justification of the alleged libel nor to prove the truth thereof, but to show absence of malice on their part, and thus to mitigate the damages), sundry matters and things which are set forth at great length in the bill, all of which, it is averred, were known to the complainants at and before the composition and publication of the libel.

So far as appears, the matters thus recited furnished the sole basis for their alleged belief that Talbott had prostituted his office in the manner alleged in the newspaper article. Without repeating them here, it is enough to say that if those matters did in fact constitute their whole case against Talbott, their counsel was probably correct in his judgment that a plea of justification, supported by such evidence alone, would be deemed a republication of the libel and a ground for allowing increased damages against them.

The bill of complaint further avers that before pleading *to the declaration the[656 appellants and their counsel diligently inquired of every person believed to have any possible knowledge in the premises, with the view to obtaining and producing testimony tending to support a plea of justification and to prove the truth of the matter alleged as libelous, but without avail.

It also alleges that the like diligent inquiries were continued after the trial of the

cause down to the filing of the bill, but wholly without result until the 29th day of December, 1908, when, in an accidental meeting between one of the counsel for the appellants and Hon. James B. Henderson, one of the judges of the circuit court for Montgomery county, who held that office at the time of the indictment referred to, Judge Henderson informed counsel of a conversation said to have taken place between him and Talbott while the indictment was pending, in which conversation Talbott stated to the judge in substance that he was keeping the indictment alive in order to assist the insurance companies in an effort to recover from Pickford and Walter the moneys that had been paid to them for the fire loss; and that he, Talbott, or his firm, would get a large fee out of the business.

The bill rests upon the prayer for relief against the judgment at law solely upon the ground that the evidence of Judge Henderson, taken in connection with the other matters and things that were given in evidence on the trial of the libel suit as mentioned, would have caused the jury to render a verdict in favor of the defendants, Pickford and Walter.

Talbott answered the bill, fully and specifically denying all allegations thereof that attributed improper conduct to him, and expressly denying the alleged conversation between him and Judge Henderson, and denying that he had kept the indictment alive for personal gain, and every other improper inference deducible from the alleged conversation. The answer called upon complainants to make ⁶⁵⁷strict proof of the averments of the bill respecting the conferences between complainants and their counsel and respecting what was done by them about the preparation of their defense in the action at law, and denied that if the truth of the libelous matter had been pleaded and the evidence of Judge Henderson introduced the result of the trial would have been different; averring that, if the pleadings had been such as to admit his testimony, the door would have been opened for the admission of other evidence unfavorable to the complainants.

After the filing of this answer the complainants, by leave of the court, amended and supplemented their original bill of complaint by the addition of a considerable amount of new matter. Included in it is an averment that the indictment of Pickford and Walter, as above mentioned, was in fact caused by and through a conspiracy between Talbott and others, with the object of extorting money from the complainants, and that everything done by Talbott in reference to the indictment was done in pursuance of that conspiracy. To this, by a

further answer, Talbott entered an unequivocal denial.

Upon these pleadings, and upon proofs submitted by the respective parties in support thereof, the cause was brought to final hearing, with the result already mentioned.

The principles upon which the decision of the case must turn are entirely familiar. In order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment.

*As Chief Justice Marshall said:[⁶⁵⁸ "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. ed. 362, 363. Or, as Mr. Justice Curtis expressed it, in *Hendrickson v. Hinckley*, 17 How. 443, 445, 15 L. ed. 123, 124: "A court of equity does not interfere with the judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

One who seeks relief in equity against a judgment at law on the ground that through accident or mistake alone, unmixed with fraud, he has lost the benefit of a defense that would have been available in the court of law, must show entire freedom from fault or neglect on the part of himself and his agents, and must also make it manifest that the judgment against him is wrong on the merits, that he ought in justice to prevail, and that upon a retrial, with the aid of the newly discovered matter of fact or of evidence, it is reasonably certain that he will prevail. *Pom. Eq. Jur.* 3d ed. §§ 1364, 1365, and notes.

The trial court rested its decision adverse to Talbott upon the theory that, if it were true that he had misused his office as state's attorney, and, because of spite or for any other selfish or personal reason, had wrongfully procured an unjust indictment against Pickford and Walter, *he ought not, in equity and good conscience, to be permitted to collect damages against them for publishing his misconduct, because he would thereby be taking advantage of his own wrong. The court recognized that this theory was applicable only if the statements made in the libelous article were true; and, accepting Judge Henderson's testimony as conclusive upon that issue, the court held it to be unconscionable for Talbott to enforce his judgment. We find it unnecessary to test the correctness of the theory, because, like the court of appeals, we differ with the trial court upon the question of fact. Under the pleadings, the burden was upon the complainants (now appellants) to prove the official misconduct of Talbott, and this they failed to prove.

The court of appeals, correctly considering that most of the evidence was wholly irrelevant to the issues, and that substantially the only material evidence in support of the bill was that of Judge Henderson, and reviewing his testimony *in extenso*, came to the conclusion that it not only did not conclusively establish the truth of the matters alleged in the libelous article, but did not render it clear beyond reasonable doubt that it would produce a verdict favorable to the complainants if a new trial of the libel suit should be had. Attention was called to the fact that Judge Henderson testified to a conversation had with Talbott about nine years before, of which he had no memorandum to refresh his memory; that his examination showed his memory to be not entirely reliable; that Talbott expressly denied making the incriminatory statements attributed to him; that it was improbable that a lawyer of his standing, holding the important office of state's attorney, would, without apparent motive, deliberately make an admission to anyone, much less to the judge of his circuit, that he was using the powers and opportunities of his office for private gain; and that it was improbable that such an admission, if 660] make under such circumstances, *would go unrebuked at the time. With this view we agree.

All question of fraud in the procurement of the judgment at law is thus eliminated. Indeed, counsel for appellants disavow any reliance upon fraud as a ground of relief. To quote from the brief: "The bill makes no averment whatever as to any fraud on the part of the appellee, plaintiff in the

lawsuit, in procuring the judgment in question; the ground on which relief is prayed is accident, as distinguished from fraud."

Next, we agree with the court of appeals that, assuming the newly discovered evidence elicited from Judge Henderson would otherwise be sufficient ground for restraining the enforcement of the judgment, it was incumbent upon the appellants under the pleadings in the present action to prove that their failure to discover evidence of the truth of the libel and plead the same by way of defense in the action at law was not attributable to their own want of diligence. The bill alleges that they made diligent but unsuccessful efforts to discover such evidence, both before and after the filing of their plea. The answer calls for strict proof of this. But the averment is left entirely unsupported by the proofs in the case. Neither Pickford nor Walter nor their counsel in the libel suit gave any evidence tending to show any effort, diligent or otherwise, to discover evidence of the truth of the libel.

We do not hold them negligent merely because of not having sooner discovered that Judge Henderson was available as a witness. He himself testified to the effect that, because of the character of the communication, he was careful not to reveal what was said by Mr. Talbott to him until after the conclusion of the libel suit. But, assuming that what was charged against Mr. Talbott in the newspaper article was true, it is not to be assumed that diligent efforts would have discovered no other evidence of its truth. All of Talbott's dealings with the insurance *companies[661 and with the other persons concerned in his alleged misconduct were within the range of investigation, had diligence been exercised.

Again, one of the peculiar features presented by this case is the following: Appellants, coming into equity for relief on the basis of Judge Henderson's evidence, rely upon it not as newly discovered evidence alone, but as evidence of a newly discovered fact. Merely as evidence it would not have been admissible on the former trial, justification not having been pleaded. It is upon the fact alleged to have been disclosed by Judge Henderson—the fact being Mr. Talbott's alleged misconduct, and not merely his alleged admission of it—that appellants are relying as a newly discovered defense to the action for libel. Now, the settled rule in equity is that a defense is not to be deemed "newly discovered," or as lost by "accident or mistake," if it was or ought to have been within the knowledge of the party when he was called upon for his defense in the action at law. As Lord Hardwicke said: "As to reliev-

ing against verdicts, for being contrary to equity, those cases are where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, *and the defendant was ignorant of it at the trial.*" *Williams v. Lee*, 3 Atk. 223, 224. Chancellor Kent said: "The general rule is, that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense." *Lansing v. Eddy*, 1 Johns. Ch. 49, 51. See also *Taylor v. Nashville & C. R. Co.* 86 Tenn. 228, 6 S. W. 393, and cases cited.

But how can the appellants be heard to say that when making their defense at law they were ignorant of the truth of the matters charged against Talbott in the newspaper article, when they themselves were the authors of those charges? Not only do 662] the verdict and judgment in *the libel suit legally establish their responsibility for the published accusation, but such responsibility is tacitly admitted in the bill of complaint herein, and there is nothing to throw doubt upon it.

Upon the whole case, therefore, it cannot be said that appellants omitted to plead justification in the libel suit because of any "accident" or "mistake" within the meaning of the equitable rule. That defense was considered by them and their counsel and deliberately and advisedly rejected because (a) it could not be sustained, and (b) a failure to sustain it would probably embarrass them in their defense under the general issue; or rather, would render it probable that in the anticipated event of the plaintiff prevailing over them on the general issue, increased damages would be awarded against them because of the reiteration of the libel in a plea of justification. And if, when called upon to make defense in the libel suit, they had no sufficient evidence at hand to maintain the truth of the published matter, this must on the present record be attributed to one or the other of two causes. One is, that the published matter was in fact untrue; the other is, that they did not use proper diligence to discover evidence of its truth. Either explanation leaves them without claim to relief in this action.

The question whether appellants, because of having originally made a public accusation of malfeasance in office against the appellee without having evidence of the truth of the accusation sufficient even to warrant prudent counsel in making an issue of it in a libel suit are barred from relief in equity

under the doctrine of "clean hands," it is unnecessary to consider.

It seems to us that the case of the appellants is without merit, and the decree under review will be affirmed.

*EX PARTE CHARLEY WEBB, Pe-[663
titioner.

(See S. C. Reporter's ed. 663-691.)

Habeas corpus — scope of review — sufficiency of indictment.

1. Whether the offense is sufficiently alleged in the indictment is a question which is not a proper subject-matter for inquiry on habeas corpus.

[For other cases, see *Habeas Corpus*, II. c, in Digest Sup. Ct. 1908.]

Indians — Federal regulation — implied repeal.

2. An intention to repeal the existing Federal laws and regulations respecting the Indians cannot be gathered from the proviso in the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), § 1, reserving to the government of the United States the authority to make laws and regulations in the future respecting such Indians.

[For other cases, see *Indians*, II.; Statutes, III. b, in Digest Sup. Ct. 1908.]

Indians — Federal regulation — admission of state.

3. The reservation in the Oklahoma enabling act of June 16, 1906, § 1, of the authority of Congress to legislate in the future respecting the Indians residing within the new state, is within the constitutional power of Congress to regulate commerce with the Indian tribes.

[For other cases, see *Indians*, II.; State, XI., in Digest Sup. Ct. 1908.]

Indians — Federal regulation — intoxicating liquors — implied repeal — admission of state.

4. The scope of any repeal of the prohibitions of the act of March 1, 1895 (28 Stat. at L. 693, chap. 145), § 8, against the manufacture and sale of intoxicating liquors in the Indian territory, or the bringing of such liquors into such territory, ef-

NOTE.—On questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L.R.A. 373; *Bion's Appeal*, 11 L.R.A. 694; *Glass v. The Betsy*, 1 L. ed. U. S. 489; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; *Oteiza y Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

On repeal of statutes by implication—see notes to *State v. Massey*, 4 L.R.A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. Henderson*, 20 L. ed. U. S. 235.

On the power of Congress over the Indians—see note to *Worcester v. Georgia*, 8 L. ed. U. S. 484.

fectured by implication from the provisions of the Oklahoma enabling act of June 16, 1906, which, in addition to a requirement that the state constitution shall prohibit the manufacture and sale of intoxicating liquors in that part of the proposed state known as the Indian territory, and their shipments from other parts of the state into such protected territory, with a proviso for the establishment of state agencies for the sale of liquors for certain limited purposes specified, contains a reservation to the government of the United States of authority to make laws and regulations in the future respecting the Indians, and declares that the laws of the United States not locally inapplicable shall have the same force and effect within the state as elsewhere within the United States,—must be limited to the extent that the two acts cover the same field, thus leaving in full force so much of the prohibitions of the earlier act as relates to the carriage of such liquors from without the state of Oklahoma into that part of it which was the Indian territory, except liquors brought in by the state for the use of the state agencies.

[For other cases, see *Indians*, II.; *State*, XI.; *Statutes*, III. b, in *Digest Sup. Ct. 1908*.]

Indians — congressional control — intoxicating liquors — admission of state.

5. Congress, in the exercise of its power to regulate commerce between the states and with the Indian tribes situate within the limits of a state, may so legislate, when creating a new state out of territory inhabited by Indian tribes, into which territory the introduction of intoxicating liquors is, by existing laws and treaties, prohibited, as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition. [For other cases, see *Indians*, II.; *State*, XI., in *Digest Sup. Ct. 1908*.]

[No. 11, Original.]

Argued May 13, 1912. Decided June 10, 1912.

ORIGINAL APPLICATION for Habeas Corpus and Certiorari to inquire into a detention under a bench warrant issued upon an indictment charging the petitioner with bringing intoxicating liquors into that part of the state of Oklahoma formerly known as the Indian territory. Denied.

Statement of the Case.

This is an original application for a writ **665**]of habeas corpus *to inquire into the arrest and detention of the petitioner, who is held in custody by the United States marshal for the eastern district of Oklahoma, under a *capias* or bench warrant issued out of the United States district court, upon

an indictment of which the following is a copy:

United States of America,

Eastern District of Oklahoma, ss:

In the District Court of the United States in and for the Eastern District aforesaid, at the March Term thereof, A. D. 1912, at Vinita, Oklahoma.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid on their oath present, that Otis Tittle and Charley Webb, and each of them, on the 23d day of January, in the year 1912, in the said division of said district, and within the jurisdiction of said court in Craig county, in the state of Oklahoma, the same then and there being and constituting a portion of the Indian country of the said United States, did at the time and place aforesaid unlawfully, knowingly, wilfully, and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, 17 gallons of spirituous, ardent, and intoxicating liquor, to wit: alcohol, which said alcohol was by the said Otis Tittle and Charley Webb and each of them so introduced and carried into that portion of said eastern district of Oklahoma, so being then and there Indian country, as above set forth and described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Petitioner also applies for a writ of certiorari to review the action of the district court in refusing, on habeas corpus, to discharge him from custody under the bench warrant.

For present purposes it is admitted that petitioner is a *white man, not of In-[**666** dian blood; that the intoxicating liquors described in the indictment were shipped on his order from the city of Joplin, in the state of Missouri, by way of a railway that is a common carrier of interstate shipments, consigned to petitioner at the city of Vinita, in the state of Oklahoma; that the same reached the latter city over said railway line in the course of ordinary transportation at the time of the alleged offense set forth in the indictment, to wit, January 23, 1912; that said intoxicating liquors were delivered by the transportation company to the petitioner within the city of Vinita, and he received them upon a public street and highway, and not upon restricted land, for the purpose and with the intent of carrying and transporting the liquors along the streets and highways to another point within the same city, and

that while he was in the act of so receiving the same he was arrested. That the city of Vinita is situate in Craig county, Oklahoma, which county constitutes a part of what was formerly the Cherokee Nation; that all the lands of the Cherokee Nation have been either allotted to individual citizens of the Cherokee Tribe under the terms of the Cherokee Agreement and the several acts of Congress providing for the allotment of said lands, or sold by the United States for the benefit of the citizens of the Cherokee Nation, either as town sites or otherwise, under the authority of the several acts of Congress providing therefor; that the city of Vinita, including the place where the intoxicating liquor was delivered to and received by the petitioner, is a part of the original town site of Vinita, Indian territory; and that the status of the lands and of the enrolled members of the Cherokee Tribe of Indians are such as are fixed by law.

The petitioner contends that the district court is without jurisdiction, because there is no existing law under which the offense alleged against him is punishable in the Federal courts. He claims that he is obliged to resort to this court for relief because the United States circuit court of appeals for the eighth circuit has decided the questions involved, adversely to his contention, in the case of *United States Exp. Co. v. Friedman*, 191 Fed. 673.

Messrs. **Joseph C. Stone** and **Lawrence Maxwell** argued the cause, and, with Messrs. **James S. Davenport**, **Thomas H. Owen**, and **Joseph S. Graydon**, filed a brief for petitioner:

The police provisions of the act of January 30, 1897, do not apply to Oklahoma since its admission into the Union. Their continued existence is inconsistent with the enabling act and the state Constitution and laws expressly authorized thereby.

Draper v. United States, 164 U. S. 240, 243, 41 L. ed. 419, 420, 17 Sup. Ct. Rep. 107; *Cherokee Tobacco (Boudinot v. United States)* 11 Wall. 616, 20 L. ed. 227; *Re Heff*, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506.

As the enabling act deals with and affects the same subjects and persons as the act of 1897, it must repeal it entirely, unless it can be contended that it repeals it only *pro tanto* by way of amendment. But the objection to such construction of the two statutes is that its acceptance results in a statute so incongruous and indefinite in purpose and effect that it would be impossible to enforce it.

United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 1250

538; *The Enterprise*, 1 Paine, 32, Fed. Cas. No. 4,499; *Bishop*, Statutory Crimes, § 41; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744. 2 Inters. Com. Rep. 325, 35 Fed. 866; *Sutherland*, Stat. Constr. 1st ed. pp. 438, 439; *Aukland*, Principles of Penal Law, (1771) pp. 312-314.

The question whether the act of January 30, 1897, remained in force in that part of Oklahoma which was formerly Indian territory after the admission of the state, is one of statutory construction, the presumption being that it did not, because its continued existence implies inequality of statehood.

United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; *Draper v. United States*, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

The place where the alleged offense was committed was not "Indian country" within the meaning of the act of January 30, 1897.

Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca.) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *United States v. LeBris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *United States v. Four Bottles Sour-Mash Whisky*, 90 Fed. 720; *United States v. Knowlton*, 3 Dak. 58, 13 N. W. 573; *Re 43 Cases Cognac Brandy*, 14 Fed. 539; *United States v. Martin*, 8 Sawy. 473, 14 Fed. 817.

Petitioner is entitled to habeas corpus.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; *Re Nielson*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Re Mayfield*, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Re Schneider*, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; *May*, U. S. Sup. Ct. Pr. p. 440.

Solicitor General **Lehmann** argued the cause, and Assistant Attorney General **Denison** and Mr. **Louis G. Bissell** filed a brief for respondent:

The extinguishment of the Indian land title to the particular lot in question did not remove it from the sphere of the Federal liquor laws, because the very treaties and statutes which authorized the extinguishment reserved the operation of those laws.

Bates v. Clark, 95 U. S. 204, 208, 209, 24 L. ed. 471-473; *Diek v. United States*, 208 U. S. 340, 358, 52 L. ed. 520, 527, 28 Sup. Ct. Rep. 399; *United States v. 43 Gallons of Whisky (United States v. Lari-viere)* 93 U. S. 188, 193, 195, 197, 23 L. ed. 846-848; *Ex parte Crow Dog (Ex parte*

Kang-Gi-Shun-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396; United States v. Thomas, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426.

Neither by admitting Oklahoma to statehood, nor by anything in the enabling act, did Congress renounce its control over the interstate liquor traffic into the Indian territory.

United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396; United States v. Thomas, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; United States v. McBratney, 104 U. S. 621, 624, 26 L. ed. 869, 870; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

Among the provisions essential to the complete protection of the Indians against the liquor traffic, only those were assigned by the enabling act to the state which, under the decisions of this court, the state could clearly and naturally exercise.

The state, for instance, was not required to prohibit the introduction of liquor from other states, because that would involve a regulation of interstate commerce.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Louisville & N. R. Co. v. F. W. Cool-Brewing Co. 223 U. S. 70, ante, 355, 32 Sup. Ct. Rep. 189; United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673.

Nor was the state required to prohibit the use of liquors by the consignees (who might be Indians), because the state power does not attach to "use" as distinguished from "disposition."

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

But the state is empowered and required to prohibit the advertising for sale or soliciting the purchase of liquors, which have been held to be within the valid police powers of the state under the Wilson act (Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733), so that the enabling act has in this particular also required the action by the 56 L. ed.

state at the precise point where its power begins.

Nor was the state required to exercise a police power at the crossing of the boundary line with other states, because the existence of that power has not been determined, having been expressly reserved from decision in Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The draftsman of the indictment evidently intended to charge the offense known as "introducing liquor into *the Indian[671 country," made punishable by § 2139, Rev. Stat. as amended by act of July 23, 1892 (27 Stat. at L. 260, chap. 234), and by the "Act to Prohibit the Sale of Intoxicating Drinks to Indians," etc., approved January 30, 1897 (29 Stat. at L. 506, chap. 109).

The circuit court of appeals in United States Exp. Co. v. Friedman, 191 Fed. 673, dealt with the question whether that portion of Oklahoma formerly known as the Indian territory ceased to be "Indian country" upon the admission of Oklahoma as a state, so that these acts were no longer applicable, and with the question whether the admission of Oklahoma as a state had the effect of repealing them so far as pertained to the introduction of liquors into the territory. Petitioner's application to this court for a habeas corpus was intended to bring that decision under review, and the agreed statement of facts was designedly so framed as to show the grounds of his contention that the *locus in quo* is no longer "Indian country."

The government, however, in resisting the application, relied for support of the jurisdiction of the district court not only upon the acts just referred to, but also upon § 8 of "An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory, and for Other Purposes," approved March 1, 1895 (28 Stat. at L. 693, chap. 145).

The three enactments in question are set forth in chronological order in the margin.†

†Act of July 23, 1892 (27 Stat. at L. 260).

"Chap. 234.—An Act to Amend Sections Twenty-one Hundred and Thirty-nine, Twenty-one Hundred and Forty, and Twenty-one Hundred and Forty-one of the Revised Statutes Touching the Sale of Intoxicants in the Indian Country, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That

672] *At the time of the passage of the act of 1895, the territory known as the Indian territory was that which was *described by metes and bounds in the act of May 2, 1890 (26 Stat. at L. 81, 93, chap. 182, § 29). It included the lands of 674] *the Cherokee Nation and the city of Vinita, where the petitioner's alleged offense was committed. It is now, of course, a part of the state of Oklahoma.

It is not open to serious dispute that if the prohibition of the act of 1895 against "carrying into said territory any such liquors or drinks" remains operative so far as pertains to the carrying of intoxicating liquors from another state into that part of Oklahoma which was the Indian territory, the acts admittedly done by the petitioner constitute an offense thereunder, of which the United States district court has jurisdiction. Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject-matter for inquiry on habeas corpus. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; *Ex parte Carll*, 106 U. S. 521, 27 L. ed. 288, 1 Sup. Ct. Rep. 535, 4 Am. Crim. Rep. 253; *Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689. Recognizing this, counsel

section twenty-one hundred and thirty-nine of the Revised Statutes be amended and re-enacted so as to read as follows:

"Sec. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind, shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country, shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons, made for violation of any of the provisions of this act, shall be made in the county where the offense shall have been committed; or, if committed upon or within any reservation not included in any county, then in any county adjoining such reservation; and, if in the Indian territory, be-

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for the petitioner, upon the oral argument and in a supplemental brief, modified his original contentions so as to deal with the act of 1895. As thus modified, the grounds upon which he relies are the following:

First, that the act of 1895, being a special act applicable to the Indian territory, had the effect of superseding, as to that territory, the existing general statute against the introduction and sale of intoxicating liquors in the Indian country.

Secondly, that the act of 1897, being amendatory of the general statute against the introduction and sale of intoxicating liquors in the Indian country, did not apply to the Indian territory, because that territory was covered by the special act of 1895.

*Thirdly, that the jurisdiction cannot be rested upon the act of 1897, because the place where the alleged offense was committed was not Indian country within the meaning of that act, since there was no Indian title remaining in the town site of Vinita; the insistence being that where there is no Indian title, no inalienable land, and no allotted land held in trust, there can be no "Indian country."

Fourthly, that, whether the act of 1895 or the act of 1897 would otherwise be applicable, these acts were both repealed as to that part of Oklahoma which was formerly the Indian territory, by the force

fore the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 716). And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

Act of March 1, 1895 (28 Stat. at L. 693).

*Chap. 145.—An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory, and for Other Purposes.

"Sec. 8. That any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind what-

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of the Oklahoma enabling act of June 16, 1906, chap. 3335, 34 Stat. at L. 267, under the authority of which the Constitution of Oklahoma was adopted and a state government established, covering the territory previously known as Oklahoma and the Indian territory; and pursuant to which certain statutes were afterwards enacted by the state legislature, *viz.*, an act of March 24, 1908, known as the Billups law, being §§ 4156-4209 of the Compiled Laws of Oklahoma of 1909, and an act passed March 11, 1911, Session Laws of Oklahoma, 1910-1911, pp. 154-156.

The contentions of the government, on the other hand, are:

First, that the act of 1895 prohibits the liquor traffic in the Indian territory, regardless of any question concerning the term "Indian country," or concerning the title to particular lands, or the race or color of the persons affected.

Secondly, that the extinguishment of the Indian land title to the particular *locus in quo* did not remove it from the operation of § 2139, Rev. Stat. as amended by the acts of 1892 and 1897, because (among other reasons) a contrary intent is manifested in the treaties and statutes under which that title was extinguished.

Thirdly, that neither by admitting Oklahoma to statehood, nor by anything in the 676] enabling act, did Congress *renounce

its control over the interstate liquor traffic in what had been the Indian territory.

The question whether the act of 1895 was superseded by the act of 1897 was not much discussed in the argument. It is a question of nicety, having an importance extending beyond the exigencies of the present case. In the view we take of the other questions, however, we may simplify the discussion by assuming (without conceding) that petitioner's first two points are well taken, and that the act of 1897 did not apply to the Indian territory because that territory was covered by the special act of 1895. This at the same time renders it unnecessary for us to consider his third contention, *viz.*, that the *locus in quo* was not Indian country within the meaning of the act of 1897, because of the extinguishment of the Indian title.

We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), and the admission of the state of Oklahoma into the Union pursuant thereto. Since the government concedes that the act of 1895 has been thereby repealed, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory, the matter to be discussed is still further narrowed.

Before passing, however, it should be

soever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory, any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars, and by imprisonment for not less than one month nor more than five years."

Act of January 30, 1897 (29 Stat. at L. 506).

"Chap. 109.—An Act to Prohibit the Sale of Intoxicating Drinks to Indians, Providing Penalties Therefor, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any In-

dian a ward of the government, under charge of any Indian superintendent or agent or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided, however, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department, or any officer duly authorized thereunto by the War Department.

Sec. 2. That so much of the act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this act, is hereby repealed."

noted that § 2139, Rev.Stat., and the act of 1897, contain prohibitions respecting the sale of intoxicating liquor to Indians, and in this, and perhaps in other important respects, cover ground not covered by the act of 1895. We must not be understood as deciding that these prohibitions are no longer in force within what was the Indian territory, either because of the assumed effect of the act of 1895 in superseding the previous general statute of which the act of 1897 was amendatory, or because of the Oklahoma enabling act and the admission of the state thereunder. **677]** *The assumption we make in favor of the petitioner is for the purposes of the present argument only.

The title and pertinent sections of the enabling act are set forth in the margin.† **678]** *It will be observed that its 1st section provides that nothing in the constitu-

tion of the new state shall be construed ***to limit or effect the authority of the[**679** government of the United States to make any law or regulation respecting *such[**680** Indians, their lands, property, or other right by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." Also that § 3 requires that the constitution shall prohibit the manufacture and sale of intoxicating liquors within those parts of the proposed state known as the Indian territory and the Osage Indian Reservation, and within any other parts of said state which existed as Indian reservations on January 1, 1906, and shall prohibit the shipment or conveyance of such liquors from other parts of the state into the portions just described; the prohibition to continue for a period of twenty-one years, and thereafter until the

†Oklahoma Enabling Act (34 Stat at L. 267, chap. 3335).

"An Act to Enable the People of Oklahoma and of the Indian Territory to Form a Constitution and State Government and Be Admitted into the Union on an Equal Footing with the Original States," etc.

Section 1. "That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian territory, as at present described, may adopt a constitution and become the state of Oklahoma, as hereinafter provided: Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

"Sec. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian territory and Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for, and choose delegates to form a constitutional convention for, said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates; . . .

"Sec. 3. . . . Said convention shall, and is hereby authorized to, form a constitution and state government for said proposed state. . . . And said convention shall provide in said constitution:

"Second. That the manufacture, sale, bar-

ter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said state now known as the Indian territory and the Osage Indian reservation, and within any other parts of said state which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said constitution and proper state legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said state, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said state into the portions hereinbefore described shall be punished, and conviction thereof by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: Provided, That the legislature may provide by law for one agency under the supervision of said state in each incorporated town not less than two thousand population in the portions of said state hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said state, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States;

people shall otherwise provide by constitutional amendment and proper state legislation; with a proviso for the establishment of state agencies for the sale of liquors for medicinal purposes and to bonded apothecaries, or denaturized alcohol for industrial purposes and of alcohol for scientific purposes; and with elaborate provisions for carrying the prohibition into effect and preventing any abuse of the limited privileges conferred; it being declared, at the same time, that "upon the admission of said state into the Union these provisions shall be immediately enforceable in the courts of said state."

Pursuant to this act, a constitutional convention prepared and submitted to the people for adoption a constitution containing the clauses thus prescribed by Congress. At the same time a separate constitutional provision was submitted, for

establishing state-wide liquor prohibition, substantially in the same terms and subject to the same provisions that were prescribed, with respect to the Indian territory and the Indian reservations, by the enabling act. The constitution and [681 the separate constitutional provision were duly adopted by the people, and on November 16, 1907, by proclamation of the President, Oklahoma was admitted as a state of the Union. [35 Stat. at L. 2160.]

No doubt the enabling act, followed by the adoption of the constitution therein prescribed and the admission of the new state, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the state, and respecting commerce in such liquors conducted wholly within the state; and, to the extent that the

and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said state hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing, setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said state at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which, after his own personal diagnosis, he shall deem to require such treatment, shall, upon conviction thereof be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day.

Upon admission of said state into the Union these provisions shall be immediately enforceable in the courts of said state.

"Third. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits, owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

Sec. 4 provides for the submission to the people of the constitution to be adopted by the constitutional convention, and the admission of the state (on ratification of the constitution by the people) "on an equal footing with the original states."

"Sec. 13. That said state, when admitted as aforesaid, shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian territory shall constitute said eastern district, and the said Oklahoma territory shall constitute said western district. . . . The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. . . ."

"Sec. 21. . . . All laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

scheme of prohibition established by the enabling act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed. But the act of 1895 included offenses that are not covered by the prohibition scheme of the enabling act; it prohibited the carrying of intoxicating liquors from other states into territory that was included in the state of Oklahoma. And the question for present solution is whether the act of 1895, having been partially repealed, as just indicated, remains in force as a prohibition against such interstate traffic. In deciding it we shall do well to bear in mind that the offense of importing or "introducing" or "carrying in" such liquors into a protected district is different in its nature and readily distinguishable from the offenses of manufacturing, selling, etc., within the district; that from the earliest times they have been treated in Federal legislation as different offenses; that Congress for many years has consistently pursued the policy of forbidding sales of liquor to Indians and excluding it from country occupied by them; that the prohibition of importations has been deemed necessary to effectuate the purpose of preventing the use of it in protected districts; that the act of 1895 was passed for the evident purpose of enforcing the two-fold prohibition in the Indian territory; and that by agreements with the Indian 682]tribes *inhabiting the territory (as will appear below) the United States was, to some extent, at least, pledged to maintain the prohibition. Besides these considerations, it is to be noted that the enabling act, while containing most stringent clauses for preventing (at least for twenty-one years) the manufacture of and traffic in liquors within the Indian territory, and their transportation from other parts of the new state into the territory, imposes no duty upon the new state with respect to preventing liquors from being brought into the territory from other states.

In view of these considerations, and others to be mentioned, it seems to us that Congress, so far from intending by the enabling act to repeal so much of the act of 1895 as prohibits the carrying of intoxicating liquors into the Indian territory from points without the state, framed the enabling act with a clear view of the distinction between the powers appropriate to be exercised by the new state over matters within her borders, and the powers appropriate to be exercised by the United States over traffic originating beyond the borders of the new state and extending within the Indian territory.

In addition, there is the proviso con-

tained in § 1 of the act, that nothing contained in the state Constitution shall be construed "to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma if necessity requires. This, we think, is an inadmissible *con- 683]struction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congresses the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

Of course, an act of Congress may repeal a prior treaty as well as it may repeal a prior act. The *Cherokee Tobacco*, 11 Wall. 616, 20 L. ed. 227; *Fong Yue Ting v. United States*, 149 U. S. 698, 720, 37 L. ed. 905, 915, 13 Sup. Ct. Rep. 1016; *Ward v. Race Horse*, 163 U. S. 504, 511, 41 L. ed. 244, 246, 16 Sup. Ct. Rep. 1076; *Draper v. United States*, 164 U. S. 240, 243, 41 L. ed. 419, 420, 17 Sup. Ct. Rep. 107.

But it is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope v. Cope*, 137 U. S. 682, 686, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222, and cases cited; *Ward v. Race Horse*, 163 U. S. 504, 511, 41 L. ed. 244, 246, 16 Sup. Ct. Rep. 1076.

The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, § 8, which con-

fers upon Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *United States v. Holliday*, 3 Wall. 407, 418, 18 L. ed. 182, 684]186; *United States v. 43 *Gallons of Whiskey (United States v. Lariviere)* 93 U. S. 188, 195, 197, 23 L. ed. 846-848; *Dick v. United States*, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399, and cases cited.

And it is as clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new state, as it is to reserve the right to enact new laws in the future upon the same subject-matter.

We must read the proviso contained in § 1 of the enabling act, and also the declaration in § 21, that "the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States," in the light of the existing relations, then recently established by treaties and by acts of Congress, between the government of the United States and the Five Civilized Tribes that occupied the area known as the Indian territory. Although those tribes had long been treated more liberally than other Indians, they remained none the less wards of the government, and in all respects subject to its control. *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 653, 34 L. ed. 295, 301, 10 Sup. Ct. Rep. 965, and cases cited. And after Congress, in the year 1893, had inaugurated the policy of terminating their tribal existence and government and allotting their lands in severalty (act of March 3, 1893, chap. 209, § 16; 27 Stat. at L. 645), agreements were negotiated by the Dawes Commission with each of the tribes, designed to carry out the objects indicated; and in each of those agreements there was some recognition of the importance of preserving restrictions upon the introduction of intoxicating liquors from without and the traffic in them within the Indian territory.

The agreement with the Seminoles was made in 1898 (30 Stat. at L. 567, chap. 542), with the Creeks in 1901 and 1902 (31 Stat. at L. 861, chap. 676, 32 Stat. at L. 500, chap. 1323), with the Choctaws and Chickasaws in 1898 (30 Stat. at L. 507, chap. 517), and in 1902 (32 Stat. at L. 641, chap. 1362), and with the Cherokees 56 L. ed.

in the latter year (32 Stat. at L. 716, chap. 1375).

*Section 73 of the agreement with the [685 Cherokees (32 Stat. at L. 727, chap. 1375) continued in force in that Nation the 14th section of an act of June 28, 1898, entitled, "An Act for the Protection of the People of the Indian Territory and for Other Purposes" (30 Stat. at L. 500, chap. 517), which contained a proviso against the sale of liquor in the territory, and against the introduction thereof into the territory.

In the first Choctaw and Chickasaw agreement there was a provision (30 Stat. at L. 509, chap. 517) that no law or ordinance should be passed by any town interfering with the enforcement of, or conflicting with the laws of, the United States in force in said territory, "and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality."

In the Choctaw-Chickasaw agreement of 1902, § 64, which provided for the cession to the United States of lands at the Sulphur Springs, contained a provision (32 Stat. at L. 656, chap. 1362) that "until otherwise provided by Congress, the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the southern district of Indian territory."

The Seminole agreement likewise provided that "the United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality." (30 Stat. at L. 568, chap. 542.)

The first Creek agreement provided that "the United States agrees to maintain strict laws in said Nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever." Act of March 1, 1901, chap. 676, § 43, 31 Stat. at L. 872. And this was not modified *by the supplemental [686 agreement Act of June 30, 1902, chap. 1323, 32 Stat. at L. 500.

It seems to us that the provisions of the enabling act show that Congress recognized that, because of these agreements or otherwise, the government of the United States was under a duty to the inhabitants of the Indian territory different from its duty to the inhabitants of the other territory that went to form the new state.

We are unable otherwise to explain the insertion in the proposed constitution of the clause establishing liquor prohibition within the Indian territory, and the exclusion of the other territory from the operation of this clause. This action is indicative of a purpose on the part of Congress to fulfil the spirit as well as the letter of the agreements with the Five Tribes. There were differences in those treaties, so far as the liquor traffic is concerned. But in the enabling act all the tribes were treated alike, and in a manner to fulfil the amplest promise given to any tribe, so far—but only so far—as the establishment of general prohibition within the new state was concerned.

But if the Federal law that had prevented the bringing in of intoxicating liquors from without the state was at the same time repealed, the pledges of the government were thereby in a material part broken. For manifestly it would be of comparatively little use to prohibit the manufacture of intoxicating liquors within the territory and their shipment from other parts of the state into the territory, if at the same time all laws prohibiting the introduction of such liquors from other states into the territory were to be repealed.

And it is clear that in framing the enabling act, Congress was mindful not only of its jurisdiction over commerce with the Indian tribes, but was mindful that traffic in liquors between one state and another is subject only to the control of Congress. 687] *Bowman v. Chicago & N. W. *R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

It is argued that the result of engrafting the provisions of the enabling act upon that part of the act of 1895 which remains unrepealed is a statutory system “so incongruous and indefinite in purpose and effect that it would be impossible to enforce it.”

This contention is based largely upon the fact that the prohibition of the manufacture, sale, barter, etc., of intoxicating liquors within those parts of the state that were known as the Indian territory and Osage Indian Reservation, and the other parts of the state which were Indian reservations on January 1, 1906, and the prohibition of the shipment or conveyance of such liquors from other parts of the state into the portions just mentioned, is subject to a proviso that the legislature may provide by law for state agencies for the sale of such liquor for medicinal purposes,

for the sale of denaturalized alcohol for industrial purposes, for the sale of alcohol for scientific purposes, and for the sale of liquors to bonded apothecaries.

It is argued that in the *interim* between the admission of the state and the enactment of legislation for establishing state liquor agencies, there would necessarily be a period of considerable duration (as the event happened, it was over four months) during which, in what was formerly the Indian territory, it would be doubtful whether sales of liquor would be punishable in the Federal or in the state courts, and whether according to the act of 1895 or under the different penalties of the enabling act.

It may be conceded that until the state took action, in accordance with the constitution, for the establishment of agencies for the sale of liquors for the limited purposes mentioned, such sales could not be made at all, and that all sales which otherwise were in violation of the prohibition of the constitution were punishable in the courts; to what extent punishable in the Federal courts, and to what extent in the state courts, it is not worth while to spend time in considering. Some temporary confusion and uncertainty may be unavoidable upon the establishment of a state government under such conditions: but this has little bearing upon the question before us.

A more serious argument is that which is based upon the effect of the constitutional provision respecting the establishment and maintenance of state agencies for the disposition of liquor, after the state legislature shall have provided by law for such agencies; for when such a law has been enacted we are brought to the permanent condition of things that was in the contemplation of Congress.

And here it is urged that as to the offense of carrying intoxicating liquor into the territory, it must be that the introduction thereof for supplying the needs of the state agencies was permitted by the enabling act, and that the provisions of the act of 1895 must be taken to be repealed to that extent, leaving the act in force against the introduction of liquor for other purposes. But it is said (to quote from the brief): “If that was the purpose of the enabling act, it entirely fails to express it, because it does not provide who may so introduce liquors into the territory, and who may not, for the purpose of supplying local agencies, and the law would be so framed that neither court nor layman could ascertain by reading it by whom and under what circumstances such introduction was innocent or criminal.”

No doubt, in order to give effect to the

constitutional provision that permits the legislature to provide by law for agencies under the supervision of the state for the sale of liquors for the limited purposes specified, it is necessary that the state agencies shall procure these liquors from some source.

The authorization is in the form of a proviso. Whether, by fair construction, it 689]qualifies merely the force of the *clause to which it is subjoined,—that is, qualifies, merely the prohibition against the manufacture, sale, etc., of intoxicating liquors within the Indian territory and the Indian reservations, and the prohibition against the shipment of such liquors from other parts of the state into the portions mentioned,—or whether, on the other hand, it has the effect of permitting liquors to be introduced from without the state, is a question that need not detain us. Upon the former construction, the state would presumably be obliged to cause the liquors to be manufactured within its own borders for the supply of its distributing agencies. Upon the latter construction, the state would be at liberty to import the necessary liquors from beyond its borders. In the one case, as in the other, the operation would be lawful and innocent when conducted under the authority of the state; otherwise unlawful. It is not to be presumed that the state would conceal or cloak its operations, or leave its agents without evidence of their authority. We can see no more practical difficulty here than there is in determining in any other matter that is subject to public regulation—for instance, the killing or transportation of game, the manufacture or sale of liquor—whether a given act is done with or without a license from the state. The argument *ab inconvenienti* is without force.

We are reminded that “laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid” (United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 538; and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen.

But there is no uncertainty or ambiguity about the prohibition of the act of 1895 against carrying intoxicating liquors into the Indian territory. It is not suggested that there is any express repeal of that 690]prohibition. And *we are unable to see that a *pro tanto* repeal by implication leaves anything doubtful or ambiguous in the meaning of that which remains.

It is not our purpose to qualify the doctrine established by repeated decisions of 56 L. ed.

this court that the admission of a new state into the Union on an equal footing with the original states imports an equality of power over internal affairs. The cases cited by counsel for the petitioner under this head are cases that dealt with matters wholly internal. United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506. And see Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; United States v. Celestine, 215 U. S. 278, 288, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93; United States v. Sutton, 215 U. S. 291, 294, 54 L. ed. 200, 202, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 323, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

The most recent decision of this court upon the subject of the proper construction of acts of Congress passed for the admission of new states into the Union is Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; where it was held that the Oklahoma enabling act (34 Stat. at L. chap. 3335, p. 267), in providing that the capitol of the state should temporarily be at the city of Guthrie, and should not be changed therefrom previous to the year 1913, ceased to be a limitation upon the power of the state after its admission. The court, however, was careful to state (221 U. S. 574): “It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but *sole-[691 ly because the power of Congress extended to the subject, and therefore would not operate to restrict the state’s legislative power in respect of any matter which was not plainly within the regulating power of Congress.”

We are here dealing with one of those matters such as are referred to in this citation. The power of Congress to regulate commerce between the states, and with Indian tribes situate within the limits of a state, justifies Congress when creating

a new state out of territory inhabited by Indian tribes, and into which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition. *Dick v. United States*, 208 U. S. 340, 353, 52 L. ed. 520, 525, 28 Sup. Ct. Rep. 399. This being so, and since we find in the Oklahoma enabling act no repeal, express or implied, of the act of 1895 so far as pertains to the carrying of liquor from without the new state into that part of it which was the Indian territory (saving as to liquor brought in by the state for the use of state agencies established under the provisions of the enabling act), it follows, upon the admitted facts, that the United States district court has jurisdiction to punish the petitioner for the offense that he has committed.

The petition for a writ of habeas corpus and the accompanying application for certiorari will be denied.

act of March 2, 1867 (14 Stat. at L. 517, chap. 176). The decree of the circuit court is final.

[For other cases, see Appeal and Error, 725, 726, 738, 804, 805, in Digest Sup. Ct. 1908.]

[No. 972.]

Submitted March 11, 1912. Decided March 18, 1912.

A PPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree dismissing, for want of jurisdiction, an appeal from an order of the Circuit Court for the District of Massachusetts, entered upon a revisory proceeding filed under the bankruptcy act of 1867. Dismissed for want of jurisdiction.

See same case below, 108 C. C. A. 659, 186 Fed. 989.

Mr. Warren Ozro Kyle submitted the cause for appellants.

Mr. Hollis R. Bailey submitted the cause for appellees.

Per Curiam:

Before the repeal of the bankruptcy act of 1867 [14 Stat. at L. 517, chap. 176] the decision of the circuit court would have been final. *Wiswall v. Campbell*, 93 U. S. 347, 348, 23 L. ed. 923, and cases cited; *Cleveland Ins. Co. v. Globe Ins. Co.* 98 U. S. 366, 25 L. ed. 201. In view of the saving clause of the repealing act of June 7, 1878 (20 Stat. at L. 99, chap. 160) we are of opinion the review of such an order was not provided for by the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488].

The decision in *Huntington v. Saunders*, 163 U. S. 319, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120, is not to the contrary. There it was merely decided that if the act of 1891 authorized a review of analogous orders, the one sought to be reviewed did not involve the requisite jurisdictional amount.

The appeal is dismissed for want of jurisdiction.

692] *WARREN OZRO KYLE et al.,
Appts.,

v.

JOHN C. HAMMOND et al.

(See S. C. Reporter's ed. 692.)

Appeal — in bankruptcy cases — revisory proceedings.

The Federal Supreme Court has no jurisdiction of an appeal from a decree of a circuit court of appeals, dismissing, for want of jurisdiction, an appeal from an order of a circuit court, entered upon a revisory petition filed under the bankruptcy

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

695]*LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, etc., Plaintiff in Error, v. FRANÇOIS DE BEARN et al. [No. 797]; LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, etc., Plaintiff in Error, v. FRANÇOIS DE BEARN [No. 798]; LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, etc., Plaintiff in Error, v. ODON DE BEARN [No. 799]; LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, etc., Plaintiff in Error, v. PIERRE DE BEARN [No. 800]; and LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, etc., Plaintiff in Error, v. JEAN BAPTISTE CHAUMET [No. 801].

Error to state court—Federal question.

In Error to the Court of Appeals of the State of Maryland to review a judgment which reversed an order of the Superior Court for Baltimore city, releasing and discharging certain bonds and coupons attached thereto from the operation of a writ of attachment.

See same case below, 115 Md. 668, 36 L.R.A.(N.S.) 421, 81 Atl. 223.

Messrs. Maurice Leon and Charles Stewart Davison for plaintiffs in error.

Messrs. J. Kemp Bartlett and Edgar Allen Poe for defendants in error.

April 8, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. Toland v. Sprague, 12 Pet. 300, 331, 9 L. ed. 1093, 1105; Boyle v. Zacharie, 6 Pet. 648, 8 L. ed. 532; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, ante, 155, 32 Sup. Ct. Rep. 46.

JOSEPH D. SULLIVAN, Trustee, etc., Appellant, v. AARON GOLDMAN. [No. 874.]

Appeal from the Supreme Court of the District of Columbia.

Messrs. Joseph D. Sullivan and L. P. Loving for appellant.
56 L. ed.

Messrs. Henry E. Davis and Alexander Wolf for appellee.

April 8, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Tefft v. Munsuri, 222 U. S. 114, ante, 118, 32 Sup. Ct. Rep. 67.

*HANNAH L. ANDREWS, Executrix, [696 etc., Appellant, v. HARVEY K. PARTRIDGE, Trustee, etc. [No. 907.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a revisory order which reversed a decree of the District Court for the District of New Jersey, adjudging the executrix of a deceased bankrupt to be entitled to the proceeds of policies of insurance upon the bankrupt's life.

See same case below, — L.R.A.(N.S.) —, 191 Fed. 325.

Messrs. Thomas E. French and Samuel H. Richards for appellant.

Messrs. Henry F. Stockwell and John D. McMullin for appellee.

April 8, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. Holden v. Stratton, 191 U. S. 115, 116, 48 L. ed. 116, 117, 24 Sup. Ct. Rep. 45; Duryea Power Co. v. Sternbergh, 218 U. S. 299, 54 L. ed. 1047, 31 Sup. Ct. Rep. 25; Tefft v. Munsuri, 222 U. S. 114, ante, 118, 32 Sup. Ct. Rep. 67.

EX PARTE: IN THE MATTER OF CHARLEY WEBB, Petitioner. [No.—Original.]

Motion to file petition for writ of habeas corpus.

Mr. J. S. Davenport for petitioner.

April 8, 1912. Denied.

See ante, p. 1248.

MISSOURI PACIFIC RAILWAY, Plaintiff in Error, v. ALONZO C. LESSENDEN. [No. 949.]

Error to state court—raising Federal question on rehearing.

In Error to the Supreme Court of the State of Missouri to review a judgment which affirmed conditionally a judgment of the Jackson Circuit Court in favor of plaintiff in an action founded on a Kansas statute making a railway company liable for injuries inflicted on an employee through the negligence of a fellow servant.

See same case below, 238 Mo. 247, 142 S. W. 332.

Mr. M. L. Clardy for plaintiff in error.

Mr. W. F. Guthrie for defendant in error.

April 29, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. *McCorquodale v. Texas*, 211 U. S. 432, 437, 53 L. ed. 269, 270, 29 Sup. Ct. Rep. 146; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227.

STATE NATIONAL BANK, Plaintiff in Error, v. D. P. RICHARDSON, City Tax Collector for the City of Frankfort, et al. [No. 223.]

Error to state court—final judgment.

697] In Error to the Court *of Appeals of the State of Kentucky to review a decree which reversed a decree of the Franklin Circuit Court, sustaining a demurrer to the answer in a suit to enjoin an assessment for taxing purposes.

See same case below, 135 Ky. 772, 123 S. W. 294, 1189.

Messrs. James P. Helm and Thomas Kennedy Helm for plaintiff in error.

Mr. F. M. Dailey for defendants in error.

April 29, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Schlosser v. Hemphill*, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 Sup. Ct. Rep. 654.

ELMER H. DUFFIELD, Appellant, v. HENRY F. ASHURST, as District Attorney, etc. [No. 231.]

Abatement—termination of office.

Appeal from the Supreme Court of the Territory of Arizona to review a decree sustaining a demurrer to the petition for mandamus to compel a district attorney to institute and prosecute a quo warranto proceeding.

See same case below, 12 Ariz. 360, 100 Pac. 820.

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Messrs. Robert Dunlap, T. J. Norton, and Gardiner Lathrop for appellant.

Mr. Edward M. Doe for appellee.

April 29, 1912. *Per Curiam*: Appeal dismissed with costs. *United States ex rel. Warden v. Chandler*, 122 U. S. 643, 30 L. ed. 1244; *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441; *Security Mut. L. Ins. Co. v. Prewitt*, 200 U. S. 446, 449, 50 L. ed. 545, 549, 26 Sup. Ct. Rep. 314, and cases cited, and cause remanded to the Supreme Court of the State of Arizona.

COALGATE COMPANY, Plaintiff in Error, v. J. W. HURST, as Administrator or Trustee, etc. [No. 294.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Coal County, in that state, in favor of plaintiff in a suit to recover damages for the death of an employee.

See same case below, 25 Okla. 588, 107 Pac. 657.

Mr. Arthur G. Moseley for plaintiff in error.

Mr. James R. Wood for defendant in error.

May 13, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. *Wabash R. Co. v. Flannigan*, 192 U. S. 29, 38, 48 L. ed. 328, 331, 24 Sup. Ct. Rep. 224; *United States v. Pridgeon*, 153 U. S. 48, 53, 54, 38 L. ed. 631, 633, 14 Sup. Ct. Rep. 746; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 508, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; *Re Moran*, 203 U. S. 96, 104, 51 L. ed. 105, 108, 27 Sup. Ct. Rep. 25.

*INDIAN PROTECTIVE ASSOCIATION, Appellant, v. HUGH H. GORDON. [No. 262.] Foreign corporation—suit by.

Appeal from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill of a foreign corporation to establish an interest in a fund.

See same case below, 34 App. D. C. 553.

Messrs. Charles Poe, Benjamin S. Minor, Hugh B. Rowland, C. C. Calhoun, and Daniel B. Henderson for appellant.

Mr. John Lewis Smith for appellee Gordon.

May 27, 1912. *Per Curiam*: Decree as to Hugh H. Gordon affirmed, with costs, upon the opinion of the court below (34 App. D. C. 553).

225 U. S.

EVAN B. ROSENKRANS, Plaintiff in Error, v. STATE OF RHODE ISLAND. [No. 870.] Constitution law—registration of dentists.

In Error to the Supreme Court of the State of Rhode Island to review a judgment which affirmed a conviction in the Superior Court for Providence and Bristol counties, in that state, of practising dentistry without registration and examination.

See same case below, 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824.

Mr. Amasa M. Eaton for plaintiff in error.

Messrs. Percy W. Gardner and Alexander L. Churchill for defendant in error.

June 7, 1912. *Per Curiam*: Judgment affirmed with costs. Collins v. Texas, 223 U. S. 288, ante, 439, 32 Sup. Ct. Rep. 286.

ARTHUR HIRSH et al., Appellants, v. J. W. TAYLOR et al., etc. [No. 841.]

Error to circuit court—jurisdiction below.

Appeal from the Circuit Court of the United States for the Southern District of West Virginia to review a decree sustaining a demurrer to a bill which seeks the dissolution of a corporation.

See same case below, 196 Fed. 104.

Mr. John H. Holt for appellants.

Messrs. C. W. Campbell and Douglas W. Brown for respondents.

June 10, 1912. *Per Curiam*: Dismissed for the want of jurisdiction. Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547. Cause remanded to the District Court of the United States for the Southern District of West Virginia.

699]*CLARENCE DAYTON HILLMAN, Petitioner, v. UNITED STATES. [No. 1020.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 192 Fed. 264.

Messrs. Wade H. Ellis, T. F. Bevington, and Abner H. Ferguson for petitioner.

Attorney General Wickersham and Solicitor General Lehmann, for respondent.

April 1, 1912. Denied.

56 L. ed.

EDWARD B. GOODMAN & COMPANY et al., Petitioners, v. UNITED STATES. [No. 1024.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Messrs. Charles J. Kappler, Charles H. Merillat, and Joseph S. Kammerlohr for petitioners.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Wemple for respondent.

April 1, 1912. Denied.

HANNAH L. ANDREWS, Executrix, etc., Petitioner, v. HARVEY K. PARTRIDGE, Trustee, etc. [No. 907.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Thomas E. French and Samuel H. Richards for petitioner.

Messrs. Henry F. Stockwell and John D. McMullin for respondent.

April 8, 1912. Granted, and ordered that transcript on file herein stand as the return to the Writ of Certiorari.

SAMUEL LEWIS, Petitioner, v. G. OLIVER FRICK, United States Immigration Inspector, etc. [No. 1010.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Philip T. Van Zile for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

*April 8, 1912. Granted. [700]

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Petitioner, v. FRANK IMEROVEK [No. 1028]; ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Petitioner, v. STATE OF MARYLAND, to the use, etc. [No. 1029.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Nicholas P. Bond and Edward Duffy for petitioner.

Mr. John E. Semmes, Jr., for respondents.

April 8, 1912. Granted.

A. LEO EVERETT, Trustee, etc., Petitioner, v. WILLIAM D. JUDSON, Executor, etc. [No. 1046.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles K. Beckman for petitioner.

Mr. William A. Keener for respondent.

April 8, 1912. Granted.

HARRISON T. GROOM, Petitioner, v. MORTIMER LAND Co. et al. [No. 1000.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 192 Fed. 849.

Messrs. Maurice E. Locke, Eugene P. Locke, and Eugene Marshall for petitioner.

Mr. Sam J. Hunter for respondents.

April 8, 1912. Denied.

701]*ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Petitioner, v. LEWELLEN BROTHERS. [No. 1018.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 192 Fed. 540.

Messrs. Roy F. Britton, E. B. Perkins, and Samuel H. West for petitioner.

No appearance for respondents.

April 8, 1912. Denied.

JOSEPH D. SULLIVAN, Trustee, etc., Petitioner, v. AARON GOLDMAN. [No. 1021.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 38 App. D. C. 319.

Messrs. Joseph D. Sullivan and L. P. Loving for petitioner.

Messrs. Henry E. Davis and Alexander Wolf for respondent.

April 8, 1912. Denied.

NATIONAL EQUIPMENT COMPANY, Petitioner, v. GEORGE C. HOLT, United States District Judge, etc. [No. 1037]; JAMES C. KUH, Petitioner, v. GEORGE C. HOLT, United States District Judge, etc. [No. 1038]; POWELL's, a Corporation, v. GEORGE C. HOLT, United States District Judge, etc. [No. 1039]; JAMES A. McCLURG & SONS, Petitioner, v. GEORGE S. HOLT, United States District Judge, etc. [No. 1040.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 195 Fed. 488.

Mr. Livingston Gifford for petitioners.

Mr. Ferdinand E. M. Bullowa for respondent.

April 8, 1912. Denied.

HERSCHEL MARTIN BACON, Bankrupt, Petitioner, v. BUFFALO COLD STORAGE COMPANY. [No. 1048.]

Petition for a Writ of Certiorari to the *United States Circuit Court of Ap-[**702** peals for the Fifth Circuit.

See same case below, 193 Fed. 34.

Mr. Sam J. Hunter for petitioner.

Mr. Joseph M. McCormick for respondent.

April 8, 1912. Denied.

FREDERICK C. TIEDT, Petitioner, v. ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY. [No. 1049.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Fred W. Bentley for petitioner.

Messrs. Robert Dunlap and J. L. Coleman for respondent.

April 8, 1912. Denied.

MARIA A. EVANS, Executrix, etc., Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1054]; STEPHEN M. WELD, Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1055]; THEOPHILUS PARSONS, Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1056]; ALBERT S. BIGELOW, Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1057]; WILLIAM M. CONANT, Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1058]; RUSSELL S. CODMAN, Petitioner, v. KNICKERBOCKER TRUST COMPANY [No. 1059].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 110 C. C. A. 347, 188 Fed. 549.

Mr. Felix Raekemann for Evans, Weld, Parsons, Conant, and Codman.

Mr. Burton E. Eames for Bigelow.

Messrs. Julien T. Davies and John G. Milburn for respondents.

April 8, 1912. Denied.

WILLIAM SEYMOUR, Petitioner, v. A. M. McDANIEL. [No. 1060.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for *the Fifth Circuit. [**703**

See same case below, 111 C. C. A. 672, 191 Fed. 1005.

Mr. William E. Mason for petitioner.

Messrs. Hiram Glass, John J. King, W. L. Estes, and A. L. Burford for respondent.

April 8, 1912. Denied.

MAYOR AND CITY COUNCIL OF BALTIMORE, Petitioners, v. ANDREW MILLER et al. [No. 1064].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Sylvan Hayes Lauchheimer and Alexander Preston for petitioners.

No appearance for respondents.

April 8, 1912. Denied.

CHOEMON KI KUCHI, Claimant, etc., Petitioner, v. UNITED STATES. [No. 1036.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 111 C. C. A. 282, 190 Fed. 450.

Mr. A. R. Serven for petitioner.

Attorney General Wickersham and Solicitor General Lehmann, for respondent.

April 15, 1912. Denied.

TEXARKANA GAS & ELECTRIC COMPANY, Petitioner, v. MRS. OLLIE POWELL et al. [No. 1069.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 111 C. C. A. 673, 191 Fed. 1006.

Messrs. Max Pam, Charles S. Todd, and John J. King for petitioner.

Mr. Charles A. Culberson for respondents.

April 15, 1912. Denied.

ARTHUR JOHNSON, Petitioner, v. UNITED STATES. [No. 1075.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Paca Oberlin and Joseph Salomon for petitioner.

Solicitor General Lehmann for respondent.

April 22, 1912. Granted, the record presented with the petition *to stand as a return to the writ.

MERCHANTS & MINERS' TRANSPORTATION COMPANY, Petitioner, v. ROBINSON BAXTER-DISSOSWAY TOWING & TRANSPORTATION COMPANY et al. [No. 1051]; MERCHANTS & MINERS' TRANSPORTATION COMPANY et al., Petitioners, v. GENERAL CHEMICAL COMPANY [No. 1052]; MERCHANTS & MINERS' TRANSPORTATION COMPANY, Petitioner, v. LOUIS GILDERSLEEVE et al. [No. 1053].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 191 Fed. 769

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Mr. Daniel H. Hayne for Merchants & Miners' Transportation Company.

Mr. Samuel Park for Robinson Baxter-Dissosway Towing & Transportation Company.

Messrs. James J. Macklin and de Lagnel Berier for General Chemical Company and Gildersleeve et al.

April 22, 1912. Denied.

ATLANTIC MUTUAL INSURANCE COMPANY, Petitioner, v. PENINSULAR & OCCIDENTAL STEAMSHIP COMPANY, Owner, etc. [No. 1066.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 194 Fed. 84.

Messrs. Walter F. Taylor and George E. Hamilton for petitioner.

Messrs. John F. Lewis and Francis L. Laws for respondent.

April 22, 1912. Denied.

DARIUS COLE TRANSPORTATION COMPANY, Petitioner, v. WHITE STAR LINE. [No. 1079.]

*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 108 C. C. A. 165, 186 Fed. 63.

Messrs. George L. Canfield and F. H. Canfield for petitioner.

Messrs. William J. Gray for respondent.

April 22, 1912. Denied.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Petitioner, v. W. A. HERR, Administrator, etc. [No. 1082.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 193 Fed. 950.

Messrs. H. Generes Dufour, L. Russell Alden, W. F. Evans, and E. T. Miller for petitioner.

No appearance for respondent.

April 22, 1912. Denied.

SALMEN BRICK & LUMBER COMPANY, LIMITED, Petitioner, v. DONALD & TAYLOR. [No. 1083.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 194 Fed. 800.

Messrs. John D. Grace and Gustave Lemle for petitioner.

No appearance for respondents.

April 22, 1912. Denied

WILLIAM R. HOPKINS et al., Petitioners, v. CHARLES HEBARD et al. [No. 1087.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. C. Bentley Matthews for petitioners. Messrs. William A. Stone and John Franklin Shields for respondents.

April 29, 1912. Granted.

FRANK N. CHAPLIN and DAVID H. CHAPLIN, Petitioners, v. UNITED STATES. [No. 1072.]

706] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 193 Fed. 879.

Messrs. P. F. Dunne, Charles H. Bates, Oscar A. Trippett, and Sherley C. Ward for petitioners.

Attorney General Wickersham and Assistant Attorney General Knaebel for respondent.

April 29, 1912. Denied.

CITY OF ST. AUGUSTINE, Petitioner, v. MINNIE THOMPSON. [No. 1081.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 193 Fed. 1019.

Messrs. E. P. Axtell and C. B. Rinehart for petitioner.

Messrs. William W. Dewhurst, Horatio Bisbee, and George C. Bedell for respondent.

April 29, 1912. Denied.

J. C. TURNER CYPRESS LUMBER COMPANY, Petitioner, v. HENRY M. PFANN et al., etc. [No. 1095.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 194 Fed. 69.

Messrs. Horatio Bisbee and George C. Bedell for petitioner.

Messrs. Charles M. Cooper and John C. Cooper for respondents.

April 29, 1912. Denied.

EMMA HARRIS, alias Emma R. Smith, et al., Plaintiffs in Error, v. UNITED STATES OF AMERICA [No. 1067]; and DELLA BENNETT, Plaintiff in Error, v. UNITED STATES OF AMERICA [No. 1068]. Petitions for Writs of Certiorari.

Mr. Max Levy for plaintiffs in error. Solicitor General Lehmann and Assistant Attorney General Haar for defendant in error.

May 13, 1912. Granted.

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*FRANK M. ASHLEY, Petitioner, v. SAMUEL G. TATUM COMPANY. [No. 1042.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, first appeal, 108 C. C. A. 539, 186 Fed. 339, second appeal, 111 C. C. A. 279, 189 Fed. 357.

Mr. Frank E. Rapp for petitioner.

Messrs. Edmund E. Wood and William Ray Wood for respondent.

May 13, 1912. Denied.

WYLIE PERMANENT CAMPING COMPANY, Petitioner, v. GAIL V. LYNCH. [No. 1088.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 195 Fed. 386.

Mr. George E. Price for petitioner.

Messrs. J. Bernard Handlan and John H. Holt for respondent.

May 13, 1912. Denied.

CITY AND COUNTY OF DENVER et al., Petitioners, v. NEW YORK TRUST COMPANY et al. [No. 1127]; and CITY AND COUNTY OF DENVER et al., Petitioners, v. DENVER UNION WATER COMPANY et al. [No. 1128].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. George L. Nye, H. A. Lindsley, C. S. Thomas, C. W. Waterman, W. H. Bryant, and G. W. Richmond for petitioners.

Messrs. Joel F. Vaile, Henry McAllister, Jr., Gerald Hughes, and Clayton C. Dorsey for respondents.

May 27, 1912. Granted.

UNITED STATES, Petitioner, v. TWENTY-FIVE PACKAGES OF PANAMA HATS. [No. 1134.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Attorney General Wickersham, Solicitor General Lehmann, and Mr. J. C. Adkins for petitioner.

Mr. Albert H. Washburn for respondent.

May 27, 1912. Granted.

225 U. S.

M. ANDERSON v. PACIFIC COAST STEAMSHIP COMPANY, Claimant of the Steamship "Queen," etc. [No. 641]; and N. JORDAN v. PACIFIC COAST COMPANY, Claimant of the Steamship "Umatilla," etc. [No. 642].

Petitions for Writs of Certiorari to bring up the whole record.

Messrs. Graham Sumner and George W. Towle in support of the petition.

Mr. William Denman in opposition.

May 27, 1912. Denied.

W. H. STALEY et al., Petitioners, v. W. L. DERDEN. [No. 1080.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 111 C. C. A. 672, 190 Fed. 1021.

Messrs. R. S. Neblett and Richard Mays for petitioners.

Messrs. W. J. McKie and Horace Chilton for respondent.

May 27, 1912. Denied.

UNITED STATES OF AMERICA EX REL. BEN B. JONES, Petitioner, v. WALTER L. FISHER, Secretary of the Interior. [No. 1105.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 38 App. D. C. 46.

Messrs. Charles Cowles Tucker, H. B. F. Macfarland, J. Miller Kenyon, and E. S. Bailey for petitioner.

Attorney General Wickersham and Assistant Attorney General Knaebel for respondent.

May 27, 1912. Denied.

PAUL A. PRIMEAU, Petitioner, v. OLIVE L. GRANFIELD, Executrix, etc. [No. 1106.]

709] Petition *for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 193 Fed. 911.

Mr. Clarence J. Shearn for petitioner.

Mr. Clarence Blair Mitchell for respondent.

May 27, 1912. Denied.

HYGIENIC FLEECE UNDERWEAR COMPANY, Petitioner, v. PHOENIX KNITTING WORKS et al. [No. 1110.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 195 Fed. 763.

Mr. Hector T. Fenton for petitioner.

Messrs. Joseph C. Frailey and H. N. Paul, Jr., for respondent.

May 27, 1912. Denied.

56 L. ed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Petitioner, v. J. E. HELMS. [No. 1119.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. William A. Blount and A. C. Blount, Jr., for petitioner.

Mr. R. P. Reese for respondent.

May 27, 1912. Denied.

MARX & RAWOLLE et al., Petitioners, v. UNITED STATES. [No. 1121.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. B. A. Levett for petitioners.

Attorney General Wickersham, Solicitor General Lehmann and Assistant Attorney General Wemple for respondent.

May 27, 1912. Denied.

GERMAN BANK OF CARROLL COUNTY, Iowa, et al., Petitioners, v. GEORGE C. BALL, Receiver, etc. [No. 1122.]

Petition for a Writ of Certiorari *to the United States Circuit Court [710 of Appeals for the Eighth Circuit.

See same case below, 109 C. C. A. 498, 187 Fed. 750.

Mr. Benjamin I. Salinger for petitioners.

No appearance for respondent.

May 27, 1912. Denied.

A. W. LAWTON, Petitioner, v. N. LESLIE CARPENTER et al., etc. [No. 1124.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 195 Fed. 362.

Messrs. Joseph A. McCullough and William Garrard for petitioner.

Mr. Joseph E. Johnson for respondents.

May 27, 1912. Denied.

GEORGE ROUKOUS, Petitioner, v. UNITED STATES. [No. 1126.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 195 Fed. 353.

Messrs. Boyd B. Jones and Walter H. Barney for petitioner.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

May 27, 1912. Denied.

EDWARD H. HANCE et al., etc., Petitioners, v. UNITED STATES. [No. 1135.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 191 Fed. 573.

Messrs. Joseph C. Frailey, H. N. Paul, Jr., and Charles L. Sturtevant for petitioners.

Attorney General Wickersham and Assistant Attorney General Harr for respondent.

May 27, 1912. Denied.

UNITED RAILROADS OF SAN FRANCISCO, Petitioner, v. CITY AND COUNTY OF SAN FRANCISCO et al. [No. 888.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 111 C. C. A. 339, 190 Fed. 507.

Messrs. William M. Abbott and Joseph D. Redding for petitioner.

Messrs. Percy V. Long and Thomas E. Haven for respondents.

711] *June 7, 1912. Denied.

MERCHANTS & MINERS TRANSPORTATION COMPANY, Petitioner, v. UNITED STATES. [No. 1143.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Samuel B. Adams and Daniel H. Hayne for petitioner.

Attorney General Wickersham, and Solicitor General Lehmann, for respondent.

June 7, 1912. Denied.

W. B. QUAINANCE, Petitioner, v. UNITED STATES. [No. 1144.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Messrs. Wade H. Ellis, John A. Kratz, Jr., and Albert H. Washburn for petitioner.

Attorney General Wickersham, Solicitor General Lehmann, and Assistant Attorney General Wemple for respondent.

June 7, 1912. Denied.

HENRY F. SAMSTAG et al., Petitioners, v. GEORGE FROST COMPANY et al. [No. 830.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 105 C. C. A. 37, 180 Fed. 739.

Mr. John S. Seymour for petitioners.

Mr. Horace A. Dodge for respondents.

June 10, 1912. Denied.

FRED W. WOLF COMPANY, Petitioner, v. MOUNT VERNON REFRIGERATING COMPANY. [No. 1141.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Frank H. Scott, Edgar A. Bancroft, John E. MacLeish, and Ernest Wilkinson for petitioner.

Messrs. Murray Seasongood and J. B. Waight for respondent.

*June 10, 1912. Denied.

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CENTRAL PARK, NORTH & EAST RIVER RAILROAD COMPANY, Petitioner, v. FARMERS LOAN & TRUST COMPANY, Trustee, et al. [No. 1146.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 193 Fed. 963.

Messrs. William N. Dykman and Arthur E. Goddard for petitioner.

Messrs. Frederick Geller and Bronson Winthrop for respondents.

June 10, 1912. Denied.

WILLIAMS SOAP COMPANY et al., Petitioners, v. J. B. WILLIAMS COMPANY. [No. 1158.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 193 Fed. 384.

Messrs. Charles T. Hanna and Thomas A. Daily for petitioners.

Mr. V. H. Lockwood for respondent.

June 10, 1912. Denied.

DEGRASSE PAPER COMPANY, Petitioner, v. AMERICAN SULPHITE PULP COMPANY. [No. 1161.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 193 Fed. 653.

Mr. Henry Schreiter for petitioner.

No appearance for respondent.

June 10, 1912. Denied.

*BALTIMORE & OHIO RAILROAD COMPANY, Petitioner, v. HARRY A. GAWINSKE. [No. 1162.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. George E. Hamilton for petitioner.

No appearance for respondent.

June 10, 1912. Denied.

VICKSBURG, SHREVEPORT, & PACIFIC RAILWAY COMPANY, Petitioner, v. ANNIE MAY ROGERS et al. [No. 1163.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 194 Fed. 65.

Messrs. Joseph Hirsh and J. Blanc Monroe for petitioner.

No appearance for respondents.

June 10, 1912. Denied.

STEAMSHIP GOOD HOPE, J. Harding, Claimant, Petitioner, v. CHELSEA FIBRE MILLS [No. 1164]; STEAMSHIP GOOD HOPE, Edward N. Norton et al., Claimants, Petitioners, v. ROBERT BALFOUR et al., etc. [No. 1165]; and STEAMSHIP GOOD HOPE, Edward N. Norton et al., Claimants, Petitioners, v. HENRY P. WINTER et al., etc. [No. 1166].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. J. Parker Kirlin for petitioners.

Mr. Douglas Campbell for Chelsea Fibre Mills, Mr. George Whitefield Betts, Jr., for Balfour et al. and Winter et al., respondents.

June 10, 1912. Denied.

GIUSEPPE MORELLO, Petitioner, v. UNITED STATES. [No. 1168.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals **714***for the Second Circuit.

See same case below, 111 C. C. A. 37, 189 Fed. 305.

Mr. W. Bourke Cockran for petitioner.

Attorney General Wickersham and Solicitor General Lehmann, for respondent.

June 10, 1912. Denied.

FRANK T. WELLS, Petitioner, v. UNITED STATES [No. 1011]; RUFUS J. IRELAND, Petitioner, v. UNITED STATES [No. 1012]; WILBERFORCE SULLY, Petitioner, v. UNITED STATES [No. 1013]; GEORGE W. DALLY, Petitioner, v. UNITED STATES [No. 1014].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 192 Fed. 870.

Messrs. John C. Spooner and Joseph P. Cotton, Jr., for petitioners.

June 10, 1912. Denied.

56 L. ed.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONN., Petitioner, v. BENJAMIN LUCAS OUTLAW. [No. 1156.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 194 Fed. 862.

Mr. Levi H. David for petitioner.

No appearance for respondent.

June 10, 1912. Denied.

ORDER OF ST. BENEDICT OF NEW JERSEY, Petitioner, v. ALBERT STEINHAUSER, Individually, etc. [No. 1157.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. J. Warren Greene and Frank W. Arnold for petitioner.

No appearance for respondent.

June 10, 1912. Granted.

WILLIAM M. MCCOACH, Collector, etc., Petitioner, v. MINEHILL & SCHUYLKILL HAVEN *RAILROAD COMPANY. [715 [No. 1169].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Attorney General Wickersham and Solicitor General Lehmann, for petitioner.

No appearance for respondent.

June 10, 1912. Granted.

KATE C. ARCHER, Petitioner, v. GREENVILLE SAND & GRAVEL COMPANY et al. [No. 1170.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. T. M. Miller and Percy Bell for petitioner.

No appearance for respondents.

June 10, 1912. Granted.

A. D. GIBBS, Appellant, v. INTERNATIONAL BANKING CORPORATION et al. [No. 127.]

Appeal from the Supreme Court of the Philippine Islands.

Mr. Allison D. Gibbs for appellant.

No appearance for appellees.

April 2, 1912. Dismissed with costs, on motion of counsel for the appellant.

COMMERCIAL STATE BANK & TRUST COMPANY, Plaintiff in Error, v. J. L. BATES, Trustee. [No. 284.]

In Error to the Supreme Court of the State of Mississippi.

See same case below, 96 Miss. 386, 51 So. 599.

Messrs. Marcellus Green, Charles A. Douglas, Gibbs L. Baker, Thomas Ruffin, and Hugh H. O'Bear for plaintiff in error.

Messrs. W. R. Harper and Robert P. Willing for defendant in error.

April 2, 1912. Dismissed with costs, on motion of counsel for plaintiff in error.

[716] *TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. B. B. CAUBLE. [No. 493.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. W. L. Hall for plaintiff in error.

Mr. Theodore Mack for defendant in error.

April 2, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Plaintiff in Error, v. WILLIAM F. OWENS. [No. 538.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Asa G. Briggs for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

April 2, 1912. Dismissed without costs to either party, per stipulation.

WILLIAM BOWMAN, Plaintiff in Error, v. STATE OF ARKANSAS. [No. 1078.]

In Error to the Supreme Court of the State of Arkansas.

Mr. James P. Clarke for defendant in error.

April 9, 1912. Docketed and dismissed with costs, on motion of Mr. James P. Clarke for the defendant in error.

TRUSSED CONCRETE STEEL COMPANY, Appellant, v. FIDELITY STORAGE CORPORATION et al. [No. 291.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Jackson H. Ralston, Frederick L. Siddons, and William E. Richardson for appellant.

Messrs. Alan O. Clephane and Walter C. Clephane for appellees.

April 11, 1912. Dismissed with costs, on motion of counsel for the appellant.

*W. H. BYLES, Plaintiff in Error, v. [717] STATE OF ARKANSAS. [No. 267.]

In Error to the Supreme Court of the State of Arkansas.

See same case below, 93 Ark. 612, 37 L.R.A.(N.S.) 774, 126 S. W. 94.

Mr. A. C. Lyon for plaintiff in error.

Mr. Hal L. Norwood for defendant in error.

April 18, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

JUSTO ARMSTERDAM et al., Appellants, v. FELIX PUENTE et al. [No. 402.]

Appeal from the Supreme Court of Porto Rico.

Messrs. N. B. K. Pettingill, H. P. Leake, and W. V. Robbins for appellants.

Messrs. Frederic D. McKenney, Myer Cohen, and John Spalding Flannery for appellees.

April 22, 1912. Dismissed with costs, on motion of counsel for the appellants.

CITIZENS' SAVING & TRUST COMPANY, Appellant, v. C. C. FOERSTNER, Trustee, etc. [No. 628.]

Appeal from the United States Circuit of Appeals for the Sixth Circuit.

Mr. Thomas H. Hogsett for appellant.

No appearance for appellee.

April 22, 1912. Dismissed with costs, on motion of counsel for the appellant.

SAMUEL LOEB, Plaintiff in Error, v. STATE OF GEORGIA. [No. 237.]

In Error to the Court of Appeals of the State of Georgia.

Mr. Jackson H. Ralston for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

April 25, 1912. Dismissed with costs, pursuant to the Tenth Rule.

May 27, 1912. Motion to set aside judgment of dismissal for failure to print the record granted, and cause restored to the docket.

*JOHN F. HANSON, Plaintiff in Error, [718] v. EMIL GUSTAFSON. [No. 241.]

In Error to the Supreme Court of the State of Kansas.

May 1, 1912. Dismissed with costs pursuant to the Tenth Rule.

May 13, 1912. Ordered that the order entered herein on May 1, dismissing this case for failure to print the transcript of the record, be set aside and the cause restored to the docket.

JACOB OPPENHEIMER, Plaintiff in Error, v. PEOPLE OF THE STATE OF CALIFORNIA. [No. 245.]

In Error to the Supreme Court of the State of California.

Mr. Henry G. W. Dinkelspiel for plaintiff in error.

No appearance for defendant in error.

May 2, 1912. Dismissed with costs, pursuant to the Tenth Rule.

JOHN L. JAMES, Bankrupt, Appellant, v. STONE & COMPANY, Creditors, et al. [No. 403.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. L. L. Lewis, Samuel A. Anderson, and H. L. Stevens, for appellant.

No appearance for appellee.

October 23, 1911. Denied.

56 L. ed.

WISCONSIN CENTRAL RAILWAY COMPANY, Plaintiff in Error, v. ELIZABETH BOUCHER, as Administratrix, etc. [No. 253.]

In Error to the Supreme Court of the State of Wisconsin.

Messrs. John L. Erdall and William A. Hayes for plaintiff in error.

Mr. Oscar H. Eeke for defendant in error.

January 9, 1912. Dismissed per stipulation.

STATE OF ARKANSAS, Complainant, v. STATE OF TENNESSEE. [No. 8, Original.]

Messrs. Hal L. Norwood and Caruthers Ewing for complainant.

Mr. Charles T. Cates, Jr., for defendant.

April 22, 1912. Ordered that the demurrer of the defendant, filed herein, be overruled, and leave is granted to answer by the first day of the next term.

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APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1911.

IN MEMORIAM JOHN MARSHALL HARLAN.

On Monday, October 16, 1911, two days after the event, the Chief Justice said:

Gentlemen of the Bar:

It is my painful duty to announce the death of Mr. Justice Harlan. The court will stand adjourned until Wednesday morning next, without the transaction of business of any kind to-day.

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol at 12 o'clock, Saturday, December 16, 1911.

On motion of Mr. Louis T. Michener, Mr. Augustus E. Willson was chosen Chairman and Mr. James H. McKenney, Secretary.

On taking the Chair, Mr. Willson said:

Gentlemen of the Bar:

In the death of John Marshall Harlan, Associate Justice of the Supreme Court of the United States, our country has suffered a very great public loss, and the Bar of the Supreme Court and a host of personal friends bear a very great personal as well as official loss. I feel that the suggestion that I should be Chairman of this meeting is a token of your loving recollection of Justice Harlan and his loyalty to his friendships, which never depended on eminence, rank, wealth, or power, but folded to himself many, just because they loved him faithfully.

As a boy in his office, I loved and honored him, then, as devotedly as when he came to be the great Judge, and, in the best sense of the expression and its most eminent instance, the Grand Old Man of the United States, and I realize that I have been called here because it would have pleased him.

I leave to others, long and constant in attendance in this great court, and versed in its ways and traditions, to review his work as that of one of the noblest figures in judicial history. He was greatly loved and honored by his intimates, younger friends, who knew him in everyday life of office and home, and with even greater affection and respect than by those who saw him only in the robes of the Justice.

He was a great big man physically, mentally, and in spirit, simple-hearted as a child, and his rugged, sturdy, great-hearted and kindly spirit shone in his face and his walk.

His work as a member of the Louisiana Commission, which solved a grave domestic complication in a way long justified by the course of our country's history, and as a member of the Behring's Sea Tribunal, which arranged satisfactorily a great international dispute, constitute a part of the great peace-making events of history.

His record as a Judge is wonderful, in the long period which it covered, nearly two generations of sustained hard work of the very greatest importance, interest, and usefulness; in his strong common sense, wisdom, energy, industry, and strength; wonderful in his spiritual consciousness of the will of the people and the future of our country; and wonderful in his power to understand the lessons of the past and the hopes and

chances of the future of our people. No man in all our history, not even Abraham Lincoln, was, in the best spirit of the expression, more truly the man of the people, more naturally and instinctively part of the people, in blood and bone, in character and temper, in their ideas and their feelings, their likes and their dislikes, their hopes and their fears, and their joys and their sorrows.

He walked and talked and lived and toiled among the people as one of them, set apart from them only by the eminence of soul and body which made him a great and natural leader of men by sheer force of his splendid gifts of character and presence.

But he was most wonderful of all in his great spirit. He loved his God and his service devotedly and vitally. He honored and loved his father and mother, his brothers and sisters, and all his kin better than he loved himself.

He tenderly cherished and loved his wife best of all, who, through all their life together, far past their golden wedding, was his dear helpmeet and his best, most trusted and most revered counselor; and he loved his children and grandchildren and his friends and neighbors in the good old-fashioned way. He was the devoted friend of every one of the judges of this court from the beginning to the end of his work here. He was cordially friendly to the members of the bar, and felt deeply their friendship to him, and the ties of mutual regard and esteem between him and the lawyers were exceptionally strong and warm.

I can see him to-day as I saw him when as a boy I entered his office forty-one years ago. He seemed a very mountain of a man, of noble presence, one of the tallest and most superbly built men in all Kentucky, a giant at a bar which was rich in great judges and distinguished lawyers, and in that goodly company he was easily the leader.

He was great as a pleader, and of such tremendous earnestness and power as an advocate that it was not easy at first to understand how such an impassioned advocate could make an impartial judge. And, withal, he was always most regardful of the rights and feelings and opinions of others.

He had a splendid memory, kindly and joyful, a genuine great-hearted sense of humor, keen, wholesome, natural, and easy coming, which made him a delightful host, a joyful guest, and loved friend and neighbor. He loved liberty above all other rights and blessings, and sternly resisted every power and influence which tended to restrict it; but it was liberty under the law, and he had no toleration for violence or lawlessness in society or business.

He was Adjutant General of Kentucky at twenty. He was a brave and gallant soldier of the Union, Colonel of the Tenth Kentucky Volunteer Infantry, and Brevet and Acting Brigadier General.

He was twice nominated by acclamation, without seeking it, for Governor of Kentucky, and his campaigns were models of intrepid courage, patriotism, statesmanship, and manly spirit. He was also the hero in his youth of a noted campaign for Congress.

Of his life as a Judge, I shall only mention his dissenting opinion in the Civil Rights cases, of which Roscoe Conkling, a great leader, and until then not wholly friendly, wrote to Justice Harlan that it was the greatest opinion, in its learning, patriotism, and statesmanship, in the history of our country and court. I state this substance of the letter from my recollection of reading it many years ago.

A mighty host of people, both lawyers and laymen, have always believed, and still cling to the faith, that that opinion expresses with great force, insight, and clearness, the spirit of our race and breed of people, and that it will yet be the law of our folk and land, expressly declared by the court, and written into the Bill of Rights.

To the last week of his life, he worked steadily, through practically every day of every term of his long judicial career, excepting while absent on the Behring Sea Tribunal, and died in the harness. He had a strong and useful part in considering and deciding thousands of Supreme Court cases. He read hundreds of thousands of pages of records and briefs, and heard thousands of arguments. He did his whole duty, throughout, loyally, bravely, and unselfishly, with dauntless faith and zeal, and won the love and respect of every person of the many thousands that got to know him.

At his last breath, suddenly, for just an instant, his eyes, which had been for some time closed, suddenly opened, with a bright and clear light, and his whole expression

APPENDIX I.

changed and a look of strength and youth seemed to come into his face and form, as if he had rallied the spirit and strength of his manhood's prime in a supreme effort to meet the trial of the crossing over, and as if a blessed vision opened before him to cheer him, as he answered the last summons, and this mortal put on immortality, and then his eyes closed, the muscles relaxed, and in his last sleep he lay, and said no more.

On motion of Mr. Solicitor General Lehmann, the Chair appointed a Committee on Resolutions.

COMMITTEE ON RESOLUTIONS.

Mr. Frederick W. Lehmann, Missouri, Chairman; Mr. Joseph W. Bailey, Texas; Mr. Elihu Root, New York; Mr. Lawrence Maxwell, Ohio; Mr. William O. Bradley, Kentucky; Mr. Henry E. Davis, District of Columbia; Mr. Swagar Sherley, Kentucky; Mr. William F. Mattingly, District of Columbia; Mr. Blackburn Esterline, Illinois.

Mr. Solicitor General Lebmann, for the committee, presented the following

RESOLUTIONS.

Resolved, That the members of the Bar of the Supreme Court of the United States record their profound appreciation of the life and labors which were brought to a close by the death of Mr. Justice Harlan.

He was dedicated at his birth to the profession of the law by his father, who was himself an honored and distinguished member of that profession, and prophecy of a personal career was never more completely fulfilled than that which spoke in the christening of John Marshall Harlan. He came into an heroic epoch of American history, and, mentally and physically, was cast in an heroic mold. In his earliest manhood he entered upon the practice of his profession and at the same time took part in the political controversies by which the country was then deeply disturbed, and which nowhere tried the mettle of American manhood more than in that border land of contention of which his native state of Kentucky was a part; and when the discussion of the hustings and of legislative halls proved unequal to the settlement of the problems, he met the full measure of patriotic duty by responding to the call to arms and sharing in the perils and privations which an appeal to the arbitrament of war made necessary. Returning, after distinguished service in the field, to the practice of his profession, he continued his interest and his efforts in behalf of the public welfare, and in the contests of politics was a willing leader of the forces which held his faith, alike whether the prospect was of victory or of defeat.

Disciplined by the experiences of civil and military life and by the duties of public and private station, he came, in the full maturity of his powers, to this tribunal, whose broad jurisdiction imposes upon its members responsibilities as serious as can rest upon the conscience of man. For nearly thirty-four years he honored his high position by faithful discharge of its duties. The record of his service is to be found in a hundred and twenty-six volumes of reported cases in the determination of which, with few exceptions, he participated. In seven hundred cases he wrote the opinion of the court, and in many others he wrote opinions, sometimes of concurrence, for reasons separately stated, and sometimes of radical dissent; but whether he spoke for others or only for himself, and whether in assent or in dissent, it was always in the language of honest and earnest conviction.

Personal and property rights, individual and corporate interests, the reciprocal relations of citizen, state, and nation, in ever-changing phases, presented themselves as subjects for adjudication. Indifferent in no instance, there was, however, an especial appeal to him in cases involving those rights of the individual which it was the purpose of the Amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights.

His style proclaimed the man. It was simple, direct, strong, and rugged. His

opinions are supported by abundant authority, but make no vain display of learning, and of their meaning there is no room for doubt.

Virile and masterful, his strength was subdued to a conscience sensitive to right, and his purposes were shaped by a character of perfect integrity. Throughout the many years that fell to his part, as a man, citizen, soldier, and judge, he kept without stain the name he bore and which he cherished as the guide and inspiration of his life.

Resolved, That the Attorney General be requested to present these resolutions to the court for entry upon the record, and that the chairman of the meeting be directed to send to the family of Justice Harlan a copy of the resolutions, with an expression of our sympathy for them in the loss they have sustained.

REMARKS OF MR. SOLICITOR GENERAL LEHMANN.

Mr. Chairman:

It was just nine years ago that the members of this Bar gathered at a dinner given to Mr. Justice Harlan in recognition of the twenty-fifth anniversary of his accession to the Supreme Court. Speaking of the court on that occasion, he said : "There is abundant reason to believe that the people confide in its patriotism, its integrity, and its learning, and have an abiding faith that no permanent or irreparable harm will come to the Republic by any action that court will ever take."

For the standing of the court with the people, Justice Harlan was under great responsibility, for to him had come great opportunity.

Of the sixty-five men who hold and have held positions on this Bench, only two exceeded him in length of service, and no one of them all participated in the determination of so many cases.

The position of Marshall must always remain distinctive, for he was the pioneer in a new field of jurisprudence,—that of constitutional law; and not only was he Chief Justice for so many years, but through a large part of that time he seemed to be the court itself. In the thirty volumes of reports which record his service, from first Cranch to ninth Peters, the opinion of the court in nearly one half of the cases was delivered by the Chief Justice. The business of the court has grown too much to permit any member now to bear so large a share of its burdens.

The record of Justice Field runs through a hundred volumes of reports, from the sixty-eighth to the one hundred and sixty-seventh; and in six hundred and twenty cases he delivered the opinion of the court. Justice Harlan begins with volume ninety-five and continues to volume two hundred and twenty-one. Evidence of his labors is to be found in every volume of that long series save three, and these cover the time of his absence from the bench, but not from public duty, during his service as an arbitrator appointed by the United States in the Fur Seal Arbitration. In more than seven hundred opinions he spoke for the court.

But length of service and number of opinions, in themselves, attest nothing more than opportunity and industry. Justice Harlan had by nature the patriotism, the integrity, and the capacity for learning required for judicial service, and his faculties were developed to their highest efficiency by the education of schools and the experiences of active life. He was a country lawyer of the type of Otis and Adams in Massachusetts, Henry and Marshall in Virginia, Clay and Crittenden in his own State, and Lincoln and Douglas in Illinois. These men were general practitioners from necessity. Their situation and surroundings forbade specialization. The interests they represented were human. The issues in the cases they tried were of life, liberty, reputation, and property, in which the entire community felt a deep concern, and they became, as Justice Miller has said, by the nature of their duties, the molders of public sentiment on questions of government, and were every day engaged in the formation, the construction, and the enforcement of the laws.

The courthouse then, rather than the counting room, was the seat and center of political power, and proved ability in the contests of the forum was regarded as the best qualification for duty in legislative halls, on the bench, and in executive office.

The state of Kentucky was prolific of such men, and among them in his genera-

tion Justice Harlan stood in the front rank. At the age of forty-four he was a lawyer of ripe experience, had served with distinction in office and in the field, had met victory and defeat with the same temper, was strong, broad-minded, and sympathetic with his fellowmen, and so was equal to the great mission to which he was then called; and throughout his thirty-four years of service he contributed in the full measure of his great opportunity to strengthening the people's confidence in the patriotism, integrity, and learning of the court, and to confirming their faith that no permanent or irreparable harm will come to the Republic from any action the court will ever take.

Any expression we may record in appreciation of his career will be but a mockery of his memory if we do not take inspiration from his example and recognize that upon us, also, in our service at the bar, rests the duty to maintain undisturbed the confidence, and unshaken the faith of the people in their highest tribunal.

REMARKS OF MR. JOSEPH W. BAILEY.

In this place on any occasion, and in any place on this occasion, a lawyer would be naturally inclined to exaggerate—if, indeed, it could be exaggerated—the importance of the judiciary in our system of government; but I shall not yield to that inclination, because my training has produced in my mind a conviction that the legislative, executive, and judicial departments are each as essential as the others to the preservation of this Republic. In saying this, I do not mean that under all circumstances, and from every point of view, these three departments are equally important, for the most superficial thinking will convince us that they are not. In regulating the rights of property, and in defining the relation of men towards each other, obviously the legislature is more important than either the executive or the judiciary department; for if wicked or unwise legislators enact unjust or foolish laws, the more fearless the executive may be in their enforcement, and the more correct the judiciary may be in their construction, the worse it will be for our country and her people. Nor is the executive department without its greater importance in some respects; for upon the prompt and impartial enforcement of the law depends not only the peace and good order of every community, but also the personal protection of every citizen. The courts could exert but little power over such matters unless the executive department should do its duty.

There is, however, an office performed by the judiciary which exceeds in its consequences for good or evil, according as it is well done or otherwise, anything which our legislatures and executives have been authorized to do. We speak of these three departments as distinct, independent, and co-ordinate; but even those who assert and strive to maintain that relation between them fully understand that the judiciary alone can undo what both of the other departments have joined in doing. The judiciary is often required to hold the balance between the executive and legislative departments, and in obedience to its command each must forbear to encroach upon the rights or duties of the other. In that respect, it is supremely true that the judiciary is more than co-ordinate with the others, and is obviously superior to both of them.

This was the first government ever organized in the history of the world under which a court was empowered to annul legislative acts. There were some wise men, it is true, in our early days, who denied the existence of that power, but it was vindicated for all time to come in a memorable opinion delivered by the great Chief Justice whose name was bestowed upon our departed brother. I have never been a partisan of John Marshall, and in other places I have not hesitated to criticize some of his opinions; but no man has ever answered, and no man can ever answer, the overwhelming argument by which he asserted and established the right and duty of this court to hold null and void every act which contravenes our Constitution.

With such a function to perform, and clothed with a power greater than any court before it has ever possessed, it is as much to the credit of our people as it is to the honor of this court that we can still repeat, as the learned Solicitor General has done, the memorable sentence in which Judge Harlan declared that there is a universal confidence that no harm will ever come to this Republic through the judgments or through the conduct of this great tribunal. To have been even the humblest member of such

a court would be enough to satisfy the ambition of any man; but to have been, as Judge Harlan was, a conspicuous member of it for so many years, and to have borne himself through all that time with a dignity and a wisdom that has inseparably linked his name with the names of Marshall, Story, and Taney, is a glory which can come to but few men in our country.

Judge Harlan was not always of gentle manner on the bench; but his interruptions, which sometimes appeared to proceed from that impatience with which a great and highly trained intellect follows the halting processes of a less luminous mind, were often due to a wholly different reason. I witnessed an episode which so well illustrates what I have just said that I think it worth relating in this presence. Something like two years ago, I was called here to argue a case in which a sovereign state was the complainant, and my associate was a talented young lawyer who was letter perfect in that case, but who had never before appeared in this court. The matter was to be presented on a motion for which, under the rules, as they then stood, an hour was allowed to each side, and I suggested that my associate should open our case, intending that if he presented it satisfactorily I would leave him to occupy the entire time allotted to us; but he was so full of his case that he began the presentation of it in a way that would have required hours. I was growing a little nervous over the situation myself, but I hesitated to interrupt him, because I thought it might confuse him; and just as I was debating with myself what it was best to do, Judge Harlan called on him in a stern voice to "come to your point." My young friend, confused beyond description, managed to say that he was coming to it; but Judge Harlan replied that his time would be consumed before he reached it, and that in the meantime the court would have no idea of the question he was presenting to it. It was a trying experience for a new member of the bar, and I felt it so keenly that I shared the young man's resentment. A few days afterwards I happened to meet Judge Harlan as he was coming to the Capitol, and I told him bluntly that I regarded his rebuke of that young man as little less than cruel. Instead of exhibiting an irritation, which would have been entirely permissible against a member of his Bar who had presumed to criticize his conduct, he turned to me and, smiling, said: "My dear Senator, you do not understand my purpose. I saw that the young man was embarrassed by his surroundings, and I desired to relieve him from his embarrassment." I told him that I thought he had chosen a curious way of producing such a result, and he advised me to watch that young man when he next appeared in this court. It so happened that a reargument of that very case was ordered, and when my associate and myself appeared here to argue it at the next term, I found Judge Harlan's remedy for a lawyer's embarrassment completely justified. When the learned Justices interrogated my associate upon the second argument, he answered them with as little embarrassment and with more confidence than I could summon, and acquitted himself so admirably from the beginning to the end of his address to the court that at the close of it Judge Harlan looked over to me, plainly pleased with the outcome, and afterwards recalled the circumstance more than once.

But, Mr. Chairman, I will not detain this meeting longer, for our resolutions and our memorial addresses will not perpetuate Judge Harlan's fame. By his own words and deeds he has builded a monument to his memory which will inspire our children to venerate his name long after we have followed him across the river. As long as this court exists, and it will exist as long as this Republic survives, the fame of John Marshall Harlan will be cherished in undiminished honor and glory.

REMARKS OF MR. ELIHU ROOT.

Mr. Chairman:

I beg to second the resolutions which have been presented, and by doing so to pay the tribute of gratitude which every lover of his country must feel for a life devoted to its service with power and sincerity.

The passing of Mr. Justice Harlan severs the tie between two eras of our national development. When he came to the court thirty-four years ago, he became a part of a court made up by the men of the great Civil War, all appointed by President Lincoln

and President Grant, except one, Mr. Justice Clifford, who was the surviving connecting link between the court of the War and of the preceding era in which he received his commission from President Buchanan. Justice Harlan was the sole connection between the court of the War, the court of Lincoln and Grant, with the new court that faces the new problems in a new period of our national development; and as he goes, the old court disappears and the new times confront us. There are clocks moved by electricity from some central station; their hands remain motionless as the minute passes, but at its end they move instantly to the next, and lo, another minute of time has come. As Mr. Justice Clifford passed away, the hand moved from the ante-bellum days to the period of war and reconstruction, and as Mr. Justice Harlan passed, the hand moved from the period of war and reconstruction to the new times and new problems before us. He, Mr. Chairman, was a conspicuous illustration of a truth so often exhibited in the history of American jurisprudence,—often in that of England, more often in that of America,—the truth that more important than learning, more important than the logical faculty, more important than all scholastic qualities, is the force of character, the sympathy with life, the capacity for measuring the needs and the impulses of constantly developing and changing life which come to the men who have been significant figures in great affairs, to men who are intensely human and who have dealt with great forces. Justices Harlan did not reason about it, but his nature compelled him to illustrate the truth that in every judicial decision there are two primary elements; one is the ascertainment of the law, and the other is the application of the law to the human problems of the moment. He was intensely human, a natural contender, and he rejoiced in conflict. Life upon the Bench never emasculated him. He never wrapt himself about with the mantle of over-sensitive dignity, which sometimes minimizes judicial strength. He asked for no subservience from the Bar, and he rejoiced in the presence of counsel who stood up with manly assertion of a client's rights. His intense interest in the affairs of the world kept him young, and his youth maintained his usefulness. He could not lose his interest in the affairs of life. Sometimes, when, in executive office, I myself have been struggling with difficult questions that were attracting public attention and interest and public thought, his tall form would make its appearance in my office, and he would come in the kindly confidence of old friendship and sympathy, to tell me how, from his point of view, it would seem, and to warn me of dangers he could foresee. Sometimes he would say: "Be careful not to run against the doctrine of that or the other case in what you do." And so he lived a full life to the end, rendering service for which no one could compensate, and for which we can only render that great appreciation which is, after all, more important for us than for him. For, to mark such a life and such a career of service with honor, in order that all men may realize their worth, is of primary consequences to the pure and devoted administration of our law, and the just exercise of our governmental powers in all departments for the future. No one can be a pessimist, no one can despair of his country's future, who sees that such men as John Marshall Harlan can live in honor and can be appreciated by his countrymen.

REMARKS OF MR. WILLIAM O. BRADLEY.

Mr. Chairman:

When I entered this chamber I did not intend to say one word, but have concluded that, coming from the state that gave the great Justice birth, from the people who knew him better than any other people, from the people who loved him better than any other people could love him, it would be very inappropriate for me to be silent on this occasion. I knew Justice Harlan intimately from my young manhood, and during all those years I sincerely loved him, up to the moment of his death. No man who was ever born in Kentucky, was better loved than John Marshall Harlan save, perhaps, Abraham Lincoln. I esteem it one of the great privileges and honors of my life to have intimately known Justice Harlan, and to have enjoyed his friendship. Judge Harlan was in truth a many-sided man, as a lawyer, soldier, jurist, politician, Christian, citizen, and friend. As a man, measured by the highest standard, I never knew his superior, and doubt if I have ever known his equal. Kindness of heart, generosity of spirit, were traits of his

character well known to all. As a soldier, he was a brave and just man, treating at all times those with whom he met in combat and those who fell into his hands as prisoners with the very greatest kindness and humanity. He was a patriot; he was a true American. There has never lived a greater American. He despised oppression. His heart went out, as his opinions will show, to those who were weak and defenseless. There never was a time when he was either ashamed, afraid, or unable to take the part of the lowly. As a politician in Kentucky, he has had but few equals. In the great campaigns that he made in that state, he stirred into life and awoke to action men who, through his example, after he came upon the Bench, constructed a great party, which, when he was a candidate, was in its infancy. He intensely loved his state, and his heart was big enough to love the whole country. I remember when the case of *Taylor v. Beckham* was argued in this court. At that time intense feeling existed in Kentucky. It was indeed a period that tried men's souls as well as appealed to the sound judgment of the people of our state. During the argument the sympathies of Justice Harlan were so awakened that he shed tears. They were tears of love and sympathy for his great state, tears because of her misfortunes, tears because of the distressing and acute situation. No man was ever more loyal to his state, and no man ever more loyal to his country. As has been said, the monument of Justice Harlan has been erected by his own hand. Never was there a truer statement. Through all these long years, more or less marked with strife growing out of the War and great political agitation, Justice Harlan slowly, but surely, builded that monument. In sunshine and storm, one stone after another was laid by his master hand, until, when the end came, the monument had been completed. He was a most imposing specimen of manhood. I doubt if in this nation of ours there has ever been a more commanding figure than that of Mr. Justice Harlan, and in the midst of all his experiences as a man as well as a politician and as a great Judge, I have often thought of the peculiar aptness to him of the poem—

“As some tall cliff that lifts its awful form,
Swell from the vale and midway leaves the storm—
Though round its breast the rolling clouds are spread,
Eternal sunshine settles on its head.”

Ripe as a scholar, ripe as a man, ripe as a jurist, ripe as a citizen, there has never been gathered to the Harvest Home a richer sheaf than when his life ended here and he entered into a glorious eternity.

REMARKS OF MR. HANNIS TAYLOR.

Mr. Chairman:

During the storm of death that recently raged in this court, a great oak went down with all of its leaves fresh and green upon it. There had been no decay at the roots, no weakening at the heart, no “dying in the top.” The pride of the forest was simply forced to yield to an irresistible power no mortal, however strong, could resist. Whenever I meditate upon the masterful men who founded this Republic, they always loom up large before me, like the original forest trees,—stern, stately, heroic men who were never touched by the refining yet enervating influence of an over-culture. As our civilization advanced, the initial growth was cut down and its place taken by smaller trees perhaps of finer fibre. But the new growth does not so appeal to the imagination. It is not so luxuriant. Among the new and more severely trained men, we often find a mind like an old sedge field, worn out by excessive cultivation.

John Marshall Harlan was an American man of the old type. He sprang from a race of men who were at once jurists and statesmen. We should never forget that those who founded this government and administered it down to the Civil War were jurists and statesmen of a type which the English Bar never produced. When Lord Erskine, after he had become the monarch of Westminster Hall, passed into Parliament, he shriveled like a weakling. When the younger Pitt, who became the leader of Parliament, tried his fortunes in Westminster Hall, he shriveled like a weakling. The

peculiar political conditions created by the new American democracy forced the leaders of the American Bar to become both jurists and statesmen. The ideal product of the new system was Daniel Webster, who could have overthrown Erskine in Westminster Hall and then surpassed the younger Pitt in Parliament. Mr. Justice Harlan had in a high degree the dual equipment. He was not only a great advocate with an inborn genius for law, but he was a great tribunitian orator who would have adorned a Senate anywhere. I have heard many say that if fortune had detained him in the political arena, he would have become President of the United States. Nature made him of Presidential size. I can never forget a scene I once witnessed at Paris, when the Behring Sea Arbitration Tribunal was sitting there, with John Marshall Harlan of Kentucky at one end of the court, and John Tyler Morgan of Alabama at the other. Both were then in the Indian summer of their manhood,—Harlan with his noble and matchless form, the God-gifted Morgan, with that beautiful face and head that sculptors and painters might have loved to copy. My heart swelled with pride as I looked upon those two great American citizens, who had been opposing generals in the Civil War, and fancied that I saw in them reproductions of Brutus and Cicero. The fact is that there is a very close resemblance between the Roman Bar and the American Bar. The members of each had to be masters in the forum and in the Senate; the members of each had to be masters of parliamentary as well as legal procedure.

Destiny was kind when it led Mr. Justice Harlan away from the turbid arena of national politics into the "unvexed silence of a student's cell," where he was able to work for more than thirty years for the expansion and readjustment of our marvelously flexible Federal Constitution. I say expansion and readjustment because we should never forget that all law, public and private, is a living and growing organism that changes as the relations of society change. In the words of the great German jurist, Savigny, "law is simply a part and parcel of national life; a member of a nation's body, not a garment merely, which has been made to please the fancy, and which can be taken off at pleasure and exchanged for another." Law is a part of the life of people, like their social habits and their language, and as such it must grow with their growth and wither with their decay. Never in the constitutional life of any people has the organic development been so vast and rapid as that which has taken place here since the existing Federal Constitution went into effect. During the very short period in which the thirteen scattered communities that fringed our Atlantic seaboard towards the close of the seventeenth century have been expanding across the continent the dissolving views of change have followed each other like the pictures in a panorama. In expanding with that expansion, in adapting itself to the changes and relations resulting therefrom, the American Constitution has developed an elasticity, a growing power, entirely beyond the cumbrous process of amendment its terms provide. When the 13th, 14th, and 15th Amendments, involving a single subject-matter, are considered as they should be, as a single transaction, the fact remains that the Constitution of the United States has been amended but once since 1804, a period of one hundred and seven years. And yet, during all that time, it has been passing rapidly, despite its rigid and dogmatic form, through a marvelous process of unparalleled development, chiefly through the subtle agency of judge-made law, ever flowing from a generous fountain, the Supreme Court of the United States.

No man who has been a member of that court during the last fifty years has done more than Mr. Justice Harlan to enrich that stream of judge-made law, whereby our apparently rigid Constitution has been enabled to expand with the growth of the nation. Without the elasticity drawn from that source our intricate Federal system would have perished long ago, as did the rigid paper constitutions born of the French Revolution. No man has done more of recent years than Mr. Justice Harlan to infuse into our growing Constitution the advancing spirit of the people which is its very breath of life. His popular tendencies were always helpful, because they were always in the right direction. Sixteen years ago, in the Sugar Trust Case, he foresaw all that was to come when he said: "In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines under the name of a corporation to destroy

competition, not in one state only, but throughout the entire country, in the buying and selling of articles—especially the necessities of life—that go into commerce among the states. . . . To the general government has been committed the control of commercial intercourse among the states, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and imperiously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one state.” It was his comfort to see before he died these great and necessary principles fully recognized.

REMARKS OF MR. BLACKBURN ESTERLINE.

Mr. Chairman:

In seconding the resolutions I shall speak only of the deep interest which Mr. Justice Harlan always entertained for young men. Even though he lived more than seventy-eight years, he never grew old. And from the time he first began to think for himself until he closed that long and remarkable career, he never failed in his interest and efforts for the young men of his time. For them he seemed to feel a real responsibility. Of him this should not now fail to be said. His efforts for them were directed in various ways. He drew them about him in earnest conversation always lofty. He bestowed upon them that sound and invaluable advice and counsel which came from his extensive acquaintance with great men and his vast knowledge of big things and the wonderful ways of the world. For more than twenty years he lectured in one of the great law schools of the nation located at the Capital. Thousands of students drawn from all the states and from foreign nations have sat before him and listened in admiration while he expounded the Constitution and the great opinions of Marshall. Dull was the man who was not thrilled when he dwelt on such mighty words as “the trial of all crimes shall be by jury;” or, “no person shall be deprived of life, liberty, or property without due process of law;” or, “this Constitution and all laws passed in pursuance thereof shall be the supreme law of the land.” It was written by the poet Goethe that “the destiny of any nation at any given time depends on the opinions of its young men under five-and-twenty.” If that statement be but partly true, Mr. Justice Harlan rendered a service to his country in teaching and inspiring its young men, the length and breadth of which service the world may never know. It stands to his everlasting credit.

As the students left him and went back to the various states, his spirit and hope and good will went along. In many instances a correspondence ensued. Unlike most men, he had a capacity for letter writing. And here was a trait of character which portrayed the colossal mind always at work on current and great subjects,—always urging,—always encouraging,—always inspiring by his own unique personality. As late as August 12, 1911, only sixty-three days before he triumphed in death, and while in the quiet of his summer home on the banks of the St. Lawrence,—it must have been about the going down of the sun,—he wrote with his own hand a long letter to a young friend, in which these remarkable words appear: “The passage of the Veto Bill in Parliament practically wipes out the House of Lords as a power in England. We are to have no more governing there by titles or heredity. This is good. In the end Britain, if it is to last, must have a union of states or dominions with local Parliaments to deal with domestic matters and a General Parliament to deal with imperial or Empire matters.” But he did not stop there. While writing the same letter, he shifted his mind from the affairs of the people of the Old World to the affairs of the people of the country he had served so long and loved so well, and continued: “I hope that the President will put his feet down firmly on the recall of judges in Arizona and New Mexico, while in territorial condition. It is one thing for these people, after becoming states, to amend their constitutions, and provide for the recall of judges. It is quite a different thing for Congress to give its sanction to the principle of the ‘recall’

by admitting those territories into the Union with constitutions providing for the recall of judges. No people, it seems to me, are fit to come into the Union as states who are willing to put the 'recall' of judges into their fundamental law. Whether a particular territory shall be admitted into the Union as a state is a matter of discretion with Congress. That discretion should be exercised so as to maintain sound principles that are recognized as such by Anglo-Saxon people. Upon the question whether the 'recall' of judges is republican in the constitutional sense, I express no opinion; for that question may come up for judicial determination. I only speak of the 'recall,' as a matter of public policy, and that far I may appropriately go."

Mr. Chairman, we shall miss him, but his influence can never die. Oh, the clods of the valley shall be sweet unto him. The result of his labors will endure as long as the Constitution and liberty shall last. Of all that is so worthily and truly said of this great and good man, to my mind the noblest and sweetest phase of his life is his association with the young men of his country, exchanging ideas and expressing sentiments of liberty and the Constitution, national sovereignty and state's rights. Even now I can hear his parting voice repeating unto them the inspiring words of the poet:

"Are these thy views, proceed, illustrious youth,
And virtue guard thee to the throne of truth."

REMARKS OF MR. FRANKLIN W. COLLINS.

Mr. Chairman and Members of the Bar:

If I may be permitted to add a word to the tributes which have been paid to the memory of this illustrious man,—speaking for the younger members of the bar and the younger men of the country, who regarded Mr. Justice Harlan with a feeling akin to reverence, for to them he was both oracle and friend,—his loss, or rather our loss, seems well nigh irreparable, and his passing will be deeply mourned for many years to come.

To us he was indeed the ideal jurist, patriot, and citizen.

At the time of his demise I doubt if any man in the whole land occupied a higher or larger niche in the affections of the American people than he. This is not difficult to understand. His love of and faith in the people were only equalled by their affection for and confidence in him.

He never lost sight of the fact that he was a minister of justice, and that the humblest as well as the highest are entitled to its protecting arm.

Justice, equal, exact, and eternal, seasoned with mercy, was his constant aim.

He was a hard hitter but a fair fighter, and after the smoke of battle had cleared away, there was no rancor in his bosom, there was no bitterness in his soul. This marks the line of cleavage between the truly great and the really little. This is what lifted Lincoln above his contemporaries.

In his reverence for the organic law, in bodily and mental stature, in imperial brow, in militant and majestic mien, as well as strength of purpose, he more nearly resembled Daniel Webster than any man of his time.

There were three strong strands running through the life mantle which the great Justice wove and wore for seventy-eight honored years,—piety, philanthropy, and patriotism,—love of God, love of man, and love of country.

In his death the American people have suffered an incomparable loss, for indeed he was their faithful counselor and protector, a great tribune of the people, on whose wisdom, patriotism, and probity, they could confidently rely in every crisis with which the highest court had to deal. I knew him well and count the remembrance of his friendship as one of my most cherished possessions. To know him intimately was to love him devotedly, and to enlarge the understanding greatly.

Of him another Tennyson might as worthily sing, as England's great bard once sang of Wellington:

"And thus he bore without abuse
The grand old name of Gentleman."

for he was indeed one of

"God Almighty's Gentlemen."

I lay this simple but sincere tribute upon this great man's tomb.

The resolutions were then adopted, and, on motion of Mr. Louis T. Michener, the meeting adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 29, 1912.

Present: The Chief Justice, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Lurton, Mr. Justice Hughes, Mr. Justice Van Devanter, and Mr. Justice Lamar.

Mr. Attorney General Wickersham presented the following resolutions:

Resolved, That the members of the Bar of the Supreme Court of the United States record their profound appreciation of the life and labors which were brought to a close by the death of Mr. Justice Harlan.

He was dedicated at his birth to the profession of the law by his father, who was himself an honored and distinguished member of that profession, and prophecy of a personal career was never more completely fulfilled than that which spoke in the christening of John Marshall Harlan. He came into an heroic epoch of American history, and, mentally and physically, was cast in an heroic mold. In his earliest manhood he entered upon the practice of his profession and at the same time took part in the political controversies by which the country was then deeply disturbed and which nowhere tried the mettle of American manhood more than in that borderland of contention, of which his native state of Kentucky was a part, and when the discussion of the hustings and of legislative halls proved unequal to the settlement of the problems, he met the full measure of patriotic duty by responding to the call to arms and sharing in the perils and privations which an appeal to the arbitrament of war made necessary. Returning, after distinguished service in the field, to the practice of his profession, he continued his interest and his efforts in behalf of the public welfare, and in the contests of politics was a willing leader of the forces which held his faith, alike whether the prospect was of victory or of defeat.

Disciplined by the experiences of civil and military life and by the duties of public and private station he came, in the full maturity of his powers, to this tribunal, whose broad jurisdiction imposes upon its members responsibilities as serious as can rest upon the conscience of man. For nearly thirty-four years he honored his high position by faithful discharge of its duties. The record of his service is to be found in 126 volumes of reported cases, in the determination of which, with few exceptions, he participated. In 700 cases he wrote the opinion of the court, and in many others he wrote opinions, sometimes of concurrence, for reasons separately stated, and sometimes of radical dissent, but whether he spoke for others or only for himself, and whether in assent or in dissent, it was always in the language of honest and earnest conviction.

Personal and property rights, individual and corporate interests, the reciprocal relations of citizen, state, and nation, in ever-changing phases, presented themselves as subjects for adjudication. Indifferent in no instance, there was, however, an especial appeal to him in cases involving those rights of the individual which it was the purpose of the amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights.

His style proclaimed the man. It was simple, direct, strong, and rugged. His

opinions are supported by abundant authority, but make no vain display of learning, and of their meaning there is no room for doubt.

Virile and masterful, his strength was subdued to a conscience sensitive to right, and his purposes were shaped by a character of perfect integrity. Throughout the many years that fell to his part, as a man, citizen, soldier, and judge, he kept without stain the name he bore, and which he cherished as the guide and inspiration of his life.

Resolved, That the Attorney General be requested to present these resolutions to the court for entry upon the record, and that the chairman of the meeting be directed to send to the family of Justice Harlan a copy of the resolutions, with an expression of our sympathy for them in the loss they have sustained.

The Attorney General then said:

May it please the court, on the first page of the tenth volume of Peter's Reports of the decisions of this court is recorded the fact that John Marshall, its chief justice, died at Philadelphia on the 6th day of July, 1835, and, in a brief minute, it is added:

"His judgments upon great and important constitutional questions, affecting the safety, the tranquillity, and the permanency of the government of his beloved country,—his decisions on international and general law, distinguished by their learning, integrity, and accuracy,—are recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years."

This simple bald recital of the services of the great expounder of our Constitution concludes with these words:

"As long as the Constitution and laws shall endure and have authority, these will be respected, regarded, and maintained."

Perhaps by no other member of this court have these decisions been more highly respected, regarded, and maintained than by John Marshall Harlan, the Associate Justice of this court, who departed this life on October 14, 1911, after a length of service nearly coincident with that of the great judge whose name he bore.

Mr. Justice Harlan was born in Boyle county, Kentucky, on June 1, 1833. His commission as an Associate Justice of this court is dated November 29, 1877, and he took the oath of office on December 10 of that year, being then little more than forty-four years of age.

His first recorded opinion is that in *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563. His last opinion expressing the judgment of the court is that in *Northern P. R. Co. v. Trodick*, 221 U. S. 208, 55 L. ed. 704, 31 Sup. Ct. Rep. 607, rendered May 15, 1911. In the same volume is recorded his very last written opinion, delivered two weeks later, in the case of *United States v. American Tobacco Co.*, concurring in part and in part dissenting from the opinion of court.

The records of his activities as a Justice of this court during the thirty-four years of his service are therefore to be found in the one hundred and twenty-six volumes of its published opinions, from the ninety-fifth to the two hundred and twenty-first, and they cover the entire range of subjects which have come before this court during all those years. From the first to the last, these opinions breathe what Lowell called the "brave old wisdom of sincerity."

Justice Harlan was born, educated, and came to manhood in Kentucky, then a border state. His father, James Harlan, was a Whig, a devoted friend of Henry Clay, an admirer of Webster, and an earnest believer in the principles of constitutional law as expounded by Marshall. He intended his son to be a lawyer and, in the expression of his hopes, he named him John Marshall. The future Justice was brought up in the school of thought represented by Marshall, Webster, and Clay. He began to take part in political affairs when he was but twenty. He was elected county judge of Franklin county when twenty-five. He was an elector on the Bell and Everett ticket, which carried Kentucky in 1860. He threw himself actively into the controversy which developed into civil war in 1861, and, together with James Speed, Attorney General of the United States under Mr. Lincoln, labored successfully to prevent Kentucky from

joining the Confederacy. In July, 1861, he was commissioned captain of a company of zouaves. His military service lasted until the death of his father in 1863, when, upon resigning his military commission, he was elected attorney general of his state. He continued active in political affairs and, in 1877, was one of the commissioners charged with settling certain disputes which threatened to disturb the peace of the state of Louisiana. In December of that year President Hayes appointed him an Associate Justice of this court.

Perhaps the fact that his native state was divided in the great contest of 1861-1865 lent a greater intensity to Justice Harlan's convictions concerning the true meaning and correct interpretation of the Constitution than he might otherwise have felt, and inclined him to a construction which gave to the national government the maximum power which the language of the fundamental law would permit. The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always *vox Dei*, the former *vox populi*, was no less so. His opinions were expressed in forceful and vigorous language, and his convictions upon questions of public policy which were involved in the decision of cases in which he wrote blazed out in language whose meaning admitted of no doubt. When he did not agree with his brethren, he said so in unmistakable terms.

He was impatient of a construction which limited what he believed to be the intention of the people in adopting the war amendments to the Constitution, and which thwarted the entire equalization of the negro with the white man in all political and public relations. He expressed the judgment of the court in *Neal v. Delaware*, 103 U. S. 370, where it was held that the adoption of the 15th Amendment rendered inoperative a provision in the then-existing Constitution of the state of Delaware, whereby the right of suffrage was limited to the white race, and that a statute of the state confining the selection of jurors to persons possessing the qualifications of electors was enlarged in its operation so as to embrace all those who, by the Constitution of the state as modified by the 15th Amendment, were entitled to vote.

But in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18, he vigorously dissented from the view taken by the majority of the court respecting the civil rights act of March 1, 1875, contending that their opinion proceeded "upon grounds entirely too narrow and artificial."

"I cannot resist," he said, "the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. 'It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.' Constitutional provisions adopted in the interest of liberty and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom and belonging to American citizenship have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency of policy; I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

Again, in *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, he dissented, with equal vigor, from the decision which sustained the constitutionality of an act of the legislature of Louisiana, requiring railway companies carrying passengers in their coaches in that state to provide equal, but separate, accommodations for the white and colored races.

"The sure guaranty of the peace and security of each race," he wrote, "is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the War, under the pretense of recognizing the equality of rights, can have

no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting."

In *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6, he dissented from the decision of the majority that the 14th and 15th Amendments to the Constitution operate solely on state action, and not on individual action, and that the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases; and that, consequently, the United States district courts have no jurisdiction under the 13th Amendment, or §§ 1978, 1979, 5508 or 5510, Revised Statutes (U. S. Comp. Stat. 1901, pp. 1262, 1263, 3712 or 3713), of a charge of conspiracy made and carried out in a state to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor.

He protested against the decision in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292, that the words "due process of law" in the 14th Amendment do not necessarily require an indictment by a grand jury in a prosecution by a state for murder, contending that "due process of law," within the meaning of the national Constitution, does not import one thing with reference to the powers of the state, and another with reference to the powers of the general government.

"My brethren concede," he wrote, "that there are principles of liberty and justice lying at the foundation of our civil and political institutions which no state can violate consistently with that due process of law required by the 14th Amendment in proceedings involving life, liberty, or property. Some of these principles are enumerated in the opinion of the court. But for reasons which do not impress my mind as satisfactory they exclude from that enumeration the exemption from prosecution, by information, for a public offense involving life. . . ."

It is said by the court that the Constitution of the United States was made for an undefined and expanding future, and that its requirement of due process of law in proceedings involving life, liberty, and property must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the state which adopts it has entered upon an era of progress and improvement in the law of criminal procedure."

He concurred with the majority of the court in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, in holding that territory (in this case, Porto Rico) acquired by the United States by cession from a foreign power is not "foreign country" within the meaning of the tariff laws. But in *Downes v. Bidwell*, 182 U. S. 245, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, he was one of the justices who agreed with the Chief Justice in dissenting from the conclusion that, after its cession to the United States by Spain, the island of Porto Rico was not a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States."

In *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465, again dissenting from the majority of the court, he maintained that, after the annexation of Hawaii, and before the passage of the act of Congress providing a government for that territory, a conviction for manslaughter upon an indictment not found by a grand jury, and by the verdict of nine only out of twelve

jurors, in accordance with the laws of Hawaii in force at the time of annexation, could not be legal.

But if he was strong and vigorous in dissent, he was equally so in voicing the conclusions of the majority of the court. The vigorous line of opinions dealing with the power of the Federal government over interstate commerce are the best examples of the strength of his convictions and the lucidity of his reasoning in constitutional exposition. In them the principles of Marshall's interpretation of the Constitution were fully recognized and applied. In the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, he demonstrated the proposition that legislation, under the power to regulate commerce among the several states, may sometimes properly assume the form or have the effect of prohibition, and that Congress, under this power, might prohibit the carriage of lottery tickets from one state to another. In *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, he wrote the decision holding to be unconstitutional a statute of the state of Minnesota which prohibited the sale in that state of fresh beef, veal, pork, etc., for human food, unless the animals from which taken should have been inspected within that state before being slaughtered. In a series of forceful opinions, the last of which was written at the very close of his life, he upheld the right of corporations to engage in interstate commerce without interference or restriction by state authority. These opinions illustrate the surprising freshness and vigor of Justice Harlan's mind. In *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and in *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232, it was held that the right to carry on interstate commerce is not a privilege granted by the states, but a constitutional right of every citizen of the United States; that the Congress alone can limit the right of corporations to engage therein, and that no state may impose, as a condition of carrying on interstate commerce within its borders, a tax of a given percentage of all the capital of a corporation, represented by its business interests and property, everywhere, within and outside of the state; that a corporation organized in one state, and doing an interstate business, is not bound to obtain the permission of another state to transact business within its limits, but can go into the latter for the purpose of interstate business, although subject to reasonable legal regulations for the safety, comfort, and convenience of the people, which do not, in a real, substantial sense burden or regulate its interstate business, nor subject its other property and interests, outside of the state, to taxation. In the case of the *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, he applied these principles, in a most interesting and lucid manner, to the case of a Pennsylvania corporation engaged in furnishing instruction by correspondence with students in various states.

"It is true," he said, "that the business in which the International Textbook Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. . . . Intercourse of that kind, between parties in different states,—particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense as intercourse by means of the telegraph, —'a new species of commerce,' to use the words of this court in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 9, 24 L. ed. 708, 710."

While always asserting with vigor the supremacy of Federal control over interstate commerce, he yet wrote the opinion of the court in the case of *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086, holding valid statutes of the state of Georgia which forbade the running of freight trains on any railroad in that state

on Sunday, upon the ground that, while such legislation affected interstate commerce in a limited degree, it was not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, and would be respected by the Federal courts until superseded and displaced by some act of Congress, passed in exclusion of the power to regulate commerce granted by the Constitution. Where the people of a state deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that state shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, that result, he said, speaking for the court, was obtainable by state legislation, which would be valid until Congress should occupy the field by some inconsistent provision of law.

In an opinion remarkable for learning and research, in the case of *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, he expressed the judgment of the court that, in the courts of the United States, it is the duty of the jury, in criminal cases, to receive the law from the court, and to apply it as given by the court, subject to the condition that, by a general verdict, a jury, of necessity, determines both law and fact as compounded in the issues submitted to them in a particular case. He summed up the argument in these words:

"We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system the courts, although established in order to declare the law, would, for every practical purpose, be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions."

It would prolong this address far beyond the proper limits of this occasion to continue much further the review of Justice Harlan's many contributions to the records of the court during his service of more than one third of a century. Yet no review of his services would be adequate which failed to refer to his participation in the construction and enforcement of the law against unlawful restraints upon interstate commerce and monopolies. Strongly individual in his views and in his characteristics, he was keenly sympathetic with the widespread public dread of the effect upon individualism of the tendencies toward concentration of control over great industries, and the creation of monopolistic combinations, which found expression in the now famous Sherman act of 1890. When the court, upon the presentation of the facts in the *Knight Case*, (156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249), held that act to be ineffective in checking monopoly at its inception, and powerless in the face of the acquisition by a great corporation of 98 per cent of all the manufactories in the United States of a commodity of common necessity, his dissent was expressed in vigorous language.

"If this combination," he wrote, "so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies, holding in their grasp and injuriously controlling in their own interest the entire trade among the states in food products that are essential to the comfort of every household in the land. . . ."

"Undoubtedly the preservation of the just authority of the states is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. . . . But it is equally true that the preservation of the just authority of the general government is essential as well to the safety of the states as to the attainment of the important ends for which that government was ordained by the

people of the United States; and the destruction of that authority would be fatal to the peace and well-being of the American people." (p. 19.)

"There is no dispute here as to the lawfulness of the business of refining sugar, apart from the undue restraint which the promoters of such business who have combined to control prices seek to put upon the freedom of interstate traffic in that article.

"It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid, the mere refining of sugar in any state, would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at combinations that unduly restrain, because they monopolize the buying and selling of articles which are to go into interstate commerce." (p. 34.)

He summed up the discussion in these words:

"Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one state to another, may be reached by Congress under its authority to regulate commerce among the states. The exercise of that authority so as to make trade among the states in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations is justified by an express grant of power to Congress, and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the states, especially as that result cannot be attained through the action of any one state.

"Undue restrictions or burdens upon the purchasing of goods in the market for sale, to be transported to other states, cannot be imposed even by a state without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a state within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar to be transported to other states, how comes it that combinations of corporations or individuals within the same state may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article to be carried from the state in which such purchases are made?" (pp. 37-38.)

Mr. Justice Harlan wrote the opinion in the Northern Securities Case (193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436), which was concurred in by three other justices, and in which the conclusions reached were agreed to by Mr. Justice Brewer in an opinion expressing his dissent from the statement of some of the propositions set forth by Mr. Justice Harlan with his accustomed vigor. The case presented was the acquisition by a New Jersey corporation of the control of the capital stocks of two competing trans-continental railroad systems. The majority of the court held that the acquisition by the Securities Company, through such stock ownership, of the power to prevent or restrain competition between the companies, brought the case within the statute. Justice Harlan, in the argument to sustain the conclusion reached, contended that every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act which embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce, and was not limited in its effect to restraints that are unreasonable in their nature.

Justice Brewer, on the other hand, maintained that the correct ruling in the case would have been that the contracts under consideration were unreasonable restraints of interstate trade, and as such, within the prohibition of the anti-trust act.

Justice Harlan wrote the opinion in *Continental Wall Paper Co. v. Louis Voight & Co.* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280, which involved the right of a purchaser of goods from a combination unlawful under the anti-trust act to plead such illegality in defense of his failure to pay for goods. Holding that upon the facts admitted by the demurrer the plaintiff in effect was seeking the aid of the court to enforce a contract for the sale and purchase of goods which was in fact, and was intended to

be, based upon agreements that were parts of an illegal scheme,—a scheme based upon a combination intended and which would have the effect directly to restrain and monopolize trade and commerce among the several states and with foreign nations,—Justice Harlan, speaking for the majority of the court, held that the plaintiff could not have judgment for the account sued on, because such judgment would in effect aid the execution of the agreements which constituted the illegal combination.

In the decisions in the cases against the Standard Oil Co. (221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502), and the Tobacco Combination (221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632), Justice Harlan, while concurring in the decisions, read opinions expressing dissent from opinions which were concurred in by the other members of the court, with respect to a part of the reasoning advanced in support of the conclusions reached.

Justice Harlan's individuality and his mental characteristics were the results of heredity and early environment. Another Kentuckian who attained fame in a very different line, writing in his autobiography of experiences gained during three months' adventurous voyage in Canadian waters, and speaking of the Canadian sailors whose courage and fortitude in the face of hardship and danger had greatly impressed him, says:

"These men taught me much of human nature. I found in them the value of the common man as I probably should have found it nowhere else; for it is so well hidden in our more organized societies that many persons far more discerning than myself fail for all of their lives to see the meaning of ordinary life, and so fail to get the most important teaching the world has to give. In a way, I had been prepared for this coming revelation by my contact with the frontier type of man in Kentucky. But at his best, the man of the forests and plains cannot compare with the seaman in the even, rounded culture of human quality. As I had known him in Kentucky, he was a fine fellow of the conquering type. He had beaten his brute and human enemies and subjugated the wilderness; but he had never well learned what it was to follow a leader, to put his life in his chief's hands in a ceaseless war with a mastering deep." (Autobiography of Nathaniel Southgate Shaler, p. 165.)

Justice Harlan was a refined example of the type of Kentuckian referred to by Prof. Shaler. He had learned, in the fierce warfare of personal strife during the Civil War, and in the intensity of political contests after the war, to beat his brute and human enemies as his fathers had learned to subjugate the wilderness. But he never well learned what it was to follow a leader,—at least, not a living one. He was a student and disciple of Marshall, but among living men he could lead, but he could not follow. Where others agreed with his views he would march with them, but when they differed he marched on alone. His was not the temper of the negotiator. Strong, vigorous, self-confident, he stands out as the representative of a type which has made the American character dominant among the nations.

The Chief Justice responded:

Mr. Attorney General, your words go home to our hearts and the resolutions of our brethren of the Bar move us, since they show both the confidence which the Bar reposed in and the affection they bore Mr. Justice Harlan, as well as the veneration they cherish for his memory. The depth with which these feelings are by us shared, and the greatness of the sorrow which has come to us by the death of our brother, cannot be appreciated without understanding how completely the discharge of judicial duty in a court of last resort necessitates an effort by all to efface every merely incidental mental and moral tendency to difference of opinion in order that, by the perfect equipoise of mind with mind and the union of heart with heart, a composite, wise, and just judgment may result.

The disintegration by death of the union resulting from such ties of intimate and affectionate association brings with it not only bereavement, but a sense of despondency, because of the fleeting and perishable result of all human efforts which it apparently exemplifies. The contemplation, however, of the great life which we commemorate, dispels the miasma of despondency, and calls us to the onward and upward struggle for higher and holier things; since, when rightly measured, the lessons of that life point to the

continuing and enduring result for good of duty conscientiously performed. Through the mists of parting and the shadows of death itself, clearing our vision by the light which that life affords, we are enabled to see how greatly the dedication of the life of our Brother Harlan to the service of his country, during his more than thirty-three years of judicial labor, serves to sustain and to make fruitful for the benefit of all his countrymen the power for good of that ideal and undying personality, the Supreme Court of the United States,—the offspring of the devotion of our forefathers to human liberty and their genius in creating institutions for its perpetuation. So noble in conception and yet so simple in execution; so ordinary in its incidents and yet so majestic as the servant of the whole people; so weak and yet so strong, because founded upon the affection of all the people, and depending for its existence upon their continued support.

It would not be appropriate on this occasion, nor is there presently time, Mr. Attorney General, to afford the opportunity, to add to the condensed statement which you have made of the career of Mr. Justice Harlan by giving an outline of his services in peace and in war. I shall, therefore, leaving the general subject to some more appropriate occasion, seek only now to depict in the briefest manner some of the most dominant of the moral and mental forces which characterized Mr. Justice Harlan's discharge of judicial duty, as seen from the angle of vision of those engaged with him in such duty; thus, perhaps, speaking from a point of observation which, if not stated now, might possibly pass out of view.

In the first place, there was ever manifested the supreme importance which he attached to the performance of his judicial work, and the consequent dedication which followed of every mental and moral faculty of his being to the doing of that work. In the second place, there was likewise consequently manifested a purpose to do justice as it was given him to see it,—a justice not resting upon mere metaphysical conceptions or distinctions of casuistry concerning the lines of separation between right and wrong, but a justice based upon what seemed to him to be a common sense of justice, begetting an ever-present and vivid purpose to uphold the right and to frustrate the wrong, and ever to see to it that the weak were not overmastered by the strong. In the third place, —and this was the most prominent of all,—he possessed a reverence for and an implicit faith in our constitutional institutions,—a faith which knew no doubt, and caused him to believe that the power of adaptability of those institutions was adequate to meet and provide for any possible condition, however complex or novel. And as these dominant qualities were potential in giving shape and form to his mental attributes, the latter in substance were but the reflex of the former. His methods of thought, in disregard of mere subtleties or refined distinctions, led him to the broadest lines of conviction, and as those lines were by him discerned and differences between himself and others became impossible of reconciliation, the warfare of mind with mind was by him carried on, not with adroit fence or subtle play of reason, but with a directness and entire disregard of all narrower points of view. This was particularly observable with reference to his conclusions on questions concerning powers of government arising from constitutional limitations, and the consideration of asserted violations of the rights of individuals protected by such limitations. Once his convictions were definitely formed, so complete was his faith, so ardent was his devotion, so unalterable was his purpose to maintain and perpetuate in each and every particular, as he understood it, the government under the Constitution which he so much loved, that sometimes the very ardor and zeal with which, when he differed from others, the reasons for his differences were expounded, produced upon the merely superficial observer the impression that there was doubt on his part as to the power of the Constitution, if interpreted in conflict with the views which he held, to successfully continue to accomplish the great purpose which it was ordained to secure; but this was indeed a singularly mistaken view, since it engendered doubt and weakness merely because of the forms in which supreme and perfect faith had found their expression.

It being true, as I have said, that the lessons afforded by the life of the great American whose loss we commemorate and deplore afford a correction of despondency and constitute an incentive, calling upon all to dedicate their lives to a higher and com-

pleter fulfilment of duty, why is it not also true that a right contemplation of that life and its results will serve in some measure to assuage the feeling of sorrow begotten by his death? It was given him to exceed the allotted span of mortal existence, and during his long and useful career to faithfully serve, in war and in peace, his country; to win the affection of all his countrymen, and to afford an elevating and noble example of duty well and faithfully performed. Ah! contemplating that life, its simplicity, its courage, its devotion to duty, its love of country, does not the faith come to us that in the transition from things finite to things infinite it has been given to him to hear the ineffable melody of those words of benediction, the hope of hearing which has led so many millions to consecrate ~~their~~ lives to the performance of duty and the service of God and their country,—“Well done, thou good and faithful servant.”

Mr. Attorney General, the resolutions which you present will be ordered spread upon the records along with such other tributes concerning the life and character of Mr. Justice Harlan which were evoked by his death.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1911.

IN MEMORIAM MRS. WILLIAM RUFUS DAY.

On January 8, 1912, Mr. Justice McKenna said:

“I will say to the gentlemen of the Bar that the Chief Justice is detained at home, and I will read a statement prepared by him:

“‘Mrs. Day, wife of Mr. Justice Day, died on Friday afternoon at their home in Canton, Ohio.

“‘When we assembled for the commencement of the term, Mr. Justice Day was absent, and we learned that he was prevented from coming by illness of Mrs. Day. We soon came further to know the serious character of that illness and the ever-present dread which existed that any moment it might terminate fatally. Indeed, during the time which has elapsed our sympathy has gone out to our brother in the cruel and relentless anguish with which he has been incessantly encompassed, ending in the dread bereavement which has come to him.

“‘The funeral services take place at Canton this afternoon. Were it possible, we should attend the ceremonies in a body, and to enable us to do so would adjourn for the day. Unable to be present, however, we shall yet in spirit be there. As a manifestation of our participation in spirit in the ceremonies, and as a mark of our sorrow and affection for the living and respect and tenderness for the memory of the dead, we shall transact no business to-day, but will adjourn until to-morrow morning.”

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is ordered that the rules of this court be amended as follows, *viz.*:

RULE 6.

Strike out § 2, and insert the following:

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

Strike out § 5, and insert the following:

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as are provided for in cases of motions to dismiss under paragraph 4 of this rule. Although the court, upon consideration of a motion to affirm, may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

RULE 22.

Strike out § 3, and insert the following:

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the circuit courts of appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: Provided, always: That a fair opening of the case shall be made by the party having the opening and closing arguments.

October 23, 1911.

APPENDIX IV

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is now here ordered that the Rules of Practice for the Courts of Equity of the United States, as heretofore promulgated by this court, be, and the same are hereby, so far as not inapplicable, continued in full force and effect, and made in all respects controlling in the courts of equity created by the act of Congress entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," going into effect January 1, 1912, until the further order of this court.

December 22, 1911.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is ordered that the Rules of Practice of this court, as revised this day, be, and the same are hereby, promulgated for the guidance of all concerned, to take effect on the 1st day of January, 1912.

December 22, 1911.

RULES

OF THE

UNITED STATES SUPREME COURT.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice, either as attorney or counsel or, in
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this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by rule 10.

2.

ATTORNEYS AND COUNSELORS.

1. It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the highest courts of the states to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, *viz.*:

I, ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of King's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general of such state.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served

on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument to a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly postpaid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular

order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also \$1 per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by anyone except the justices of the court.

8.

WRIT OF ERROR AND APPEAL, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the clerk to perform such duty, and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defend-

ant in error, or his counsel, a præcipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his præcipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days, and from the Phil-

ippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when, under the requirements of law, the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and

shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, § 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record

has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under rule 24, § 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the state, territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law

in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, and stating therein the name and character of such representative, and the state or territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE.

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term: and, in addition, appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

22.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the

court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the circuit court of appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907, 34 Stat., 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be

allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, \$5.

For entering an appearance, 25 cents.

For entering a continuance, 25 cents.

For filing a motion, order, or other paper, 25 cents.

For entering any rule, or for making or copying any record or other paper, 20 cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, \$1.

For entering a judgment or decree, \$1.

For every search of the records of the court, \$1.

For a certificate and seal, \$2.

For receiving, keeping, and paying money in pursuance of any statute or order of court, 2 per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, \$10.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, 15 cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be 5 cents per folio.

For making a manuscript copy of the record, when required under rule 10, 20 cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, \$5.

For a mandate or other process, \$5.

For filing briefs, \$5 for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, \$2.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And

it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request

to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the district courts and circuit courts of appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in ease of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

56 L. ed.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32.

WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT.

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to

grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court direct to this court, under § 238 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9, of rule 10.

36.

APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant

a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under § 238, the district court, or any judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37.

CASES FROM CIRCUIT COURTS OF APPEALS.

1. Where, under § 239 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

38.

INTEREST, COSTS, AND FEES.

The provisions of rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of §§ 238, 239, 240, and 241 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

40.

PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS.

The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the circuit courts of appeals.

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APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is ordered by the court that rule 36 of the rules of this court be, and the same is hereby, amended so as to read as follows:

36.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under § 238, the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

February 26, 1912.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is ordered that rule 21 of the Rules of Practice of this court be amended by adding thereto the following section:

"8. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited."

April 1, 1912.

APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It ordered by the court that § 3 of rule 37 be amended so as to read as follows:

"3. Where an application is submitted to this court for a writ of certiorari to review a decision of a circuit court of appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved, and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same, shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

June 10, 1912.

APPENDIX IX.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER

It is ordered by the court that the mandates in all cases decided prior to January 1, 1912, which, under the law as it existed before that time, should have been directed to the circuit courts of the United States, be directed to the proper district courts of the United States.

January 11, 1912.

APPENDIX X.

Supreme Court of the United States.

OCTOBER TERM, 1911.

The Chief Justice said:

"Gentlemen of the Bar, it is my privilege to announce that the President of the United States has filled the vacancy on this Bench by the appointment of Mr. Mahlon Pitney, of New Jersey. Mr. Pitney is present and ready to take the oath of office. The clerk will read his commission."

The commission was then read and the oath administered by the clerk, and Mr. Justice Pitney took his seat on the Bench.

March 18, 1912.

APPENDIX XI.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Charles E. Hughes, Associate Justice.

For the Third Circuit, Mahlon Pitney, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, Joseph R. Lamar, Associate Justice.

For the Sixth Circuit, William R. Day, Associate Justice.

For the Seventh Circuit, Horace H. Lurton, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

March 18, 1912.

APPENDIX XII.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume,

It is therefore now here ordered that he publish an additional volume in this year, pursuant to § 226 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911.

March 18, 1912.

APPENDIX XIII.

Supreme Court of the United States.

OCTOBER TERM, 1911.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued until the next term.

June 10, 1912.





Ref 348.73 Un35

United States. Supreme
Court.

Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

PHILLIPS ACADEMY



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